

Dutch Private International Law – Overview 1998-August 2002

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Abstract: This article provides an overview of the most important developments in Dutch private international law during the period January 1998-August 2002. The stormy codification of Dutch private international law in separate acts during the 1990's was in a slower pace continued in the year 2000 and is today almost completed. A complication is the ongoing international codification. The ongoing activities of the European legislator, add a third layer to the traditional 'convention - national law' scheme, namely those of the regulations. The paper concludes that there will be three important tasks for Dutch private international law and its practitioners in the years to come. The first one is to interpret all the new laws and EU- regulations. The second task will be to bring about a Consolidated law, including all the conflict of laws regulations. The third challenge will be to integrate private international law into the bigger framework of international law, European law and uniform law, since the borderline between these fields will inevitably become less distinct.

I Introduction

The first careful steps towards codification of Dutch private international law were taken in the 1980's, but it took on stormy features in the 1990's. Whereas ten years ago private international law mainly consisted of case law and doctrine, today most rules are codified. Not only national legislation, but also international developments – in particular the coming about of regulations of the European Union –, contributed to this.

This article provides an overview of the most important developments in Dutch private international law, including international procedural law¹, during the period January 1998-August 2002. Section II focuses on the process of codification of Dutch private international law. In order to place the codification in its context, some developments that took place before 1998 will receive attention as well. Section III discusses 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. Section V provides a short overview of some Dutch literature on private international law.

II Codification of Dutch Private International Law

1. The Process of Codification

The Department of Justice launches the idea to codify private international law on a national level in the beginning of the 1980's.² In 1982 the Minister of Justice sends an unpublished preliminary draft to the Netherlands Standing Committee on Private International Law (*Staatscommissie voor het Internationaal Privaatrecht*; hereafter called: Standing Committee) for advice. This preliminary draft is informally called the 'blue book'. The aim is to formulate a set of conflict of laws rules, including rules for international jurisdiction and recognition and enforcement of foreign judgments. The Standing Committee then starts its work, but after a few years some doubt arises as to the willingness of the Department of Justice to bring about a coherent law covering all aspects of private international law.

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¹ In the Netherlands international procedural law is regarded as a part of private international law.

² See on the codification process L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer: Kluwer 2000, p. 7-8; Th.M. de Boer and M.V. Polak, *Naar een gecodificeerd internationaal privaatrecht (!/?)*, Preadviezen van de Nederlandse Vereniging voor Internationaal Recht, Deventer: Kluwer 1990; L. Strikwerda, Het 'rode boek' van het internationaal privaatrecht, *Nederlands Juristenblad* 1992, p. 1572-1573.

At the annual meeting of the Dutch Association for International Law (*Nederlandse Vereniging voor Internationaal recht*) in 1990, the ‘blue book project’ is almost unanimously rejected.³ The new goal is to codify the rules of private international law piece by piece. The motto is: no renovation, but consolidation.⁴ Also the original plan to include international procedural law in the codification is abandoned. In 1992 the Department of Justice publishes a preliminary draft for a Consolidated law, the Outline of a General Law concerning Private International Law (*Schets van een Algemene Wet betreffende het Internationaal Privaatrecht*). This outline is called the ‘red book’. It contains 10 general provisions and all existing laws and conventions in the field of the conflict of laws. It follows the structure of the topics dealt with in the Dutch Civil Code. The intention is that once all topics are covered, the existing laws are consolidated and added to the Civil Code as Book 10. At the time of publication of this preliminary draft for a consolidated law in 1992, there are only a few national laws in the field of private international law. These are the Conflict of Laws Divorce Act (*Wet Conflictenrecht Echtscheiding*; in force in 1981), the Conflict of Laws Act on Names (*Wet Conflictenrecht Namen*; in force in 1990, revised in 1998), the Conflict of Laws Marriage Act (*Wet Conflictenrecht Huwelijken*; in force in 1990, revised in 1998), and the Conflict of Laws Act on Matrimonial Property (*Wet Conflictenrecht Huwelijksvermogensregime*; in force in 1992). After 1992 the process of codification starts to proceed rapidly. For each topic a separate law is enacted.⁵

In May 2001 the Department of Justice publishes another preliminary draft for a Consolidated law.⁶ This contains all existing laws and conventions⁷, draft proposals that are already pending, and proposals by the Standing Committee. The intention is still – once all topics are covered and its consistency is secured – to add this Consolidated law as a separate Book to the Civil Code.

National codification projects such as in the Netherlands, are constantly ‘challenged’ by the ongoing international codification of private international law. The Netherlands is, in comparison with other countries, party to many conventions, especially those of the Hague Convention on Private International Law. Furthermore, private international law recently also receives a lot of attention within the European Union. Especially since the European Council of Tampere of 1999, the unification of private international law has been in the centre of interest. This is further promoted by the Treaty of Amsterdam that introduced the jurisdiction to enforce regulations in the field of private international law by virtue of Article 65 in conjunction with Article 61 sub c EC Treaty. Meanwhile, five regulations concern international procedural law have been established, and a few other regulations are being prepared. These rapid developments obviously have a major influence on the national codification. Besides the harmonisation of private international law regulations there is also a tendency towards harmonisation of national substantive civil law (especially contract law) and civil procedural law within the European Union. An important step towards the introduction of a European Title is the proposal for a Council Regulation creating a European enforcement order for uncontested claims.⁸ This gives a new dimension to private international law, and its interaction with uniform law will become more prominent.

³ Verslag van de Algemene Ledenvergadering, Preadviezen Th.M. de Boer and M.V. Polak: Naar een gecodificeerd internationaal privaatrecht (!/?), Mededelingen Nederlandse Vereniging voor Internationaal Recht, Deventer: Kluwer 1991.

⁴ L. Strikwerda, Het ‘rode boek’ van het internationaal privaatrecht, *Nederlands Juristenblad* 1992, p. 1572.

⁵ They include: 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 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); 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* 2002).

⁶ Published at: WWW <http://www.justitie.nl/themas/wetgeving/rapporten_en_notas/privaatrecht/staatscommissie_ipr.asp>.

⁷ It does not include the texts of the relevant international conventions and regulations, but it refers to these rules.

⁸ COM (2002) 159 final, 2002/0090 (CNS), Brussels 18 April 2002. See also the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, *Official Journal* 15 January 2002, C 12.

2. *General Aspects of Private International Law*

At this moment, there are no codified general provisions concerning private international law in the Netherlands. These rules are formulated in doctrine, case law and derived from conventions. The intention is to include general provisions in the Consolidated law as well. Also the preliminary draft of 1992 (see the Introduction) has a chapter with general principles. In June 2002 the Standing Committee published a comprehensive report with a new proposal.⁹ It has 17 articles on topics like the application of foreign law, general issues of nationality (multiple nationality, displaced persons, refugees), renvoi, priority rules, *fait accompli*, general and public policy exception, formal validity, choice of law and limitation periods. The report is quite clear and interesting, though the rules do not bring about substantive changes to the general principles as currently recognised.

3. *International Family Law – Applicable Law*

International family law is the field where diversity of sources is predominantly visible and in which codification is most important. The Netherlands is party to most Hague Conventions concerning family matters¹⁰. Furthermore, at this moment seven national laws are in force in this field¹¹. Recently family law also caught the attention of the European legislator. In March 2001 the European Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters entered into force.¹² Meanwhile other drafts for the harmonisation of rules in the field of family law are being prepared. These regulations have an impact on the scope of national private international laws and will affect future codification projects.

3.1 *Names*

The Conflict of Laws Act on Names (*Wet Conflictenrecht Namen*) is complementary to the München Agreement on the Law applicable to Family Names and Given Names 1980. This law was already enacted in 1989, but revised in 1998 (in force in 1999).¹³ Three articles (Articles 5a-5c) were added that concern the recognition of names registered abroad. Article 5a contains a liberal rule for recognition, that applies to both Dutch nationals and foreigners. It provides that names that are (at birth or on the occasion of a change of name) registered abroad in accordance with local regulations, are recognised in the Netherlands. Recognition cannot be refused on the basis of public policy in case another law is applied than indicated in this Conflict of Laws Act.¹⁴ Under certain conditions, set out in Articles 5b and 5c, a choice of name in conformity with Dutch law can be made.

