The Europeanisation of international family law: From Dutch to European law
Baarsma, N.A.

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2010

Citation for published version (APA):
Baarsma, N. A. (2010). The Europeanisation of international family law: From Dutch to European law: An analysis on the basis of the choice of law on divorce and on the termination of registered partnerships. [Thesis fully internal (DIV), Rijksuniversiteit Groningen]. s.n.

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the “Taverne” license. More information can be found on the University of Groningen website: https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment.

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Download date: 24-04-2024
al practice might otherwise be burdened with

Conference on Private International Law

KREUZER’s maxim:

and patience will eventually result in a

International family law is an area that is currently predominantly regulated by national law; Europeanisation will therefore in all probability entail considerable changes. This research deals with the question on the methodological consequences of the change from a national to a supranational choice of law approach? The nature and reasons of these changes in one particular field of international family law are discussed: the termination by dissolution of marriages and marriage-like registered partnerships. Divorce is the first field of family law in which the European legislature made attempts to unify the choice of law: in July 2006 the European Commission proposed the introduction of common choice of law rules on divorce. In order to assess the central question, the current Dutch and the proposed European choice of law rules on divorce are examined and compared. Subsequently, a number of directions as regards the methodology of European international family law at large are deduced from the European attempt to unify the choice of law on divorce. This study consequently results in a look into the future with respect to the methodological aspects of the European system of international family law that is being established as a whole.

The first part of this study addresses the Dutch dimension of the research: in chapters 2 and 3 the Dutch choice of law rules on divorce and on the termination of registered partnerships are examined.

Chapter 2 delves into the Dutch choice of law rules on divorce. The law applicable to divorce is currently determined by Article 1 of the Choice of Law Act on Divorce (Wet conflictenrecht echtscheiding). This Act is based on the favor divorci principle, implying that the choice of law rule often refers to the application of a legal system which does not preclude the wish of the parties to obtain a divorce.

The main rule of Article 1 CLAD is that the spouses can choose the law applicable to their divorce. This choice, however, is limited to the law of the common nationality of the spouses (Article 1(2) CLAD) and Dutch law (the lex fori, Article 1(4) CLAD). Although the possibility to choose the applicable law is to be endorsed,
makes a further distinction between the limitation to the mentioned two legal systems can be questioned. In the light of the favor divorci principle arguably more legal systems should be eligible for application.

Should the parties have made no professio iuris, the law applicable to their divorce is determined on the basis of the cascade rule of Article 1(1) to (3) CLAD. The regulation of Article 1(1) to (3) CLAD entails the designation of the common national law of the spouses as the applicable law if they have a common nationality. In determining whether the spouses possess a common nationality, their nationality is subject to an authenticity test and to an effectivity test. If the spouses do not have a common nationality, the law of the country in which they have their common habitual residence is applied. If the spouses do not have a common nationality and have no shared habitual residence, Dutch law (the lex fori) is applied.

Chapter 2 does not only discuss the current state of play, but also the proposed amendment of the choice of law on divorce. In September 2009 the Dutch legislature published the proposal on the consolidation of Dutch private international law, to be included as Book 10 of the Dutch Civil Code. Article 36 of this Proposal provides for the application of Dutch law in all cases, save for those in which the parties have made a professio iuris. The professio iuris is limited to the common national law of the parties. The proposed amendment seems to imply a fairly radical change of the current choice of law approach on divorce: from a multilateral and neutral to a unilateral choice of law approach. However, Article 1 CLAD is not such a neutral choice of law rule as it appears to be: it often leads to the designation of Dutch law as the applicable law. Article 56 of the Dutch Proposal on Private International Law no longer gives the impression of a neutral choice of law rule and the application of Dutch law takes indeed first place. Nevertheless the argument that, because in practice Dutch law is applied in the majority of international divorce cases, the choice of law rule should be turned into a unilateral choice of law rule is not very convincing for the radical change of choice of law approach. The categorical application of the lex fori contradicts the thought of neutrality which underlies the field of private international law and by virtue of which all legal systems are equally eligible for application.

Chapter 2 deals with the Dutch choice of law rules on the termination of registered partnerships. Despite some activity in this field, to date there is no international treaty providing for a regulation of the private international law aspects of registered partnerships. It is not very probable that an international treaty will be drawn up in the near future. The number of states that recognise the possibility of cohabitation outside marriage or of a registered partnership is too small. Although the number of countries introducing the institution of registered partnership increases, the large diversity of national regulations in this field will make it very hard to reach consensus on the international level.

