

# ***Dutch Private International Law – Overview 2002-2006***

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***Abstract: This article provides an overview of the most important developments in Dutch private international law, including international procedural law, during the period August 2002-June 2006. Evaluating the developments in the codification of Dutch private international law, the implementation and application of European private international law rules and the low participation of Dutch scholars in the (national and international debate) it is concluded that for both the Legislative Department, practitioners and academics there is still a lot of work to do. As for the bringing about of a Dutch consolidated law in private international law the question might be what the right time is. However, since it is rather unpredictable and doubtful whether there will be a right time in the near future and since international development will continue, it would in my view be best to just go ahead with it. Furthermore an active participation of the Netherlands in international and European developments, and more intensive deliberation by Dutch academics would be desirable.***

## **I Introduction**

The previous overview on Dutch Private International Law in this journal indicated that in the 1980's the first steps towards codification of Dutch private international law were taken and that the 1990's witnessed some stormy developments.<sup>1</sup> During the last years developments have been somewhat slower, and can be characterized as the finishing touch of the codification of Dutch private international law, though some important work still remains to be done. The big challenges now mainly come from the flow of EU-Regulations and case law of the European Court of Justice. These continuously necessitate deliberation, adaptation and implementation and furthermore raise the question of the coherence of private international law rules.

This article provides an overview of the most important developments in Dutch private international law, including international procedural law, during the period August 2002-June 2006. In Section II recent developments in the codification of Dutch Private International Law will be described. Section III focuses on the most important case law during this period. In section IV attention will be paid to the impact of recent European regulations and case law of the European Court of Justice on Dutch private international law.

## **II Further codification of Dutch Private International Law**

### ***1. The Ongoing Process of Codification***

The ambitious aim to establish a private international law act, covering conflict of law rules, and rules for international jurisdiction and recognition and enforcement, already formulated in the 1980's, has turned out not to be feasible. Since the 1990's codification has gone ahead by means of separate conflict of law acts for each topic. Most of these laws came about in the 1990's.<sup>2</sup> In the period of review three new conflict of law acts entered into force, and several amendments

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<sup>1</sup> X.E. Kramer, Dutch Private International Law – Overview 1998-August 2002, IPRax 2002, p. 537-546

<sup>2</sup> See Kramer 2002 (footnote 1), p. 537 and footnote 5 thereof. See also L. Strikwerda, Inleiding tot het Nederlandse Internationaal Privaatrecht, Deventer: Kluwer 2005, nos. 9-15.

were made to older ones.<sup>3</sup> The only lacking part is a conflict of laws act concerning property aspects.

The plan was – and officially still is – to consolidate all these laws and add them to the Civil Code as Book 10. However, fifteen years after the big *ad hoc* codification started, there is still no prospect of a consolidated law. At the end of 2003 the Department of Justice published an updated pre-draft for a Consolidated Law on Private International law, based upon a draft of the Standing Committee on Private International Law of June 2002.<sup>4</sup> No concrete action has, however, been taken since. Unlike in Belgium, where the new Code on Private International Law entered into force on 1 October 2004 after less than ten years of preparation<sup>5</sup>, the codification and consolidation in the Netherlands is still not completed and does not seem to have priority.<sup>6</sup>

One of the reasons why national codification receives less attention is the ongoing Europeanization of private international law. These developments on EU-level first of all limit the importance of a national codification. Furthermore, it is also no longer clear in which direction private international law as a whole is heading. National private international law rules are based upon the principle of the closest connection and protection of weaker parties when necessary, whereas in the recent EU-Regulations and proposals the interests of the internal market and the call for uniformity, simplicity and legal certainty seem to be more important.<sup>7</sup>

In this section attention will be paid to the new conflict of law acts and other important national legislative initiatives or amendments since the previous overview of 2002.

## 2. *General Aspects of Private International Law*

General principles of private international law, such as the application of foreign law, renvoi, priority rules and public policy are still not codified. The mentioned draft for a Consolidated Law contains 17 articles on these general aspects.<sup>8</sup> They reflect the generally recognized doctrine and

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<sup>3</sup> The existing laws are: Conflict of Laws Divorce Act (*Wet Conflictenrecht Echtscheiding*, in force 1981), Conflict of Laws Act on Names (*Wet Conflictenrecht Namen* 1990, revised 1999), Conflict of Laws Marriage Act (*Wet Conflictenrecht Huwelijken* 1990, revised 1998), Conflict of Laws Act on Matrimonial Property (*Wet Conflictenrecht Huwelijksvermogensregime* 1992); Conflict of Laws Act concerning Maritime-, Inland Navigation- and Air Law (*Wet Conflictenrecht zee-, binnenvaart- en luchtvaart* 1993); Conflict of Laws Life Insurance Act (*Wet Conflictenrecht levensverzekering* 1993, implementation of Directive 90/619 of November 8, 1990); Conflict of Laws Act on Legal Marital Relationships (*Wet Conflictenrecht huwelijksbetrekkingen* 1994); Conflict of Laws Property Insurance Act (*Wet Conflictenrecht schadeverzekering* 1994; implementation of Directive 88/357 of June 22, 1988 and Directive 92/94 of June 18, 1992); Conflict of Laws Succession Act (*Wet Conflictenrecht erfopvolging* 1996); Conflict of Laws Trusts Act (*Wet Conflictenrecht trusts* 1996); Conflict of Laws Corporations Act (*Wet Conflictenrecht corporaties* 1998); Pro Forma Foreign Companies Act (*Wet op de formeel buitenlandse vennootschappen* 1998, revised 2005); Conflict of Laws Act concerning Equalisation of Pension Rights (*Wet Conflictenrecht pensioenverevening* 2001); Conflict of Laws Tort Act (*Wet Conflictenrecht onrechtmatige daad* 2001); Conflict of Laws Act of Descent (*Wet Conflictenrecht afstamming* 2003); Conflict of Laws Act on Adoption (*Wet Conflictenrecht adoptie* 2004); Conflict of Laws Act Registered Partnership (*Wet Conflictenrecht geregistreerd partnerschap* 2005).