3.2 *Descent and Adoption*

⁹ See footnote 6 for the web page where the reports of the Standing Committee are published.

¹⁰ They include: 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.

¹¹ See the Introduction and footnote 5.

¹² Meanwhile a proposal has been published to withdraw this regulation and replace it by another regulation in which the scope of regulation 1347/2000 is extended, see: Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, COM/2002/0222 final.

¹³ The revision was necessary because some changes were made to the substantive law (Art. 5 and 9 Book 1 Civil Code). See I.S. Joppe, *Personen- en familierecht*, Namenrecht, Titel 1, Internationaal privaatrecht, Deventer: Kluwer (loose-leaf); K. Boele-Woelki, Tien jaar internationaal namenrecht in Nederland, *FJR* 2000, p. 133-148.

¹⁴ According to Art. 1 the name of a foreigner is determined by his national law. See also Art. 1 München Agreement 1980.

The Conflict of Laws Act of Descent (*Wet Conflictenrecht Afstamming*) was approved of in March 2002, and it will probably enter into force at the end of 2002. As most Dutch conflict of laws codifications, it has rules for the applicable law as well as for the recognition of foreign decisions concerning descent. The part on the applicable law is divided into three topics. Articles 1-3 provide rules for family relations established at birth. As is the case in most matters of the law of persons and family law in the Netherlands, the main rule is that the law of the common nationality of the parents (husband and wife) is applicable. If they do not have a common nationality, the law of their habitual residence applies. In the absence of a common habitual residence, the law of the residence of the child is decisive. Article 2 provides a special rule for the denial of fatherhood, and Article 3 gives a rule for the establishment of the relation between a mother and a child born out of wedlock. In Articles 4-6 rules for the recognition and judicial decree of fatherhood are laid down. In principle the nationality of the man is decisive, but in the case that this law does not allow recognition, the law of the habitual residence of the child applies (*favor infantis*). Article 7 provides a rule for the legitimisation of a child, by marriage or by decree of a judicial or other competent authority. In principle the applicable law is determined on the basis of the Rome Agreement on the Legitimation through Marriage 1970. However, in case these rules do not establish legitimisation, the law of the habitual residence of the child will be applied. Articles 9 and 10 give rules for the recognition of foreign decisions and facts of law concerning descent. These are automatically recognised in the Netherlands, unless the foreign judge was not competent because of the absence of a genuine link with that country, or the fair trial principle is violated, or the recognition of the decision is in conflict with public policy.

With the most recent product of the codification wave, the proposal for a Conflict of Laws Adoption Act (*Wet Conflictenrecht Adoptie*), the codification of international family law seems to be almost completed. In July 2002 the Second Chamber of the Netherlands Parliament approved this law, and currently it is before the First Chamber. In 1998 the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 entered into force, which however, does not provide for conflict of law rules. This gap is filled by the mentioned proposal of law. The conflict of laws rules are by and large in conformity with current practice.¹⁵ A decision concerning adoption given in the Netherlands has, as far as the establishment of the family relations between the adoptive parents and the child and the cutting off of the family relations between the child and its natural parents are concerned, the consequences that the Dutch law attaches to this. Dutch law also governs the revocation of an adoption established in the Netherlands. This proposal also provides some rules on the recognition of foreign adoptions for cases that fall outside the scope of the Adoption Convention 1993. It is not yet known when the First Chamber will give its approval and when this law will enter into force.

3.3 Marriage and Registered Partnership

The Conflict of Laws Marriage Act (*Wet Conflictenrecht Huwelijken*) that provides rules on the applicable law and recognition, already entered into force in 1990, but was revised in 1998 (in force in 1999).¹⁶ This revision regards Article 4. It provides that a marriage in the Netherlands can only be solemnised according to Dutch law, which means that it has to be solemnised by an official of the Civil Registry. An exception is made for so-called consular marriages; diplomatic and consular agents can solemnise a marriage according to the rules of the country they represent. In a case of 1996 concerning the marriage between a Moroccan man and a woman with both Dutch and Moroccan nationality, the question was whether the celebration by a Moroccan consular servant was valid considering the fact that the woman (also) had the Dutch nationality. The Supreme Court decided on the basis of the *favor matrimonii* principle that this celebration was valid.¹⁷ The Dutch legislator, however, was not pleased with this decision, and therefore added in Article 4 the explicit requirement that none of the parties (also) has the Dutch nationality.

Another development worth mentioning is the possibility for partners of the same sex to enter into a marriage, which was introduced in April 2001. This also has consequences for some regulations in the

¹⁵ See Strikwerda 2000 (footnote 2), no. 123-126; A.P.M.J. Vonken, *Personen- en familierecht*, Adoptie, Titel 12, Internationaal privaatrecht, Deventer: Kluwer (loose-leaf).

¹⁶ Furthermore, in 2001 a minor technical revision took place, because of the introduction of the possibility to marry with a person of the same sex; the words 'man' and 'woman' were changed into 'person'.

¹⁷ Supreme Court 13 December 1996, NJ 1997, no. 469 note ThMdB.

field of private international law. This mostly regards the (non) application of international regulations and some national laws. In December 2001 the Standing Committee presented a report on this matter.¹⁸ Some of the most important conclusions are that it is not sure whether the Hague Marriage Convention 1978 and the Hague Matrimonial Property Convention 1978 are applicable; that Brussels II is applicable as are both of the Hague Maintenance Conventions 1973; and that the Hague Adoption Convention 1993 is not applicable. Furthermore, the Standing Committee is of the opinion that the adaptation of some national rules concerning adoption, meant to exclude adoption by partners of the same sex, should be reconsidered.

In 1998 the so-called registered partnership was introduced as an 'alternative' for marriage, both for couples of the same sex and partners of the opposite sex. Also foreigners can in principle register their partnership in the Netherlands. This of course raises questions concerning the applicable law to its conclusion, dissolution, the personal legal relationship of the partners, the matrimonial property regime, the maintenance obligations, and the recognition of foreign registered partnerships.¹⁹ In the same year the Standing Committee published a report and a comprehensive proposal with 35 articles on these issues.²⁰ Unfortunately there has not been much progress on this topic at the Department of Justice since then.

3.4 Pension Rights and Matrimonial Property

Until recently it was not clear how the equalisation of pension rights on the occasion of a divorce should be qualified. It was suggested that it could be regarded as a question either of marital relationship, divorce law, maintenance or matrimonial property.²¹ The Standing Committee was of the opinion that the issue of equalisation was best to be regarded as a matter of matrimonial property, and should therefore be subjected to the same law.²² This led to the Conflict of Laws Act on Equalisation of Pension Rights (*Wet Conflictenrecht pensioenverevening*) that entered into force on 1 March 2001.²³ This law does not stand on its own; it only incorporates a provision in the existing Conflict of Laws Matrimonial Property Act (*Wet Conflictenrecht Huwelijksvermogensregime*)²⁴ and changes a provision of the Law Equalisation of Pension Rights in case of Divorce (*Wet verevening pensioenrechten bij scheiding*).²⁵ The newly introduced Article 10a Conflict of Laws Matrimonial Property Act states that the law applicable to the matrimonial property regime of the spouses also governs the equalisation of pension rights. An exception is made for the application of some provisions of the mentioned Law Equalisation of Pension Rights, which refer to cases in which the Dutch rules laid down in this law have to be applied, regardless the law that governs the matrimonial property. The consequence of this exception is that in practice most cases will be governed by the Dutch rules concerning equalisation of pension rights.²⁶

4. International Patrimonial Law – Applicable Law

The most important laws in the field of patrimonial law concern company law (in force since 1997), tort law (in force since 2001), transport and maritime law (in force since 1993) and trust law (in force since 1996, as a complement to the Hague Trust Convention 1985).²⁷ The Standing Committee published a re-

¹⁸ See footnote 6 for the web page where the reports of the Standing Committee are published.