The Dutch Choice of Law Act on Registered Partnerships (Wet conflictenrecht geregistreerd partnerschap) provides for the choice of law on registered partnerships. Since Dutch law places registered partnerships as much as possible on an equal footing with marriage, the choice of law rules regarding the termination of registered partnerships sought connection to the choice of law rules on divorce. The choice of law on the termination of registered partnerships is based on the principle of favor dissolutionis, which implies that they aim to favour the possibility to terminate a registered partnership in an international case.

The choice of law on the termination of registered partnerships has been divided in two categories: the registered partnerships entered into in the Netherlands (Article 22) and those entered into outside the Netherlands (Article 23). Article 23 CLARP
The principal rule regarding the applicable law to the termination of a registered partnership is that Dutch law will apply in all cases unless the partners have chosen the application of the lex loci celebrationis.

The general transitional provision of the Choice of Law Act on Registered Partnerships works out rather unfortunate with respect to the termination of registered partnerships. According to Article 29 of the CLARP do the rules provided for by the CLARP not apply to registered partnerships concluded prior to the date of its entry into force. This means that the termination of registered partnerships is only governed by the CLARP if the partnership has been entered into on or after 1 January 2005. Unfortunately the Dutch legislature has not amended this transitional provision in the Dutch Proposal on Private International Law.

In chapter 4 the European Union’s competence to enact measures in the field of international family law is discussed. International family law is brought more and more under the influence of the European Union. The biggest catalyst was the entry into force of the Treaty of Amsterdam in 1999, which granted the EU the competence to enact measures in the field of private international law (ex Article 61(c) in conjunction with Article 65 EC-Treaty) in order to progressively establish an area of freedom, security and justice. The recent Treaty on the Functioning of the European Union has taken the integration a step further by formally expanding the legal basis of the EU’s competence to establish private international law measures.

Common rules for matters of international family law would serve a number of objectives. In the first place, such unified rules will serve a number of general goals: they will ensure more legal certainty, prevent forum shopping, provide for more decisional harmony, grant better protection to the legitimate expectations of the parties, prevent the development of limping relationships and contribute to the achievement of justice. These objectives would, however, be fulfilled by any unification and not specifically at the European level. There are, therefore, also proper ‘European’ policy objectives that play a role, such as the promotion of integration, enhance judicial cooperation, give substance to the concept of European citizenship and ensure the sound functioning of the internal market.

The question arises whether the EU is competent to enact a European regulation unifying the choice of law on divorce. The assessment of this question shows that the requirements of both ex-Article 65 EC-Treaty and Article 81 TFEU are fulfilled.

In July 2006 the Commission has proposed the introduction of common choice of law rules on divorce in the Brussels IIter-Regulation, which contains common rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the Brussels IIter-Proposal). The introduction of common choice of law rules on divorce is regarded as a means to removing alleged shortcomings resulting from the lack of such rules. Chapter 5 contains an analysis of these proposed choice of law rules. This analysis has shown that there are still some difficulties to be clarified. Moreover, quite a number of issues are left to national law, which is not very conducive to clarity and legal certainty.
Chapter 7 contains a comparison of the choice of law systems on divorce of the
question whether from the attempt to unify the choice of law on divorce on the
The large differences in substantive law on divorce of the Member States seem to
254
Netherlands ami of the European Union. Even though the adoption of the Brussels
alternative to the establishment of a common choice of law does not currently seem to
discussed, neither of which would lead to a proper or feasible solution. Therefore, an
concerning the EU competence in the field at hand: mainly the fulfilment of the
European level some more general directions can be deduced as regards the European
require the adoption of neutral choice of law rules. However, not all Member States
divorce in its substantive legislation - posed problems. Moreover, doubts existed
internal market requirement on the one hand and the fulfillment of the principles of
subsidiarity and proportionality on the other posed problems. However, during the
negotiations in the Council both these problems seem to have been solved. The last
problem observed is the methodological approach of the common choice of law rules.
The large differences in substantive law on divorce of the Member States seem to
require the adoption of neutral choice of law rules. However, not all Member States
agree with such an approach, as they wish to continue to apply the lex fori.

The fundamental discord between the Member States concerning the Brussels
Ilter-Proposal has led to the search for alternatives. Several alternatives have been
discussed, neither of which would lead to a proper or feasible solution. Therefore, an
alternative to the establishment of a common choice of law does not currently seem to
be present. Apparently, the European Union as a whole is not yet ready for a common
choice of law on divorce. Consequently, the procedure on enhanced cooperation is the
'last resort' for establishing some form of cooperation between the Member States in
the field of the choice of law on divorce. However, establishing enhanced cooperation
in the field of divorce does create a possibly impeding precedent for all future EU
projects on international family law, such as matrimonial property and succession.