<sup>4</sup> “Voorontwerp van Wet houdende consolidatie van regelinggeving betreffende het internationaal privaatrecht (geconsolideerd overzicht van bestaande en voorgestelde wettelijke bepalingen), stand per 1 november 2003”, see <[http://www.justitie.nl/themas/wetgeving/rapporten\\_en\\_notas/privaatrecht/staatscommissie\\_ipr.asp](http://www.justitie.nl/themas/wetgeving/rapporten_en_notas/privaatrecht/staatscommissie_ipr.asp)>. See on the report of the Standing Committee *Kramer* 2002 (footnote 1), p. 538.

<sup>5</sup> See M. *Pertegas*, The Belgian Code on Private International Law: a tour d’horizon, IPRax 2006, p. 53-61.

<sup>6</sup> See also H.U. *Jessurun d’Oliveira*, Is een codificatie van het Nederlandse IPR nog zinvol? Oftewel, geloven we nog in Boek 10 BW?, Nederlandse Tijdschrift voor Burgerlijk Recht (NTBR) 2005, p. 426-428.

<sup>7</sup> See also *Jessurun d’Oliveira* 2005 (footnote 6), p. 427.

<sup>8</sup> See footnote 5 for the website of the Standing Committee.

case law and are well received in literature.<sup>9</sup> As explained above, it is not clear whether, how, where or when these rules will be incorporated in a law.

### 3. *International Family Law*

Most Dutch conflict of law acts relate to family law issues. National codification in this field is completed now and consists of nine acts.<sup>10</sup> Furthermore, the Netherlands is party to most Hague Conventions concerning family matters.<sup>11</sup> The recent EU-Regulations and proposals of the Commission in the field of family law add a third layer to the sources of international family law. They might necessitate adaptation of national laws, and will at least limit their scope.

It is worth mentioning that English translations of Dutch family law (Book 1 Civil Code), including procedural law and private international law acts concerning family law as well as Dutch inheritance law (Book 4 Civil Code) and relevant private international law legislation are available in the European Family Law Series, no's 5 and 8 (by *Sumner and Warendorf*).<sup>12</sup>

#### a) *Names*

The applicable law to names and the recognition of names registered abroad is regulated by the Conflict of Laws Act on Names (*Wet Conflictenrecht Namen*) from 1989. This law is based upon and complementary to the München Agreement on the Law applicable to Family Names and Given Names 1980.<sup>13</sup> Art. 2 of this law stipulates that in case a person has the Dutch nationality, regardless whether he also has another nationality, his given name and family name will be determined by Dutch law. In the *Garcia Avello v. Belgium* case of 2003, the European Court of Justice decided that pursuant to Art. 12 and 17 EC-Treaty a Member State cannot refuse to grant a change of surnames to a national of a Member State in case this person also has the nationality of another Member State and this change is in accordance with the law of that other Member State.<sup>14</sup> This ruling did not lead to amendment of Art. 2 Conflict of Laws Act on Names (yet),

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<sup>9</sup> See for reflections the special issue of *WPNR*, no. 6537 of 7 June 2003 "Codificatie van IPR–Algemene Bepalingen".

<sup>10</sup> See the Introduction and footnote 5.

<sup>11</sup> Convention Relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile 1955; Convention on the Law Applicable to Maintenance Obligations towards Children 1956; Convention concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children 1958; Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors 1961; Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961; Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations 1973; Convention on the Law Applicable to Maintenance Obligations 1973; Convention on the Law Applicable to Matrimonial Property Regimes 1978; Convention on Celebration and Recognition of the Validity of Marriages 1978; Convention on the Civil Aspects of International Child Abduction 1980; Convention on the Law Applicable to Succession to the Estates of Deceased Persons 1989; Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993; Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996.

<sup>12</sup> I. *Sumner* and H.C.S. *Warendorf*, *Family Law Legislation of the Netherlands*, A translation including Book 1 of the Dutch Civil Code, Procedural and transitional provisions and private international law legislation, Antwerp/Oxford/New York: Intersentia 2003; I. *Sumner* and H.C.S. *Warendorf*, *Inheritance law legislation of the Netherlands: a translation of Book 4 of the Dutch Civil Code, procedural provisions and private international law legislation*, Antwerp/Oxford/New York: Intersentia 2005.

<sup>13</sup> See *Kramer* 2002 (footnote 1), p. 538.

<sup>14</sup> ECJ 2 October 2003, C-148/02, ECR 2003, p. I-11613 = *IPRax* 2004, p. 339, note Mörsdorf/Schulte. A subsequent case (no. C-96/04, ECJ 27 April 2006) was dismissed because the requesting court (Amtsgericht Niebüll) could not be regarded as exercising a judicial function and therefore the ECJ did not have jurisdiction, *IPRax* 2006, 402 note Coster-Waltjen, p. 392.

though it has been deliberated.<sup>15</sup> The ruling of the ECJ did, however, result in an amendment of the Decree on the Changing of Family Names.<sup>16</sup> Pursuant to Art. 3 sub b, the surname of a child that besides the Dutch nationality has the nationality of another EU-Member State can, taking into consideration Art. 12 and 17 EC-Treaty, be changed according to the law of that other Member State.

It is still not clear whether this is sufficient, or whether Art. 2 of the Conflict of Laws Act on Names should also be amended. The Dutch Court of Appeal, referring to the *Garcia Avello* judgment, decided in 2004 that a request concerning a child with both Dutch and Spanish nationality to apply Spanish name law, should be granted.<sup>17</sup> In literature the opinions differ on this issue.<sup>18</sup> In my opinion it is necessary to amend Art. 2 of this law in order to give parents a choice whether to apply Dutch law or the law of another Member State in case of a dual nationality.