¹⁹ See I.S. Joppe, *Het geregistreerd partnerschap in het Nederlands IPR*, WPNR 2000, p. 371-377 and p. 391-395; I.S. Joppe, *Personen- en familierecht*, Geregistreerd partnerschap, Titel 5A, Internationaal privaatrecht, Deventer: Kluwer (loose-leaf); H.U. Jessurun d'Oliveira, *Freedom of Movement of Spouses and Registered Partners in the European Union*, in: *Private International Law in the International Arena: J. Basedow et al, From National Conflicts Rules Towards Harmonization and Unification (Liber Amicorum Kurt Siehr)*, p. 527-543.

²⁰ Staatscommissie voor het Internationaal Privaatrecht, *Advies geregistreerd partnerschap en Voorstel voor een aantal IPR-bepalingen over het geregistreerd partnerschap*, May 1998. See for the web page footnote 6.

²¹ Staatscommissie voor het Internationaal Privaatrecht, *Rapport aan de Minister van Justitie, Internationale pensioenverrekening en -verevening*, April 1998.

²² See the report mentioned in the previous footnote, p. 14.

²³ See A.R. van Maas de Bie, *De Wet conflictenrecht pensioenverevening bij scheiding – Is een afgewogen reparatiewetgeving wenselijk?*, NIPR 2001, p. 173-186.

²⁴ Complementary Act to the Hague Convention on Matrimonial Property Regimes 1978, that entered into force in 1992.

²⁵ This law regulates (national cases of) equalisation of pension rights.

²⁶ In these cases the Dutch rules are to be regarded as priority rules.

²⁷ See note 5 for specifications of the laws in force for these topics.

port and proposal on property law in 1998.²⁸ Up to now no draft has been put before Parliament. Conflict of laws in the field of contract law are nowadays exclusively regulated by conventions. These include the Rome Convention on the Applicable Law to Contracts 1980 and the Hague Agency Convention 1978. The Netherlands is also party to the Vienna Convention on the International Sale of Goods 1980. Other conventions in the field of patrimonial law to which the Netherlands are a party are the Hague Traffic Accident Convention 1971, the Hague Convention on Products Liability 1973 and the Hague Trust Convention 1985. Below attention will be paid to the laws that entered into force since 1998, which are those in the field of corporation law and tort law.

4.1 Corporations

Contrary to Germany, the Netherlands has as a principal rule that to issues concerning corporations the law of incorporation applies.²⁹ Since a few years this rule has been laid down in the Conflict of Laws Corporations Act (*Wet Conflictenrecht Corporaties*). This law entered into force in January 1998, at the same time as its complementary *Pro Forma* Foreign Companies Act (*Wet op de formeel buitenlandse vennootschappen*).³⁰ Article 2 Conflict of Laws Corporations Act provides the main rule. It states that a corporation which, under its agreement or deed of establishment, has its corporate seat or registered office, or, in the absence thereof, its external centre of activities on the date of establishment in the territory of the State under the laws of which it is established, is governed by the law of that state. Article 3 encompasses a (non exhaustive) list of topics that are subject to the law of incorporation. These include the possession of legal personality, the internal regulation of the corporation, the liability of directors and supervisory board members and other officers, and the termination of the corporation. In Article 5 an important limitation of the applicability of a foreign law on the basis of Article 2 is laid down. This regards the liability of directors, supervisory board members and persons charged with the management of the business conducted in the Netherlands in case of bankruptcy. In the case that a corporation subjected to the levy of corporate income tax in the Netherlands is declared bankrupt in the Netherlands, Articles 138 and 149 of Book 2 of the Dutch Civil Code apply. These provisions concern the joint and several liability of directors towards the assets in case of bankruptcy. They are applicable as a priority rules.

As mentioned above, the Conflict of Laws Corporations Act is complemented by the *Pro Forma* Foreign Companies Act. The aim of this Act is to prevent abuse of ‘foreign’ companies by choosing a ‘liberal’ corporation regime in order to circumvent the more strict Dutch company law. Article 1 provides a definition of a *pro forma* foreign company. This means 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. Articles 2-6 declare certain rules of Dutch company law applicable to corporations that fit this description. These relate to the registration of the *pro forma* foreign company in the Dutch commercial register, the way the company presents itself, the issued capital and equity capital, the liability of directors for debts of the company, the publication of annual accounts and reports, and the liability for the annual report. Important to notice is that for all other topics, the law of incorporation remains applicable on the basis of Article 2 Conflict of Laws Corporations Act.

4.2 Torts

The Conflict of Laws Tort Act (*Wet Conflictenrecht onrechtmatige daad*) entered into force on 1 June 2001.³¹ It did not bring about fundamental changes to the rules concerning torts. Its provisions are by and

²⁸ Staatscommissie voor het Internationaal Privaatrecht, Rapport aan de Minister van Justitie, Internationaal goederenrecht, November 1998. This draft is also included in the Consolidated law of 2001 (see Introduction).

²⁹ See on the Dutch doctrine and that of several other countries: Rammeloo, *Corporations in Private International Law. A European Perspective*, Oxford: Oxford University Press 2001.

³⁰ See Strikwerda 2000 (footnote 2), no. 199-201; P. Vlas, *Rechtspersonen*, Praktijkreeks IPR, Deventer: Kluwer 1999.

³¹ See Strikwerda 2000 (footnote 2), no. 179-185a; J.A. Pontier, Het wetsvoorstel Wet conflictenrecht onrechtmatige daad: lokale wijsheid in internationaal perspectief, *NIPR* 2000, p. 369-379. See on the development of Dutch international tort law: C.W. Dubbink e.a., *Vijftig jaar lex loci delicti – van Dubbinks proefschrift tot een Wet conflictenrecht onrechtmatige daad*, Deventer: Kluwer 1998.

large based on case law, and in particular the COVA case of 1993.³² In this case, the Supreme Court ruled that an international tort is primarily governed by the law of the place where the tort was committed, the *lex loci delicti*, unless parties have made a choice of law. An exception is made in case the author of the tort and the injured person are habitually resident in the same country, other than the country where the tort was committed (the so-called ‘consequences exception’). Another exception was formulated by Advocate-General Strikwerda in this case, which was later on accepted in doctrine and case law. This is the so-called exception of ‘accessory attachment’, meaning that when a tort is closely connected to an existing or past legal relationship between the author of the damage and the victim, the law that governs this relationship may also be applied to the tort.

The core of the conflict of laws rules are Articles 3-6. Article 3, section 1 contains the *lex loci delicti* rule. Article 3, section 2 provides a solution in case the place where the tort was committed (*Handlungsort*) and the place where the damage occurs (*Erfolgsort*) are not in the same country. In this case the law of the country where the damage arises is applicable, unless the author of the tort could reasonably not have foreseen the damage to occur in that country. Article 3, section 3 states that in case the author of the tort and the injured person are habitually resident in the same country, the law of that country applies.