*b) Law Concerning Minors: Descent, Adoption, Parental Responsibility and Child Protection*

In the previous overview the proposal for a Conflict of Laws Act of Descent (*Wet Conflictenrecht Afstamming*) was discussed.<sup>19</sup> This Act entered into force on 1 January 2003. It holds rules for both the applicable law and recognition of foreign decisions. As with most Dutch conflict of law rules in family matters, in principle the nationality of the parent(s) is decisive, but as a consequence of the *favour infantis* principle, the law of the habitual residence of the child is applicable in case the law of the nationality does not establish a family relationship between child and parent. The rules on recognition of foreign decisions on descent are flexible in order to avoid a different status.

The law concerning children is further regulated by the Conflict of Laws Adoption Act (*Wet Conflictenrecht Adoptie*) that entered into force on 1 January 2004.<sup>20</sup> This law is complementary to the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption 1993 (and the Dutch Implementation Act), and the Dutch Act concerning the Placement of Foreign Children with a view to Adoption.<sup>21</sup> According to Article 3, Dutch law is applicable to an adoption that is pronounced (or revoked) in the Netherlands. The law of the nationality of the child is, however, applicable to the consent or consultation of or to the information given to the parents of the child or of other persons or institutions.<sup>22</sup> Art. 5 and further provide rules for recognition of an adoption pronounced in other countries, as far as that country is not a member of the Hague Adoption Convention 1993. A distinction is drawn between two different types of adoption: a foreign adoption where all parties involved are domiciled abroad at the moment of the decision (art. 6) and a foreign adoption where Dutch residents are involved (art. 7). Pursuant to Art. 6, a foreign adoption will be recognized in the Netherlands in case it is pronounced by a locally competent authority of the foreign State: a) where both the adoptive parents and the child had their habitual residence at the time of the petition for adoption and the decision, or b) where either the adoptive parents or the child had their habitual residence at the time of the petition and the decision. Recognition shall be refused in case there was manifestly no proper

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<sup>15</sup> The Standing Committee concluded in its advice of 18 June 2004 (published on the website, see footnote 5) that for the moment amending the Decree on the Changing of Family Names seems sufficient.

<sup>16</sup> *Staatsblad* 2004, 239.

<sup>17</sup> Court of Appeal 's-Hertogenbosch 27 January 2004, *Nederlands Internationaal Privaatrecht (NIPR)* 2004, 106.

<sup>18</sup> See amongst others *Strikwerda* 2005 (footnote 2), no. 100; K. *Boele-Woelki*, *Internationaal Privaatrecht, Ars Aequi Katern* no. 92, 2004, p. 5053; G.R. *de Groot*, *Namenrecht op drift, Burgerzaken & Recht* 2004, p. 212-217.

<sup>19</sup> *Kramer* 2002 (footnote 1), p. 538-539.

<sup>20</sup> *Staatsblad* 2002, 283.

<sup>21</sup> See *Strikwerda* 2005, no. 123-126; A.P.M.J. *Vonken*, *Legislatieve ontwikkelingen rond interlandelijke adopties*, *NIPR* 2004, p. 133-147; E.N. *Frohn*, *De Wet conflictenrecht adoptie: het sluitstuk van de regelgeving inzake interlandelijke en internationale adoptie*, *Tijdschrift voor Familie en Jeugdrecht (FJR)* 2003, p. 242-247;

<sup>22</sup> In case of a dual nationality, the nationality with which the child had the closest connection will apply.

investigation or proper legal process, or the decision is not recognized in the country where the child or adoptive parents had their habitual residence, or if recognition is manifestly in breach of Dutch public policy. In case Dutch residents are involved, recognition does not take place automatically and requires a recognition procedure in the Netherlands. Art. 7 states that a foreign adoption pronounced by the local authority of the habitual residence of the child shall be recognized if the provisions of the Act concerning Placement in the Netherlands of Foreign Children were observed and the adoption is manifestly in the best interest of the child. Recognition will be refused on the same grounds as mentioned in the situation of Art. 6.

The Conflict of Laws Adoption Act also led to amendment of the Statute on Dutch Citizenship (*Rijkswet op het Nederlanderschap*).<sup>23</sup> Art. 5b stipulates that a (minor) child acquires Dutch nationality in case the adoption meets the requirements of Art. 6 and 7 of the Conflict of Laws Adoption Act, previous legal family ties are cut off as a consequence of the adoption, and at least one of the adoptive parents has the Dutch nationality.

Concerning parental responsibility and the protection of children an Implementation Law International Child Protection (*Uitvoeringswet internationale kindbescherming*) entered into force on 1 May 2006.<sup>24</sup> This law implements the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children of 1996<sup>25</sup>, as well as the Brussels IIbis Regulation. Most provisions of this Implementation Law are, however, also applicable to matters of parental responsibility and measures of child protection that are outside the scope of the Hague Convention and the Brussels IIbis Regulation. It regulates amongst others the competencies of the central authority, the procedure for the request of measures concerning parental responsibility and measures of child protection as well as the recognition of foreign decisions on these matters.

### *c) Marriage and Registered Partnership*

Conflict rules concerning marriage are provided in the Conflict of Laws Marriage Act (*Wet Conflictenrecht Huwelijken*), which has been in force since 1990.<sup>26</sup> Since April 2001 marriage in the Netherlands is also open to partners of the same sex, and consequently this law also applies to these marriages.<sup>27</sup>

In 1998, a few years before opening civil marriage to same sex partners, the registered partnership was introduced. The registered partnership is, however, not limited to partners of the same sex, but is also an 'alternative' for marriage for couples of the opposite sex. The standing Committee published a report and a proposal in the same year<sup>28</sup>, but it took until 2003 before a proposal for a Conflict of Laws Act on Registered Partnership was put before Parliament. This Act entered into force on 1 January 2005.<sup>29</sup> With 25 substantial articles this certainly is the most extensive conflict of laws act. It covers the applicable law, recognition of a foreign registered partnership, mutual ties and relations as to property, property regime, termination of a registered partnership in the Netherlands, recognition of a termination abroad and maintenance. A registered partnership that is entered into the Netherlands is pursuant to Art. 1 governed by Dutch law. Ac-

<sup>23</sup> Statute 3 July 2003, in force on 1 January 2004, *Staatsblad* 2003, 456.

<sup>24</sup> *Staatsblad* 2006, 123.

<sup>25</sup> This Convention was ratified on 16 February 2006, *Staatsblad* 2006, 122.

<sup>26</sup> An important revision of Art. 4 took effect in 1999, limiting the possibilities of a consular marriage according to foreign rules. See *Kramer* 2002 (footnote 1), p. 539.

<sup>27</sup> See for PIL implications *Kramer* 2002 (footnote 1), p. 539. This led to a minor technical revision of the Conflict of Laws Marriage Act; the words 'man' and 'woman' were replaced by 'person'.

<sup>28</sup> Staatscommissie voor het Internationaal Privaatrecht, Advies geregistreerd partnerschap en Voorstel voor een aantal IPR-bepalingen over het geregistreerd partnerschap, May 1998. See for the website footnote 5.

<sup>29</sup> *Staatsblad* 2004, 334. See B.E. *Reinhartz*, Het wetsvoorstel Wet conflictenrecht geregistreerd partnerschap, WPNR 2004, p. 491-498; L. *Frohn*, Wet conflictenrecht geregistreerd partnerschap, FJR 2004, p. 290-294.

According to Art. 2 a registered partnership is recognized if it was lawfully entered into according to the local law and if it forms a legally regulated form of cohabitation between two persons who maintain a close personal relationship, and this cohabitation is registered by a competent authority and excludes the existence of a marriage or cohabitation with a third person regulated by law. For the applicable law to the legal personal ties (Art. 5) and the property regime (Art. 6-21) almost the same rules are provided as for married couples.<sup>30</sup> Dutch law applies to the termination of a registered partnership entered into in the Netherlands (Art. 22), and to registered partnerships entered into abroad as well, unless parties choose the law of the country where they entered into the partnership (Art. 23). Unlike the case in dissolution of a marriage, the nationality of parties does not play a role.<sup>31</sup> The recognition of the termination of a registered partnership abroad is governed by flexible rules, similar to those applicable to a foreign divorce (Art. 24). The applicable law to maintenance is determined on the basis of the Hague Convention on the Law Applicable to Maintenance Obligations 1973 (Art. 25).

#### 4. *International Patrimonial Law*

The Netherlands has conflict of law acts concerning transport and maritime law, insurance law (based on EC Directives), trust law (complementary to the Hague Trust Convention 1985), company law and tort law.<sup>32</sup> Furthermore, the Netherlands is party to several (Hague) conventions in the field of the law of obligations.<sup>33</sup> In this section attention will be paid to some amendments and new rules in the field of company law, property law and security rights.

##### a) *Corporations*

According to the Conflict of Laws Corporations Act (*Wet Conflictenrecht Corporaties*), which has been in force since 1 January 1998, the main rule in the Netherlands is that in corporate issues the law of incorporation applies.<sup>34</sup> In order to avoid abuse of the law of incorporation and circumvention of important rules of Dutch corporate law, the *Pro Forma* Foreign Companies Act (*Wet op de formeel buitenlandse vennootschappen*) was enacted at the same time. In the case of a company with legal personality incorporated under a foreign law, which conducts its business entirely or almost entirely in the Netherlands without having any further real tie with the state under whose law it was incorporated, certain rules of Dutch company law are nevertheless applicable. These relate amongst others to the registration of the pseudo foreign company in the Dutch commercial register, a minimum capital, the liability of directors for debts of the company and the publication of annual accounts and reports. As a result of the *Inspire Art* ruling of the European Court of Justice, the scope of this *Pro Forma* Companies Act is restricted.<sup>35</sup> The Court ruled that the requirements regarding the registration in the Dutch commercial register and the minimum capital according to Dutch law for the establishment of a company with limited liability violate the Eleventh Council Directive concerning disclosure requirements, as well as the

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<sup>30</sup> See the of Laws Act on Legal Marital Relationships (*Wet Conflictenrecht huwelijksbetrekkingen*) and the Hague Convention on the Law Applicable to Matrimonial Property Regimes 1978 in conjunction with Conflict of Laws Act on Matrimonial Property (*Wet Conflictenrecht Huwelijksvermogensregime*).

<sup>31</sup> See for marriage Art. 1 Conflict of Laws Divorce Act (*Wet Conflictenrecht Echtscheiding*).

<sup>32</sup> See footnote 5 for specifications of the laws in force for these topics.

<sup>33</sup> Besides the Rome Convention on Contractual obligations the Netherlands is party to Vienna Convention on the International Sale of Goods 1980, the Hague Agency Convention 1978, the Hague Traffic Accident Convention 1971, the Hague Convention on Products Liability 1973 and the Hague Trust Convention 1985.

<sup>34</sup> See on the Dutch doctrine and that of several other countries: Rammelo, *Corporations in Private International Law. A European Perspective*, Oxford: Oxford University Press 2001.

<sup>35</sup> ECJ 30 September 2003, C-167/01, ECR 2003, p. I-10155 = IPRax 2004, p. 46, note Behrens, p. 20. See also section IV.2.

freedom of establishment provided for in 43 and 48 EC Treaty. Since 1 June 2005 Art. 1 of the *Pro Forma* Foreign Companies Act stipulates that the provisions of this act are not applicable to EU Member States or a state that is party to the Agreement on the European Economic Area of 1992.<sup>36</sup>

#### *b) Property Law and Security Rights*

The only field in which codified conflict rules are still lacking is property law.<sup>37</sup> The Standing Committee on Private International Law published an extensive report and a proposal in 1998<sup>38</sup>, but no action at the Department of Justice has been taken since.