Article 4 provides a special rule for torts arising from unfair competition. These are governed by the law of the country where the action affects the competitive position (which is also the law of the *Erfolgsort*). The ‘accessory attachment’ rule is laid down in Article 5. It prescribes that in case a tort is closely connected to an existing or past legal relationship between the author of the tort and the injured person, the law governing this relationship may be applied to the tort. The words ‘may be’ indicate that it is upon the discretion of the court to apply it or not, depending upon the circumstances. Article 6 determines that when parties have made a choice of law, the chosen law applies. The choice of law must be expressed or demonstrated with reasonable certainty. Article 8 gives a provision for mandatory rules, also called priority rules.³³ The judge has, notwithstanding the application of Article 3-7, discretionary power to take into account the rules that relate to control and safety in order to protect persons or goods of the country where the tort was committed

5. International Procedural Law – Family and Patrimonial Matters

Two topics that are regarded as most important in the field of international procedural law are international jurisdiction and the recognition and enforcement of foreign judgments. Other procedural topics, such as the service of documents and the gathering of evidence are mainly governed by regulations of the European Union and conventions.³⁴

During the 1990’s the difficult process of revising the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) of 1838 started. A bill was put before Parliament in 1996, but withdrawn in 1998. In 1999 a revised bill was submitted and – with several important changes – finally approved of by law of 6 December 2001.³⁵ Although criticised by several outstanding procedural law experts, the new Code already entered into force a few weeks later, on 1 January 2002. The most important aims of the revision are to simplify proceedings, and to cut back formalities. The relation between the parties and the court is altered; the judge has to participate more actively and parties have the duty to co-operate. The procedure has to become efficient, which means that the duration of the procedure should be reduced whereas the quality remains guaranteed. A novelty in the private international law context is the introduction of a section on international jurisdiction.

5.1 International Jurisdiction

Until January 2002, the Netherlands had a similar rule as Germany concerning jurisdiction outside the scope of the international regulations, meaning that the rules for territorial jurisdiction are also decisive for

³² Supreme Court 19 November 1993, NJ 1994, no. 622 notes JCS and PvS.

³³ Compare Art. 7 Hague Traffic Accident Convention, Art. 9 Hague Products Liability Convention, Art. 7 Rome Convention.

³⁴ See section V. International Insolvencies within the European Union are now covered by the Insolvency Regulation. In the field of arbitration there have been no substantial developments.

³⁵ Wetsvoorstel herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg, *Kamerstukken II* 1999-2000, 26 855.

the international jurisdiction (the ‘distribution is attribution’ rule).³⁶ This principle is no longer the point of departure under the new jurisdiction rules of the revised Code of Civil Procedure. According to the Explanatory Memorandum, the rules are as far as possible and desirable adapted to the Brussels Convention and Brussels II for divorce cases.³⁷ The rules that are derived from the Brussels Convention have to be interpreted in conformity with the case law of the European Court of Justice. An inaccuracy is that the legislator did not take into account the entry into force of the Brussels Regulation on 1 March 2002. This has meanwhile caught the attention of the Department of Justice, and the necessary adaptive measures will be taken.

The most important consequence of the new rules is that the jurisdiction of the Dutch courts is somewhat limited. Under the old system, the Dutch court had jurisdiction when the plaintiff was domiciled in the Netherlands (the *forum actoris* rule; see Article 126, section 3 old Code of Civil Procedure). This rule played an important role in practice. It is abandoned because it is regarded as an exorbitant ground for jurisdiction.³⁸

According to Article 1 this national section on jurisdiction applies when no Regulation of the European Union or Convention is applicable.³⁹ Article 2 prescribes the main rule for cases that are commenced by a (writ of) summons. It states that the Dutch court has jurisdiction when the defendant either has his domicile or his habitual residence in the Netherlands (the *forum rei* rule). Article 3 provides the main rule for cases that are initiated by a petition, which are usually family matters. The Dutch court has jurisdiction either when the petitioner or one of the petitioners has his domicile or habitual residence in the Netherlands (sub a), or when the petition is related to a procedure that was or has to be commenced by a summons and for which the Dutch court has jurisdiction (sub b), or when the case is otherwise sufficiently connected with the Dutch legal sphere (sub c). Sub c can be regarded as a so-called *forum conveniens* rule, as opposite to the more familiar *forum non conveniens* rule. In Articles 4 and 5 further rules for cases to be initiated by a petition are given. Article 4 prescribes that Articles 2, 5 and 6 Brussels Regulation II on divorce and custody for common children are also to be applied when the case falls outside the territorial scope of this Regulation. According to Article 5 the Dutch judge has jurisdiction in cases of custody and measures for the protection of children in case the child has its habitual residence in the Netherlands, unless the judge is not able to access the interest of the child because the case is not sufficiently connected with the Netherlands.⁴⁰

Article 6 provides alternative jurisdiction criteria for proceedings that are commenced by a summons. These rules are either derived from the Brussels Convention (such as sub a for contractual obligations, and sub d for delictual obligations) or from the old Code of Civil Procedure (such as the rule for rights *in rem* and for bankruptcies). Article 7 provides alternative rules for disputes initiated by a summons that are based on procedural efficiency, and resembles some rules laid down in Article 6 Brussels Convention.

The choice of forum is provided for in Article 8. In cases that are at the free disposal of parties (patrimonial cases and some family matters) parties can make a forum clause for the Dutch judge or for a foreign judge. The latter implicates that the Dutch judge no longer has jurisdiction. There are some limitations that are partly based on those of Article 17 Brussels Convention (Article 23 Regulation).

Article 9 encompasses the so-called implicit choice of forum rule (see also Article 18 Brussels Convention; Article 24 Regulation), as well as a general *forum necessitatis* rule. In case a procedure outside the Netherlands is not possible (negative jurisdiction conflict) or the plaintiff cannot be expected to start a procedure elsewhere (e.g. because of a war situation) and the case is sufficiently connected with the Netherlands, the Dutch court has jurisdiction. Article 10 refers to some special jurisdiction rules in the Code of

³⁶ See on this rule Strikwerda 2000 (note 2), no. 215-216.

³⁷ *Kamerstukken II* (MvT) 1999-2000, 26 855, nr. 3, p. 24, 25. See on the new jurisdiction rules: M.V. Polak, in: C.J.J.C. Van Nispen, A.I.M. Van Mierlo, M.V. Polak (ed.), *Tekst en Commentaar, Burgerlijke Rechtsvordering*, Deventer: Kluwer 2002, comments to Art. 1-14. See for comments on a earlier draft: P. Vlas *et. al.*, *De internationale bevoegdheid van de Nederlandse rechter volgens de nieuwe bepalingen van het Wetboek van Burgerlijke Rechtsvordering*, special issue NIPR 1996 (congres T.M.C. Asser Institute); Kokkini-Iatridou en K. Boele-Woelki, *De regeling van de “Internationale rechtsmacht” in het voorontwerp van wet van 1993*, NIPR 1993, p. 323-364.

³⁸ See e.g. Art. 3 Brussels Convention, Art. 3 in connection with Annex I Brussels Regulation.

³⁹ By and large this means that it is applicable in patrimonial cases where the defendant is not domiciled in an EU-State (see Art. 4 Brussels Regulation) and in family cases other than those that come within the scope of the Brussels II.

⁴⁰ This rule is derived from Art. 1 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors 1961.

Civil Procedure, and in particular the *forum arresti* rule.⁴¹ Article 12 gives a provision on *lis pendens*. In Article 13 a rule is laid down regarding provisional and protective measures that highly resembles Article 24 Brussels Convention (Article 31 Regulation).

Article 11 shows that the court only has to apply these jurisdiction rules on its own motion when it concerns proceedings commenced by a petition. In cases initiated by a summons, the defendant has to provoke these rules before going into the substance of the case.

5.2 Recognition and Enforcement of Foreign Judgments

The revised Code of Civil Procedure does – in my view unfortunately – not introduce new rules for the recognition and enforcement of foreign judgments.⁴² Article 431 still states that outside the scope of international regulations and conventions a foreign judgment cannot be *enforced* in the Netherlands. This means that a new procedure has to be initiated. According to case law and doctrine, however, this new procedure can be summarily in case the criteria – as laid down in case law and doctrine – concerning the *recognition* of foreign decisions are fulfilled.⁴³ This is called a head-and-tail decision or a disguised *ex-equatur* (grant of execution). The requirements for recognition relate to jurisdiction, fair trial, public policy and finality of the decision.