Meanwhile property law and security rights are the subject of international regulations, such as the Cape Town Convention on International Interests in Mobile Equipment of 2001 and the Hague Convention on the law applicable to certain right in respect of securities held with an intermediary of 2002.<sup>39</sup> Furthermore, Art. 4 of Directive 2000/35/EC on combating late payment in commercial transactions resulted in a new provision in the Civil Code on international retention of title on 1 December 2002. Art. 3:92a of the Civil Code provides that the property aspects of retention of title are governed by the law of the country where the goods are at the time of the delivery (*lex rei sitae* rule). Parties can, however, agree that the law of the destination of goods that are meant for export will be applicable in case that law is more favorable for the creditor. Art. 9 of the Directive 2002/47/EC on financial collateral arrangements, stating that book entry securities collateral shall be governed by the law of the country in which the relevant account is maintained, is as of 20 January 2006 incorporated in Art. 7:56 Civil Code.

### *5. International Procedural Law*<sup>40</sup>

In the previous overview attention was paid to the revision of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), effective as of 1 January 2002, which also resulted in a separate section on international jurisdiction (Art. 1-14 CCP).<sup>41</sup> These rules were as far as possible drafted in conformity with the Brussels Convention and the Brussels II Regulation for divorce cases. At the time the legislator did not take into account the entry into force of the Brussels Regulation on 1 March 2002. On 15 October 2005 several amendments of the CCP were enacted, especially in Art. 6 CCP, reflecting the new rules of the Brussels I Regulation regarding the place of performance of contractual obligations, consumer contracts and employment contracts.

Furthermore, the Implementation Law International Child Protection, effective as of 1 May 2006 (see section II.3b above), also amended Art. 4 CCP on measures concerning child protection, as well as Art. 5 on divorces, in order to adapt them to the Brussels IIbis Regulation.<sup>42</sup>

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<sup>36</sup> *Staatsblad* 2005, 230.

<sup>37</sup> Except for trust law, see section II.4.

<sup>38</sup> Staatscommissie voor het Internationaal Privaatrecht, Rapport aan de Minister van Justitie, Internationaal goederenrecht, November 1998 (published on the website, see footnote 5). This proposal is also included in the Consolidated law of 2003 as Chapter 5, Title 1 (see section II.1). See also J.W. *Rutgers*, Some recent developments within Dutch Private International Property Law, *IPRax* 2002, p. 241-244.

<sup>39</sup> The Netherlands will become a member to these conventions only as part of the EU.

<sup>40</sup> In section II.2 attention was paid to some rules of recognition in the field of family law, since they are included in the conflict of law acts that also regulate the applicable law.

<sup>41</sup> *Kramer* 2002 (footnote 1), p. 541-542.

<sup>42</sup> Art. 5 CCP for non-Regulation or Convention cases provides that the Dutch court does not have jurisdiction in case the child is not habitually resident in the Netherlands, unless in exceptional circumstances there is such a close connection to the Netherlands that the Dutch court is able to assess the child's best interests. Art. 4 CCP for divorce now refers to Art. 3, 4 and 5 of the Brussels IIbis Regulation, instead of the relevant articles of the previous Regulation for cases that fall outside the scope of this Regulation.

### III CASE LAW

#### 1. Introduction

In recent years the primary function of case law in the field of private international law shifted from developing new rules to mainly interpreting the existing rules. A selection of the most important case law has been made.

#### 2. General Aspects of Private International Law

##### a) Application of Foreign Law and Cassation at the Supreme Court

Though the court has to apply foreign law on its own motion<sup>43</sup>, according to Art. 79 Law on the Judicial Organisation violation of foreign law is not a ground for cassation at the Supreme Court (*Hoge Raad*). This was confirmed in several recent cases.<sup>44</sup> In a recent decision the Supreme Court added that in case the court applied the so-called non-choice rule (“*anti-kiesregel*”) – meaning that the court does not have to specify the applicable law in case the relevant laws come to the same result – the Supreme Court can only examine whether the decision on the existence of a certain rule is correct according to Dutch law.<sup>45</sup>

##### b) Lizardi-rule and Mandatory Law

In the same case the Court also rules on the position of the Lizardi-rule, implying that incapacity according to a foreign law cannot be invoked in case the contracting party acted in good faith.<sup>46</sup> It concerned a case between an Iranian governmental organisation and a Dutch party that concluded an arbitration clause. The arbitral tribunal in the Hague ordered payment from the Iranian party. The Iranian party then started a case before the Dutch District Court, claiming that the arbitration agreement was invalid because Art. 130 of the Iranian Constitution stipulates that an arbitration agreement is invalid without permission of the Parliament in case a governmental organisation is involved. The Court of Appeal stated that it is an internationally recognized rule that a government or governmental organisation cannot rely on its national law to invalidate an agreement of international arbitration and that the Dutch party acted in good faith as to the capacity of the Iranian party to enter into an arbitration agreement. In cassation the Supreme Court ruled that the Lizardi-rule – as the Supreme Court qualifies it – can set aside the mandatory rule of Iranian law.

#### 3. International Family Law – Applicable Law

In this paragraph two decisions regarding international child abduction and one on maintenance will be discussed.

The first case concerns a request by the Central Authority to return a child to Israel that was taken to the Netherlands by the mother. This request was based on a decision by the Israeli court,

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<sup>43</sup> See already Supreme Court 4 June 1915, *Nederlandse Jurisprudentie* (NJ) 1915, p. 865 (Ehlers & Loewenthal/Van Leeuwen), and many times repeated in case law since then. See recently Supreme Court 22 February 2002, NJ 2003, no. 483 note PV.

<sup>44</sup> E.g. Supreme Court 9 September 2005, NIPR 2005, no. 299, 8 July 2005, NIPR 2005, no. 209, 17 June 2005, NIPR 2005, no. 208. There have been situations where the Supreme Court quashed decisions of lower courts based on foreign law because of an unreasonable or incorrect motivation, see Supreme Court 31 May 1985, NJ 1985, no. 717, 3 March 1989, NJ 1990, no. 688 note JCS and 13 July 2001, NJ 2002, no. 215 note ThMdB.

<sup>45</sup> Supreme Court 28 January 2005, *Rechtspraak van de Week* (RvdW) 2005, 20 (DIO v. IMS).

<sup>46</sup> See previous footnote.

which determined on the basis of the divorce agreement that the mother had custody over the child, but the parents had shared guardianship and the mother violated the father's guardianship by removing the child from Israel. The Dutch District Court granted the request, but the Court of Appeal refused it, arguing that the Israeli decision was an *ex parte* decision and the mother did not have any possibility to give her view. In cassation the central issue concerned Art. 14 of the Hague Convention on International Child Abduction 1980. The Supreme Court determined that according to this provision the contents of the Israeli decision should be taken into account, even if it is not formally recognisable, but that in the end it is the State where the request is filed that decides whether the child should be returned, and not the State of the (former) habitual residence of the child. Israeli law is not very clear on the meaning of "guardianship". The Court of Appeal gave a narrow interpretation, based on the contents of the divorce agreement, and determined that the father did not have authority to (co-)decide upon the habitual residence of the child. The Supreme Court left this judgment intact. A commentator has remarked that the Court probably attached more value to the interests of the child in this particular case than to the aims of the Convention.<sup>47</sup>

In another case of child abduction the mother, after a period of short stays in the Netherlands with the child, permanently removed the child from Italy to the Netherlands. In Italy the child was under custody of child protection and stayed in different places, because of problems between the parents. Already before she permanently moved to the Netherlands, the mother requested both the Dutch and the Italian court to grant her custody. While proceedings were stayed in the Netherlands, the Italian court in an interim decision granted the mother provisional custody, but added that the child should stay in Italy pending the case. When the mother moved to the Netherlands the Central authority requested the return of the child to Italy. The District Court refused the request on the basis of Art. 13 Hague Convention on International Child Abduction 1980, stating that her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. A few months later in its final decision the Italian court granted custody to the father. The Dutch Court of Appeal, judging the request of return, determined that according to Art. 3 the child's habitual residence is Italy and based on the Italian decision the removal was wrongful. But it shared the view of the District Court that returning to Italy might be harmful for the child. The Supreme Court, however, ruled that Art. 13, paragraph 1 under b is to be interpreted restrictively and, though staying in the Netherlands might be better for the child, the circumstances indicated by the Court of Appeal were not enough to justify its decision. Unlike in the previous decision, the Court gave more weight to the aims of the Convention than to the best interest of the child.

In a maintenance case under the Hague Maintenance Convention 1973 the Supreme Court determined that the Dutch indexation rules are only applicable in cases where Dutch law governs the maintenance obligation.<sup>48</sup> Unlike in several other countries, the habitual residence of the creditor is therefore not relevant. The Dutch position is consistent with Art. 17, paragraph 1 sub c of the proposal for a Regulation on Maintenance Obligations, which indicates that the applicable law to a maintenance obligation shall determine the calculation and indexation.<sup>49</sup>

#### 4. *International Patrimonial Law – Applicable Law*

This paragraph focuses on a case of assignment of duties and a ruling on the relationship between the Rome Convention and the CISG.

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<sup>47</sup> See Th.M. *de Boer* in his annotation in the NJ (see footnote 45).

<sup>48</sup> Supreme Court 30 January 2004, NJ 2004, no. 560 note ThMdB.

<sup>49</sup> Proposal for a Council Regulation on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations, 15 December 2005, COM(2005) 649 final.

The first remarkable decision concerns the applicable law to assignment of duties, which was relevant in order to determine the jurisdiction on the basis of Art. 5, paragraph 1 Brussels Convention.<sup>50</sup> Assignment of duties is not resolved by the Rome Convention.<sup>51</sup> The Supreme Court rules that the question what the consequences are for the applicable law of an agreement that can involve the assignment of a duty can be resolved on the basis of Art. 12 Rome Convention concerning voluntary assignment. This implies that, as Art. 12, paragraph 1 stipulates, the applicable law to the payment obligation remains the same after the assignment. The rightful criticism in literature is mainly aimed at the qualification of the contract at hand (a simple payment agreement) as assignment of duty, and at the fact that the Court does not address the – more interesting – question of the applicable law to the other relevant issues involved in an assignment of duties.<sup>52</sup>

The relationship between the CISG and the Rome Convention came up in a case that concerned the consent for the conclusion of a sales contract and the standard terms used therein, which contained an exemption clause.<sup>53</sup> The claimant argued that according to Art. 8, paragraph 2 Rome Convention the law of his habitual residence – Belgian law – applied to the question whether he gave consent for using these contract terms, since applying Dutch law would be unreasonable. The Supreme Court, however, determined that the CISG applied to this sales contract and Art. 7, paragraph 2 only refers to private international law rules (such as Art. 8 Rome Convention) in case the CISG does not expressly settle the matter. Since the CISG does provide rules on the formation of the contract, Art. 8 Rome Convention was not applicable according to the Supreme Court.<sup>54</sup>

## 5. *International Procedural Law – Family and Patrimonial Matters*

This paragraph discusses two rulings on the Regulation on the Service of Documents, one on the Insolvency Regulation and two on the requirements of recognition and enforcement.