III CASE LAW

1. Introduction

Case law plays a very important role in the development of Dutch private international law. Because the codification movement only started in the 1980's and 1990's, most private international law rules are in fact formulated in court practice. Most laws that are now in force are (partly) based on case law. The influence of the Dutch Supreme Court (*Hoge Raad*) does not have a very long history. It has only been since 1963, when the Law on the Judicial Organisation (*Wet op de Rechterlijke Organisatie*) was adapted, that the Supreme Court is allowed to quash decisions on the basis of violation of unwritten rules. Because until recently hardly any written laws in the field of private international law existed, the Supreme Court did not have many possibilities to put its mark on the development of the conflict of laws. Although most topics are now covered either by regulations, conventions, or national law, case law is still a significant source of Dutch private international law. Important is that nowadays – as is the case in Germany – it is in principle still not possible to lodge an appeal in cassation in case of violation of *foreign* laws (Article 79 Law on the Judicial Organisation). However, in some cases the Supreme Court has been willing to quash decisions based on foreign law because the lower court did not properly motivate its judgment.⁴⁴

This overview of the most important case law in the period under review will only discuss rulings of the Supreme Court, though in selecting the case law also the importance of lower courts' decisions has been taken into account.

2. General Aspects of Private International Law

2.1 Application of Conflict of Laws Rules and Foreign Law

In a case concerning matrimonial property law between a German wife and a Dutch husband, the Supreme Court decides that the court has to apply the conflict of laws rules, as well as the applicable German law in this case, on its own motion.⁴⁵ This is based on the former Article 48 Code of Civil Procedure (Article 25 of the revised Code), which codifies the courts' duty to apply the law on its own motion. This decision is

⁴¹ This is a remainder of the old 'distribution is attribution' rule.

⁴² This is also because the revision mainly focused on the Book I of the Code of Civil Procedure, whereas the relevant Articles for enforcement are laid down in Book II and III.

⁴³ See Supreme Court 14 November 1924, NJ 1925, no. 91 (Bontmantel); Strikwerda 2000 (footnote 2), no. 268-271; R.C. Verschuur, *Vrij verkeer van vonnissen*, Deventer: Kluwer 1995, p. 34-62.

⁴⁴ See e.g. Supreme Court 31 May 1985, NJ 1985, no. 717 and Supreme Court 3 March 1989, NJ 1990, no. 688 note JCS.

⁴⁵ Supreme Court 22 February 2002, RvdW 2002, no. 46.

in accordance with Dutch doctrine on the application of the conflict of laws rules and the status of foreign law, which dates back to the early 20th century.⁴⁶

2.2 Public Policy

It is generally accepted that the public policy exception, regardless whether it concerns the applicable law or recognition and enforcement, has to be applied restrictively. This view is confirmed in a case concerning the enforcement of an Austrian judgment to which a bilateral Convention between the Netherlands and Austria was applicable.⁴⁷ The Supreme Court states that when irregularities concerning the circumstances under which the foreign decision was given could have been recovered in that country if an appeal was lodged, recognition and enforcement in the Netherlands cannot be refused on the basis of public policy.

In another case that concerned the public policy exception, this time regarding the applicable law, the Court of Appeal dismissed a petition for a divorce based on Moroccan law, because the contents of the rules applied for – concerning the *talaq* – are to be regarded as contrary to Dutch public policy. The Supreme Court, however, rules that the Court of Appeal should have examined whether a divorce on the basis of Dutch law was nevertheless possible, because in case a foreign is set aside on the basis of the public policy, the matter has to be decided upon the *lex fori*.⁴⁸

3. International Family Law – Applicable Law

In this paragraph two decisions will be discussed. One concerns a divorce case and the other a maintenance case.

Because Dutch divorce judgments on which Dutch law is (exclusively) applied are not recognisable in Morocco, it can be of importance – especially for the position of Moroccan women – to get a divorce (also) based on Moroccan law. In a somewhat miraculous case in which the husband initiated the divorce based on Dutch law, stating that the marriage was permanently disrupted, the wife argued that there could not be a matter of permanent disruption if the husband did not agree in also getting a divorce under Moroccan law.⁴⁹ Meanwhile the husband was already living together with another woman, but the wife argued that this fact, according to Moroccan standards, does not mean that the marriage is permanently disrupted. In the second place, she argued that a Dutch judge cannot pronounce a divorce based on Dutch law as long as there is no divorce under Moroccan law, because this would contradict Dutch public policy. The Supreme Court did not fall for these comprehensible attempts to seduce the court to apply Moroccan law: both arguments were dismissed. The Supreme Court rules that the concept of ‘permanent disruption’ (“*duurzame ontwijking*”) is solely to be interpreted according to Dutch standards, and that the public policy exception only applies to foreign law, whereas the wife implies to invoke it against Dutch law. A right decision in legal respect, but with unfair consequences.

In a maintenance case to which the Hague Maintenance Convention 1973 applied, the Supreme Court interprets Article 11, section 2 of this Convention.⁵⁰ According to this section, the needs of the creditor and resources of the debtor have to be taken into account when fixing the maintenance, even if the applicable law provides otherwise. The Supreme Court stated that in case the applicable law provides for a weighing of the resources and the needs, this law has to be fully applied; the rule contained in Article 11, section 2 does not imply that the judge has to examine whether the result of the applicable law is reasonable.

4. International Patrimonial Law – Applicable Law

⁴⁶ Supreme Court 4 June 1915, NJ 1915, p. 865 (Ehlers & Loewenthal/Van Leeuwen).

⁴⁷ Supreme Court 5 April 2002, RvdW 2002, no. 65. The applicable convention was the Nederlands-Oostenrijks Executieverdrag 1963.

⁴⁸ Supreme Court 9 November 2001, RvdW 2001, no. 174.

⁴⁹ Supreme Court 12 May 2000, NJ 2000, no. 452. See on this decision: M.V. Polak and V. Van Den Eeckhout, *Kroniek van het internationaal privaatrecht*, *NJB* 2001, p. 512.

⁵⁰ Supreme Court 5 November 1999, NJ 2000, no. 66 (V. v. L.).

In this paragraph three cases will be discussed. Two of them relate to contractual obligations, the other regards transport law, and more in particular the interpretation of the CMR Convention.

The sometimes not so very clear borderline between contractual obligations and property rights is always a challenge when it concerns questions of private international law. The case to be determined by the Supreme Court concerned the question which law is applicable to the acquirement of ownership of a car that was at the moment of the closure of the contract situated in Belgium, then stolen, and afterwards sold in the Netherlands.⁵¹ The Court determines that the question whether the transfer of the ownership is established by a sales contract or that further legal requirements apply – Dutch and Belgian law differ on this point –, is covered by the law of the country where the good is situated at the moment of the closure of the contract. The question whether the sales contract brings about the transfer of property is, in other words, not governed by the applicable sales law, but determined on the basis of the *lex rei sitae* rule. To determine the moment of closure of the contract, however, the applicable law to the sales contract is relevant.

In a case concerning the right of retention, the Supreme Court determines that in general a right to suspend performance is governed by the Rome Convention on the Applicable Law to Obligations 1980 (see Article 10, section 1 sub c). The right of retention is, however, a special right of suspension that, because of its property aspects, is not covered by the Rome Convention.⁵² Remarkable it that the Supreme Court, despite these property aspects, does not hold the *lex rei sitae* rule applicable. It rules that the question whether the right of retention exists and what its contents are, is governed by the law applicable to the legal relationship from which the right of retention originates (e.g. a sales contract).⁵³

In a transport case that did not qualify as ‘international’, the Supreme Court states that parties can declare the CMR Convention applicable, but this choice can only set aside the compulsory rules of Dutch transport law if the requirements of Article 8:1102, section 1 Civil Code are fulfilled.⁵⁴ Furthermore the Court decides that the statutes of limitation of Article 23 CMR do not apply in case the damage results from an intended act or a fault that is, according to Dutch law, regarded as equal to an intended act.

5. International Procedural Law – Family and Patrimonial Matters

This section focuses on five cases. These concern recognition of a foreign divorce, the interpretation of Article 5, section 3 Brussels Convention (two cases), *lis pendens* under the Lugano Convention, and recognition of a foreign security interest.

Article 2 and 3 Conflict of Laws Divorce Act (*Wet Conflictenrecht Echtscheiding*) provide rules for the recognition of foreign divorces. Article 2 gives a liberal recognition rule for divorces that are pronounced by a judge or other authority; these are recognised when there was a fair trial and the foreign judge had jurisdiction. Article 3 applies to one-sided repudiations. Repudiations are only recognisable if four requirements are fulfilled: it takes place outside the territory of the Kingdom of the Netherlands; it is in conformity with the national law of the husband; it has legal consequences in the country where it was effected; it is clear that the wife expressly or implicitly agrees with the dissolution or reconciles herself to the situation. In a case concerning a *khoel* the question was whether this manifestation of a Moroccan repudiation comes under the scope of Article 2 or of Article 3 Conflict of Laws Divorce Act.⁵⁵ This repudiation takes place on request of both husband and wife – under financial compensation by the husband – and is registered in the presence of witnesses appointed by the minister that in presence of husband and wife, and with permission of the judge, draw up a deed of repudiation. The Supreme Court rules that this *khoel* does not fall under Article 2, in particular because the wife does not have the opportunity to be heard by a judge or other authority. The Supreme Court then applies the requirements of Article 3 in a way that the repudiation can be validated. As national law of the husband, who has both Dutch and Mo-

⁵¹ Supreme Court 3 September 1999, NJ 2001, no. 405 note ThMdB.

⁵² Supreme Court 7 January 2000, NJ 2001, no. 406 note ThMdB.

⁵³ This is in accordance with the report on International Property Law of the Standing Committee, see section II.4 and footnote 28.

⁵⁴ Supreme Court 5 January 2001, NJ 2001, no. 391 (Verbeek v. Cigna) note KFH. Art. 1108, s. 1 Book 8 Civil Code states that every clause that intends to increase or decrease the liability of the carrier as set out in Art. 1095, is null and void, unless it is made explicit in, and covered by, the contract that is intended for this specified transport.

⁵⁵ Supreme Court 13 July 2001, RvdW 2001, no. 135.

roccan nationality, within the meaning of Article 3 Conflict of Laws Divorce Act the Moroccan nationality is taken into account, despite the fact that his effective nationality is the Dutch nationality. This is because the common nationality of the spouses is Moroccan, Moroccan law was applied to the dissolution and it is clear that the wife has agreed to the repudiation. It is, in other words, also in the wife's interest that this repudiation is recognised.

The interpretation of Article 5, section 3 Brussels Convention (Regulation) remains in the centre of interest. In a case between a Dutch and an English company on the one side and a German company on the other side, negotiations were broken off by the Germany company.⁵⁶ To this end, the German company sent a letter to the company seated in the Netherlands. The question now was which place can be regarded as 'the place where the harmful event occurred': Germany – where the decision to break off the negotiations was taken, or the Netherlands – where the 'bad news' letter was sent to and received? The Supreme Court rules that (only) the Netherlands is to be regarded as the place of the tort. An internal decision to break off negotiations, even if this is documented in a letter, cannot be regarded as an act as a result of which damage occurs. The break-off is only effected when the letter is actually received by the other party, which was in the Netherlands.

Another case that focused on the interpretation of Article 5, section 3 Brussels Convention is based on the following facts.⁵⁷ A woman domiciled in the Netherlands states to be sexually abused in Germany by a German resident. She adjudicates the Dutch court on the basis of Article 5, section 3, because the psychological damage occurred in the Netherlands. Under reference to the *Marinari* case of the European Court of Justice⁵⁸, the Supreme Court rules that the place where the harmful event occurred does not include the situation that damage occurs in the Netherlands as a consequence of sexual abuse in Germany. The infringement of the physical and psychological integrity took place in Germany, and the damage in the Netherlands is only to be regarded as consequential damage.

A *lis pendens* case concerned the relation between Article 21 and Article 24 Lugano Convention.⁵⁹ Seven companies, domiciled in Norway, commence proceedings against a Dutch company in Norway on the basis of a forum clause that was included in their contract. One month later the plaintiffs also commences a *kort geding* procedure in the Netherlands to obtain a provisional measure, and more in particular an interim payment, or – should this be dismissed – a security deposit. The Supreme Court refers to the rulings of the Court of Justice concerning Article 24 Brussels Regulation, and in particular the *Van Uden/Deco-Line* case.⁶⁰ It states that the *lis pendens* provision of Article 21 establishes that the Dutch court no longer has jurisdiction as to the substance of the case. This means that jurisdiction for a provisional measure can only be based on Article 24. The Court rules that if the requirements as set out in the *Van Uden* case regarding interim payments are fulfilled, the Dutch *kort geding* judge has jurisdiction. This decision is in my opinion in conformity with the rulings of the Court of Justice.⁶¹

The last decision worth discussing is on the recognition of a foreign security interest, a so-called 'floating charge' conform the law of Tanzania.⁶² The Supreme Court states that for the question whether the holder of the foreign security interest, which was validly vested according to the applicable law, can get the same protection as if it was vested under Dutch law, it is relevant whether the contents and effect of this foreign security right can be equated with a similar Dutch security interest. In order to be recognisable it is not decisive whether there is a similarity between the foreign and the Dutch security interest in general, but whether the foreign security interest has the same purpose and leads to the same result.

IV The European Impact on Dutch Private International Law

As is the case in all countries of the European Union, Dutch private international law has recently been highly influenced by the Brussels legislator. Below attention will be paid to the influence of the recent

⁵⁶ Supreme Court 21 September 2001, RvdW 2001, no. 144.

⁵⁷ Supreme Court 7 December 2001, RvdW 2001, no. 200.

⁵⁸ ECJ 19 September 1995, C-364/93, ECR [1995] p. 2719.

⁵⁹ Supreme Court 21 June 2002, RvdW 2002, no. 107.

⁶⁰ ECJ 16 June 1998, C-53/96, ECR [1998] p. I-3637. See more at length section IV.2.

⁶¹ See on this particular matter in this sense X.E. Kramer, *Het kort geding in internationaal perspectief. Een rechtsvergelijkende studie naar de voorlopige voorziening in het internationaal privaatrecht*, Deventer: Kluwer 2001, p. 145-147.

⁶² Supreme Court 14 December 2001, RvdW 2002, no. 1.

European Regulations, and their relation to Dutch private international law. Furthermore, some case law of the Court of Justice concerning the Dutch *kort geding* procedure that had an important impact on international litigation practice will be reviewed.

1. The European Regulations and Conventions

Since the Brussels Convention entered into force in 1973, it has been subject to a growing amount of Dutch case law, and has received quite some attention by legal doctrine as well. The Supreme Court, as well as the lower courts, has not been reluctant in making applications for preliminary rulings to the European Court of Justice. The provisions on jurisdiction of the Brussels Convention also served as a role model for certain provisions of the new section on jurisdiction of the revised Code of Civil Procedure.⁶³ According to the Explanatory Memorandum, these provisions have to be applied in accordance with the decisions of the European Court of Justice. As has been mentioned above, the Dutch legislator did not take into account the entry into force of the Brussels Regulation on 31 March 2002.⁶⁴ Some necessary changes will be made to adapt it to the amended provisions of the Brussels Regulation.

The coming about of the Brussels II Regulation on Divorce Matters that entered into force on 1 March 2001, led to an amendment of the original draft for the new section on jurisdiction in the Dutch Code of Civil Procedure. As set out in section II.5.1 above, Article 4 Code of Civil extends the application of Article 2, 5 and 6 Brussels II to cases that fall outside the scope of Brussels II. Consequently, for these cases the 'national' rules are the same as those of the Regulation.

The third European Regulation, which entered into force on 31 May 2001, is the Regulation on the Service Abroad of Judicial and Extra-judicial Documents. This did not lead to modification of the relevant provisions of the revised Code of Civil Procedure⁶⁵, except that they now explicitly refer to the application of the European Regulation and the Hague Convention⁶⁶. The national rules are without any substantial change borrowed from the old code.