The first decision of the Supreme Court on the Service Regulation concerns the service of the document instituting appeal, which according to Dutch law can take place at the office of the attorney of the other party, in case this party chose the place of this office as his residence for the proceedings in first instance.<sup>55</sup> In an earlier case, the Supreme Court decided that this method of service was valid under the Hague Service Convention 1965.<sup>56</sup> However, since under the Service Regulation service takes place in the receiving state, and not in the state of origin, service at the attorney of the other party does not fulfil the requirements of the Regulation. For the question whether service took place on time within the meaning of Art. 9, paragraph 2 Service Regulation – which stipulates that in the context of proceedings in the state of origin, the date to be taken into account is determined by the law of that Member State – this method provided by Dutch law is relevant. But in order to fulfil the requirements of the Service Regulation, the service should be

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<sup>50</sup> Supreme Court 24 October 2003, NJ 2004, 652 note ThMdB (Lambrecht v. Paardekooper&Hoffman).

<sup>51</sup> According to the explanatory Giuliano/Lagarde Report this was because there were still many uncertainties as to the solution to be given, see comments Art. 13, under 4.

<sup>52</sup> See annotator Th.M. *de Boer* in the NJ (footnote 50); C.G. van der *Plas* and T.H.D. *Struyken*, *Schuldoverneming en accessoire aanknopng bij samenhangende overeenkomsten: over twee vraagstukken inzake het EVO*, *Nederlands Internationaal Privaatrecht* 2004, p. 148-162; M.V. *Polak*, *Festival van verbintenissen: schuldoverneming in het EEX en EVO*, *Ars Aequi* 2003, p. 52-58.

<sup>53</sup> Supreme Court 28 January 2005, RvdW 2005, 22 (Grootscholten v. Vergo).

<sup>54</sup> Maybe in case the clause is clearly incompatible with Belgian law, application of the Belgian rule could have been pleaded as priority rule (Art. 7 Rome Convention), but it is highly unlikely that the Court would have granted this.

<sup>55</sup> Supreme Court 17 January 2003, NJ 2003, no. 113 note PV.

<sup>56</sup> Supreme Court 27 June 1986, NJ 1987, 764 note WHH (Segers v. Mabanaf).

accompanied by, or within a period of 14 days be followed by, transmittance of the document to the receiving agency of the receiving state.

The second decision on the Service Regulation concerns the interpretation of “civil and commercial matters” within the meaning of Art. 1.<sup>57</sup> In this case the Dutch Tax Collector based his claim at the District Court against an English residence, a (former) director of a Dutch company, primarily on articles concerning the liability of (amongst others) directors of the Dutch Collection of State Taxes Act (*Invorderingswet*) and secondarily on tort within the meaning of Art. 6:162 Dutch Civil Code. The Supreme Court decides that the Service Regulation was applicable to this claim, since the secondary basis of the claim was on tort, which qualifies as a civil or commercial matter. It is a pity that the Court did not follow the opinion of the Advocate-General to request a preliminary ruling from the Court of Justice.

The criterion of the centre of the debtor’s main interest (CoMI) of Art. 3, paragraph 1 Insolvency Regulation, which gives rise to many interpretation problems<sup>58</sup>, was in question in a case of insolvency of a natural person.<sup>59</sup> The CoMI of a natural person is not at all defined in the Regulation. The Supreme Court ruled that it does not follow from the Regulation that the habitual residence is to be regarded as, or assumed to be, the CoMI. The fact that the debtor moved to the Virgin Islands, and later on to Belgium (where he was imprisoned for a while), does not mean that the CoMI is no longer in the Netherlands, since he still has considerable interests in many corporations in the Netherlands and still administers his professional interests in the Netherlands.

In two family cases on recognition of a foreign decision – one as Supreme Court for Aruba concerning recognition of a divorce pronouncement under local law and one concerning recognition of an adoption under the Dutch-Belgium Enforcement Convention 1925 (*Nederlands-Belgisch Executieverdrag*) – the Supreme Court ruled that there is no room for the conflict of laws test. It is clear that the conflict of laws test is no longer a requirement for recognition in enforcement under Dutch (and Aruba) private international law. Only public policy can serve as an argument to contest the outcome, but this is of course limited to violation of fundamental rights.

## IV European Impact on Dutch Private International Law

### 1. European Regulations

The necessary implementation laws, mainly for the seven regulations that have been brought about in the past years, apparently cause the Dutch legislator quite some problems. As a general remark, the Netherlands is in most cases too late in establishing the implementation laws. Furthermore, there is a lack of uniformity in competent authorities when it comes to the enforcement of the tasks following from the EU-Regulations, as well as the Hague Conventions.<sup>60</sup> A big challenge will be the implementation of the upcoming Regulation establishing a European Payment Order. Since the Netherlands is one of the few EU countries that does not have a special payment procedure for uncontested claims and the proposal leaves quite some points open to be decided under national law, a thorough and timely implementation law will be essential.

European procedural rules also have an influence outside the territorial scope of the regulations. As was already mentioned in section II.5, national jurisdiction rules are primarily based on

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<sup>57</sup> Supreme Court 8 April 2005, NJ 2005, no. 347 note PV (Ontvanger v. Stokoe).

<sup>58</sup> See also the recent case ECJ 2 May 2006, C-341/04 (Eurofood IFSC).

<sup>59</sup> Supreme Court 9 January 2004, RvdW 2004, 12 (V v. Fortis Bank).

<sup>60</sup> See also S.J. *Schaafsma*, Kroniek van het international privaatrecht, *Nederlands Juristenblad* (NJB) 2004, p. 516. For critical comments on the implementation law of the European Enforcement Order see B. *Sujecki*, *Niederländisches Gesetz zur Durchführung der Verordnung (EG) Nr. 805/2004 zum Europäischen Vollstreckungstitel*, *IPRax* 2006 (to be published).

the Brussels I and II Regulations. The regulations on the Service of Documents, Insolvency and Evidence and Regulation did not lead to substantial amendment of the national rules.<sup>61</sup>

## 2. Case Law of the European Court of Justice

It is evident that the case law of the European Court of Justice plays a role of rapidly increasing importance in the area of Private International Law. In the previous overview attention was paid to the practice of the Dutch *kort geding* procedure in international cases (mainly concerning intellectual property and interim payments), which was “under attack” in as many as three cases in 1998 and 1999.<sup>62</sup> In the period currently under review the ECJ made sweeping corrections to, amongst others, Belgian private international law rules concerning names in *Garcia Avello*<sup>63</sup>, German international company law in *Überseerung*<sup>64</sup> and the English practice of the anti-suit injunction in *Turner*<sup>65</sup>. In section II.2 above attention was paid to the question whether the *Garcia Avello* ruling also affects the operation of the Dutch Conflict of Laws Act on Names, which declares Dutch law applicable in case of multiple nationality. It was concluded that in my view this Act should be amended.

As was explained in section II.3, Dutch international company law was affected by the *Inspire Art* ruling of 2003<sup>66</sup>. The ECJ established that the disclosure requirements as laid down in the *Pro Forma* Foreign Companies Act (*Wet op de formeel buitenlandse vennootschappen*) are contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State. Furthermore, it ruled that the requirements concerning the minimum capital and the liability of companies according to Dutch law as imposed by this Act in case of a pseudo foreign company constitute a violation of Art. 43 and 48 EC Treaty on the freedom (secondary) establishment. The scope of the *Pro Forma* Foreign Companies Act was accordingly limited to non EU and non EEA countries.

Furthermore, the Dutch Supreme Court made reference to the ECJ concerning the application of Art. 6, paragraph 1 Brussels Convention in case of an infringement order regarding a European patent, where the alleged infringement takes place in several (EU) countries.<sup>67</sup> Since 1998 the Dutch courts apply the so-called ‘spider in the web’ rule for the application of Art. 6, paragraph 1 (and the similar rule under national jurisdiction rules).<sup>68</sup> This means that in case of multiple defendants the Dutch court has jurisdiction for a restraining order if the defendants are part of the same group of companies and the Dutch defendant is the “brain” where the infringements originate from. The preliminary question is whether the connection that is required according to Art. 6, paragraph 1 is fulfilled when it concerns a European patent (this broad approach was often used in Dutch case law before 1998), and in case this is not answered in the affirmative, whether additional requirements apply, such as the fact that the defendants belong to the same group of

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<sup>61</sup> As for the Insolvency Regulation the Standing Committee published a report in 2001, arguing that at the moment it is not desirable to abandon the territorial approach of international insolvencies outside the scope of the Regulation (see *Kramer* 2002, footnote 1, p. 544-545). Indeed, the legislator did not take any action since then.

<sup>62</sup> ECJ 16 June 1998, C-53/96, ECR 1998 p. I-3637 (*Hermès*); 17 November 1998 (C-391/95), ECR 1998, p. I-7091 = IPRax 1999, p. 240, note Hess/Volkommer, p. 220 (*Van Uden v. Deco-Line*); 27 April 1999 (C-99/96), ECR 1999, p. I-2277 = IPRax 2000, p. 411, note Hess, p. 370 (*Mietz*). See *Kramer* 2002 (footnote 1), p. 545.

<sup>63</sup> See footnote 14.

<sup>64</sup> ECJ 5 November 2002 (C-208/00), ECR 2002, p. I-9919.

<sup>65</sup> ECJ 17 April 2004 (C-159/02), ECR 2004, p. I-3565

<sup>66</sup> See footnote 35.

<sup>67</sup> Supreme Court 19 December 2003, RvdW, 10.

<sup>68</sup> See Court of Appeal The Hague, 23 April 1998, *Intellectueel Eigendom en Reclamerecht* (IER), no. 30, *Bijblad Intellectuele Eigendom* (BIE) 2002, no. 8 (*EGP v. Boston Scientific*).

companies (and the infringement originates from one of them), or that they are acting together on the basis of a common policy or that the alleged infringements are (virtually) the same. The Advocate-General already concluded in his opinion that Art. 6, paragraph 1 is not applicable at all in case of infringement of a European patent, not even when the companies belong to the same group and the infringement originates from one of them. It remains to be seen whether the ECJ will follow the Advocate-General.<sup>69</sup> This would be of major influence on Dutch practice.

## V FINAL REMARKS

In the previous review the concluding remarks mentioned three important tasks for the years to come. The first one was to interpret all these new laws and recent EU-Regulations. This is indeed a process that is visible in court practice. It is in my view a pity that new European regulations do not always get much attention in Dutch literature. The second challenge that was mentioned is, once the codification of Dutch private international law is completed, the bringing about of the consolidated law. Apart from publishing an updated pre-draft for a consolidated law at the end of in 2003 (which was already prepared by the Standing Committee in June 2002), there have been no further developments. Also a conflict of law act on property issues is still to be established. It is clear that finishing the national codification does not seem to have much priority. The main reason is probably the ongoing Europeanization of private international law. First of all, this attracts the most attention and time of the Legislative Department, and secondly it also raises questions as how to bring about a coherent system of private international law. As third challenge, mainly for academics, the coming together of private international law, European law and uniform law was mentioned. Indeed, the proposals for a European Payment Order and a European Small Claims Procedure emphasize that the borderline between these specialisations is fading. In particular, the implementation of the European Payment Order, which is a novelty to in the Dutch system of procedural law, will be a big challenge.

For both the Legislative Department, practitioners and academics there is still a lot of work to do. As for the consolidated law the question might be what the right time is. However, since it is rather unpredictable and doubtful whether there will be a right time in the near future and since international development will continue, it would in my view be best to just go ahead with it. Furthermore an active participation of the Netherlands in international and European developments, and more intensive deliberation by Dutch academics would be desirable.

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<sup>69</sup> After conclusion of this contribution the ECJ gave judgment and confirmed the opinion of the Advocate-General, see ECJ 13 July 2006 (C-539/03) (*Roche v. Primus*), IPRax 2007, p. 38, note Adolphsen, p. 15.