The fourth Regulation is the European Insolvency Regulation, which entered into force on 31 May 2002. The Netherlands, contrary to Germany, traditionally takes the so-called territorial view.⁶⁷ This means that in principle a bankruptcy declared in another country is not recognised and consequently does not affect property located in the Netherlands, though in practice this rule is slightly weakened.⁶⁸ The Netherlands only fully recognises a foreign insolvency if a convention requires thus. Until recently, the Netherlands was in this regard only bound by a bilateral convention with Belgium.⁶⁹ The European Regulation is in other words a breakthrough for Dutch international insolvency law.⁷⁰ At the end of 2001, the Standing Committee published a report concerning the question whether this Regulation requires measures in the field of Dutch international insolvency law.⁷¹ Several options were presented: to extend the scope of the Regulation to non-EU insolvencies; to introduce a national system of recognition of foreign insolvencies; to adopt the UNCITRAL Model Law on insolvencies; to wait until within the European Union initiatives are taken for further regulation of insolvencies. The conclusion of the Standing Committee is, however, that adaptation of Dutch international insolvency law is not an urgent matter and that further measures are only to be considered if the future experiences with the Regulation require thus. In my view the Dutch approach towards foreign insolvencies is too narrow and a bit outdated. A more 'international' view, against the background of the insolvency Regulation, would not be out of place.

⁶³ See section II. 5.1 and the references made therein.

⁶⁴ *Kamerstukken I* (MvT) 2001/2002, 26 855, no. 16, p. 13.

⁶⁵ Art. 54-56 Code of Civil Procedure (Art. 4, section 7 and 8 of the old Code).

⁶⁶ Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial matters 1965.

⁶⁷ See Supreme Court 2 June 1967, NJ 1968, no. 16 (Abend) note HB, and Supreme Court 31 May 1996, NJ 1998, no. 108 (De Vleeschmeesters) note ThMdB.

⁶⁸ Assets that are moved to the Netherlands after the foreign bankruptcy was declared are recognised as being covered by the bankruptcy, and a foreign curator is allowed to act at law in a Dutch procedure. See the case law in the previous footnote.

⁶⁹ Nederlands-Belgisch Executieverdrag 1925.

⁷⁰ See S.C.J.J. Kortmann and P.M. Veder, *De Europese Insolventieverordening*, *WPNR* 2000, p. 764-774, and the May/June issue of *Tijdschrift voor Insolventierecht* that is dedicated to the coming into force of the Insolvency Regulation.

⁷¹ Staatscommissie voor het Internationaal Privaatrecht, EG-Verordening betreffende Insolventieprocedures (Nr. 1346/2000), 2001. See footnote 6 for the website where the reports of the Standing Commission are published.

2. Case Law of the European Court of Justice; International Litigation by Means of Provisional Measures

Recently the Dutch *kort geding* procedure has been in the centre of interest in the case law of the European Court of Justice. Three preliminary rulings concerned this procedure: the cases *Hermès*, *Van Uden/Deco-Line* and *Mietz*.⁷² Also in foreign literature the *kort geding* procedure, and especially the willingness of the *kort geding* judge to grant far-reaching measures like cross-border injunctions in intellectual property cases, received attention. It can be concluded that under influence of the international developments of recent years, the *kort geding* judge had to take a step back. This especially regards intellectual property cases under the TRIPs-Agreement, and interim payments under Article 31 Brussels Regulation.

Until a few years ago it was uncertain whether the Dutch *kort geding* could be regarded as a provisional measure in international perspective, and whether Dutch legal practice could count on any international recognition at all.⁷³ The three preliminary rulings mentioned above put an end to this. From these it is clear that in general the *kort geding* order is to be regarded as a provisional measure, which means that the rules of the conventions regarding provisional and protective measures are applicable.

As a consequence of this, the Court of Justice decided in the *Hermès* case of 1998 that the obligation to commence the main proceedings, as laid down in Article 50, section 6 TRIPs-Agreement, also applies to the Dutch *kort geding* procedure. This implicates that in cases that are covered by the TRIPs-agreement, the Dutch rule that it is not necessary to commence the main proceedings is inflicted.

The qualification of the Dutch *kort geding* as a provisional measure, further implicates that Article 31 Brussels Regulation can in principle provide jurisdiction, as decided in the *Van Uden/Deco-Line* case. However, for the application of this provision it is important that an *interim payment* can only be regarded as a provisional measure when there is a guarantee of repayment (undertakings) and the debtor has (or will have) assets in the Netherlands. This makes the requirements for obtaining an interim payment a bit more severe under Article 31 than they are under Dutch law.⁷⁴ In the *Mietz* case the Court of Justice ruled that a provisional measure, like the *kort geding* order, can be recognised and enforced according to the provisions of Article 25 ff Brussels Convention (Article 32 ff Regulation), provided that it was granted *inter partes*. Because the defendant is always summoned in the *kort geding* procedure, this means that a *kort geding* decision is in principle susceptible to international recognition and enforcement under the Brussels Regulation.

Meanwhile the Supreme Court put some further questions to the Court of Justice regarding the application of Article 24 Brussels Convention (Article 31 Regulation), and its relation to Article 16, section 2 (Article 22 Regulation).⁷⁵

⁷² ECJ 16 June 1998, C-53/96, ECR [1998] p. I-3637; ECJ November 17, 1998 (C-391/95), ECR [1998], p. I-7091; ECJ April 27, 1999 (C-99/96), ECR [1999], p. I-2277. See on *Hermès*: X.E. Kramer and T.I. Spoor, *Het TRIPs-kort geding. Hoe nu verder?*, *Bijblad bij de Industriële Eigendom* 1998, p. 370-373. See on *Van Uden/Deco-Line*: C.C.W. Lange, *Het Nederlandse 'incassokortgeding' EEXit?*, *Nederlands Juristenblad* 1998, p. 157-162; X.E. Kramer, *Internationale bevoegdheid van de kortgedingrechter*, *Nederlands Tijdschrift voor Burgerlijk Recht* 1999, p. 74-79. See on *Mietz*: X.E. Kramer, *De erkenning en tenuitvoerlegging van kortgedingvonnissen onder het EEX: het Mietz-arrest*, *Nederlands Internationaal Privaatrecht* 2000, p. 26-32. See in general: X.E. Kramer, *Het kort geding in internationaal perspectief. Een rechtsvergelijkende studie naar de voorlopige voorziening in het internationaal privaatrecht*, Deventer: Kluwer 2001.

⁷³ Important features of this procedure are that a measure can be obtained in cases of urgency at the President of the District Court. The procedure is always *inter partes*, and has an informal and oral character. The (reasoned) written judgment is usually delivered within a few weeks, but if necessary in a few days or hours, and it lacks *res iudicata*. Appeal can be lodged at the Court of Appeal and the Supreme Court for *cassation*. To apply for a provisional measure it is not necessary that the main proceedings are already pending or that these are commenced afterwards. In fact, practice in the Netherlands shows that only about 5 percent of the *kort geding* cases is followed by a normal procedure. The popularity in the Netherlands of this provisional procedure can partly be explained in view of the need for a legal decision that can be delivered within a short period of time. Ordinary proceedings in the Netherlands take about a year and a half, as a result of the growing caseload, the complexity of the cases – for example intellectual property cases – and the formalities of the main proceedings.

⁷⁴ According to Supreme Court 29 March 1985, NJ 1986, no. 84 (*M'Barek v. Van der Vloodt*) an interim payment (monetary claim) is allowed in case the president is satisfied that payment is due (this does not mean that the claim is undisputed or indisputable, only that there is a strong presumption that the claimant has a right to payment), a quick measure is required and the risk of repayment is taken into account.

⁷⁵ See Supreme Court 2 March 2001, RvdW 2001, no. 65 (*Van der Plas v. Guis*). Another interesting recent ruling on provisional measures that will be relevant for Dutch practice is ECJ 6 June 2002 (*Italian Leather*, not yet published), which states that a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on

V LITERATURE

1. General Literature

The most important and regularly updated handbook on Dutch Private International Law has since over ten years been *L. Strikwerda, Inleiding tot het Nederlandse Internationaal Privaatrecht* (Deventer: Kluwer 2000). It is expected that in the autumn of 2002 an updated edition will be published. This book offers a clear and concise overview, is used at most universities and serves as an important reference guide for practitioners.⁷⁶ Furthermore, the *Praktijkreeks IPR* is a series that covers different topics of private international law. Regularly updated loose-leaf editions on civil law and civil procedural law are nowadays covering more and more private international law aspects as well.⁷⁷

The most important source to obtain an overview of regulations, case law and literature is the legal journal *Nederlands Internationaal Privaatrecht (NIPR)*, that was founded in 1983 and is published three or four times a year. Since January 2000 this periodical not only focuses on documentation, but also contains specialised articles, annotations to case law and book reviews.

2. Ph.D. Dissertations

Important contributions to Dutch literature on private international law are the usually comprehensive Ph.D. Dissertations that are published immediately after the official public defence. They are usually written in Dutch, and contain a summary either in English, French and/or German. In the period under review in this overview, five dissertations were published.

1) *Insolvency Proceedings and Commercial Arbitration*

V. Lazic, *Insolvency Proceedings and Commercial Arbitration*, The Hague: Kluwer Law International 1998, proefschrift Universiteit Utrecht (381 pages, English with Dutch summary)

This book focuses on the interaction between arbitration and insolvency law. This interaction is examined through the applicable laws and provisions in England, France, Germany, the Netherlands, and the United States. As a component in the identification and scrutiny of the relationship between insolvency proceedings and commercial arbitration, this study assesses the nature and character of both types of proceedings and clarifies the applicable terminology.

2) *Cross-border bankruptcies in European perspective*

T.M. Bos, *Grensoverschrijdend faillissementsrecht in Europees perspectief*, Deventer: Kluwer 2000, proefschrift Vrije Universiteit Amsterdam (422 pages, Dutch with English summary)

This book contains a research on the international insolvency regulations of the Netherlands, Belgium and Germany, against the background of the bringing about of the European Insolvency Regulation.⁷⁸ In order to place this Regulation in its context, references are made to the historical background of international insolvency law and an outline of the national rules – that are primarily developed in case law and literature – is provided.

3) *International mobility of employees*⁷⁹

A.A.H. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag: Sdu Uitgevers 2000, Proefschrift Vrije Universiteit Amsterdam (648 pages, Dutch with English summary)

This research consists of a study on the applicable law on international employment contracts. Special attention is paid to the role of collective contracts as a source of rights and duties for the parties of individual employment contracts. This book provides an insight in the complex interaction between Private

interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought, and in case in that State recognition is sought, it is required to refuse to recognise the foreign judgment.

⁷⁶ The only English book on Dutch Private International Law is: R. van Rooij and M.V. Polak, *Private International Law in the Netherlands*, Deventer: Kluwer 1987, with supplement 1995. This book is, however, not up to date.

⁷⁷ Most important ones: E.H. Hondius (ed.), *Verbintenissenrecht*, Deventer: Kluwer; A.R. Bloembergen (ed.), *Onrechtmatige Daad*, Deventer: Kluwer; A.G. Lubbers (ed.), *Personen- en familierecht*, Deventer: Kluwer; W.D.H. Asser (ed.), *Burgerlijke Rechtsvordering*, Kluwer: Deventer; W.D.H. Asser (ed.), *Vademecum Burgerlijk Procesrecht*, Arnhem: Gouda Quint.

⁷⁸ This Regulation meanwhile entered into force. See also section IV.1.

⁷⁹ My translation, no English translation of the title provided by the author.

International law, Employment Law and European Law on the basis of the Posting Directive of 16 December 1996.

4) *The Dutch kort geding procedure in an international perspective. A comparative view on provisional measures and private international law*

X.E. Kramer, *Het kort geding in internationaal perspectief. Een rechtsvergelijkende studie naar de voorlopige voorziening in het internationaal privaatrecht*, Deventer: Kluwer 2001, Proefschrift Universiteit Leiden (429 pages, Dutch with English summary)

In this book attention is paid to questions that arise in an international dispute in case it is dealt with in a provisional procedure, and in particular the Dutch procedure for provisional judgment – the *kort geding*. On the basis of doctrine and legal practice answers are provided to issues concerning the international jurisdiction, recognition and enforcement, so-called extraterritorial measures, and the application of conflict of law rules and foreign law. Furthermore attention is paid to national as well as private international aspects of provisional measures under French, Belgian, German Swiss and English law.

5) *Foreign states in Dutch courts*

J. Spiegel, *Vreemde staten voor de Nederlandse rechter. Immuniteit van jurisdictie en executie*, Deventer: Tjeenk Willink 2001, Proefschrift Vrije Universiteit Amsterdam (304 pages, Dutch with English summary)

This study deals with the position of foreign states in the Dutch civil procedure in the light of the concept of state immunity. It discusses the Dutch practice in immunity matters and compares it with the international rules. The research of the Dutch rules is based on case law and literature. The international practice is primarily described on the basis of the European Convention on State Immunity, the ILC-Draft on Jurisdictional Immunities of States and their Property and the ILA-draft Articles for a Convention on State Immunity.

VI CONCLUSION

This overview started with the remark that the national codifying activities during the last decade took on stormy features. Maybe the most important observation for the conclusion is that this storm is finally about to die down. The wide range of international family law is almost covered, except for a regulation concerning international aspects of registered partnership. The Standing Committee already made a proposal on this topic. International patrimonial law is almost completely laid down in international regulations and laws as well. Property law seems to be the only substantial part that is not codified yet. Also for property law the Standing Committee already formulated draft rules. International procedural law has recently primarily been boosted by the new regulations of the European Union. A valuable national contribution to the development of procedural law is the introduction of a section on international jurisdiction in the revised Code of Civil Procedure. A consolidated national regulation on recognition and enforcement is, however, still missing.

A complication – not necessarily in a negative meaning – is the ongoing international codification. The Netherlands traditionally ratifies most Hague Conventions. The extended jurisdiction of the European Union in the field of private international law and the ongoing activities of the Brussels legislator, adds a layer to the traditional ‘convention - national law’ scheme, namely those of the regulations. The practitioner, even the more specialised one, and sometimes the academic experts as well, lose themselves in the steadily growing number of relevant sources. The period between publication of a regulation and the date of entry into force is sometimes too short in order for member states to bring about the necessary implementing legislation, and for legal practice to get acquainted with the new rules. On the other side, the Dutch legislator sometimes seems a bit passive when it comes to implementing the rules and adjusting national projects to the Brussels developments. Important to note is that in future also the tendency towards harmonisation of national civil (procedural) law in a European context and the introduction of a European title will have an important impact on the development of private international law.

In the years to come there will probably be three important tasks for Dutch private international law and its practitioners. The first one is to have all the new laws and international regulations sink in, and to clarify them. The role of case law will move from developing new rules to mainly interpreting the codified rules. This will primarily be up to the practising lawyers and the courts. The second task will be to bring about the Consolidated law, including all the conflict of laws regulations, which will hopefully make Dutch private international law more survey-able. Academics and practitioners agree that the piecemeal

codification – though maybe the best solution under the circumstances – created a ‘private international law patchwork’. This will mainly be the territory of the Department of Justice and the Standing Committee. The third challenge will be to integrate private international law into the bigger framework of international law, European law and uniform law. The borderline between these fields will inevitably become less distinct. Private international law specialists can no longer hide behind the once so secured walls between the – for outsiders – curiosity of the conflict of laws and the remainder of the law. This will mainly be a task for academics.