Chapter 7 contains a comparison of the choice of law systems on divorce of the
Netherlands and of the European Union. Even though the adoption of the Brussels
Ilter-Proposal has been cancelled, the comparison between the Dutch and the European
system of the choice of law on divorce remains of importance to answer the
question whether from the attempt to unify the choice of law on divorce on the
European level some more general directions can be deduced as regards the European
methodology of international family law at large.

Although on the face the current Dutch and the proposed European choice of law
on divorce may seem to differ, both systems have many characteristics in common.
The underlying structure of both these systems is similar: party autonomy is regarded
as the prevailing principle. Only in the absence of a professio iuris on divorce, the
applicable law to divorce is determined by the choice of law rules, which are based on
the principle of the closest connection in both systems. The main differences are to be
found in the further details of the regulations.

However, there are considerable differences between the Brussels Ilter-Proposal
and the proposed amendment of the Dutch choice of law on divorce. Firstly, the
intended amendment of the Dutch choice of law will no longer regard the principle of
party autonomy as the prevailing rule. Moreover, the proposed amendment of the Dutch
choice of law is based on the principle of the closest connection. The Private International Law is based on the

Chapter 6 showed that the Netherlands fear of a less favourable choice of law on
for. The analysis in this chapter made clear that the establishment of common choice of law rules on divorce
is not really justified in comparison with the Brussels Iltet Proposal. However, compared to Article 56 of the Brussels
which adheres to the lex fori-approach, this approach is not justified. Although the application of the
cascade rule of Article 20b of the Brussels

In chapter 8 the future of the Europeanisation
The European Commission currently considers the adoption of a sui generis system of international family law. According to the EU
Commission, the proposal on international family law including divorce, maintenance and succession has been completed by the year 2011. Moreover, a number of future EU projects on international family law, such as matrimonial property and succession.

A proper EU system of international family law, which has repercussions on the European doctrines of direct effect and
law rules, but also that more specific provisions are required. Moreover, the EU legislature has
due to the high number of objective problems involved in the choice of law methodology.

The underlying structure of both these systems is similar: party autonomy is regarded
as the prevailing principle. Only in the absence of a professio iuris on divorce, the
applicable law to divorce is determined by the choice of law rules, which are based on
the principle of the closest connection in both systems. The main differences are to be
found in the further details of the regulations.

However, there are considerable differences between the Brussels Ilter-Proposal
and the proposed amendment of the Dutch choice of law on divorce. Firstly, the
intended amendment of the Dutch choice of law will no longer regard the principle of

The objectives: providing for a clear legal certainty and predictability, and preventing a rush to court. Overall succeeds quite well in attaining these. The Proposal seem too ambitious to the system which has been taken as a point of departure: the current Dutch choice of law rule of Article 1 CLAD or its proposed amendment. The observed fear is not really justified in comparison with the current Dutch choice of law on divorce. However, compared to Article 56 of the Dutch Proposal on Private International Law which adheres to the lex fori-approach, the fear of the Netherlands seems to be more justified. Although the application of the Brussels IIter-Proposal may in the vast majority of cases lead to the application of forum law, it may very well lead to the application of foreign law considering both the professio iuris of Article 20a and the cascade rule of Article 20b of the Brussels IIter-Proposal.

In chapter 8 the future of the Europeanisation of international family law is discussed. The European Commission currently develops a common European system of international family law. According to the Hague Programme, instruments in the field of family law including divorce, maintenance, and matrimonial property should be completed by the year 2011. Moreover, also issues such as personal status, names and adoption have been mentioned as future areas of Union action in the field of private international law. From the failure to reach a compromise on the Brussels IIter-Proposal a number of lessons are drawn for future projects: the Member States should address the choice of law methodology and more transparency and coherence is required.

A proper EU system of international family law will constitute a full part of European law, which has repercussions on its content. This does not only mean that the European doctrines of direct effect and primacy apply to EU private international law rules, but also that more specific political goals, such as the promotion of integration and the establishment of the area of freedom, security and justice, are pursued. Moreover, the EU legislature has to respect the legal diversity of the Member States.

Due to the high number of objectives attached to the unified choice of law, the underlying choice of law methodology is characterised by a pluralism of methods, within which the principle of the closest connection is the point of departure. This latter principle joins the objectives of legal certainty, predictability and mutual trust. Furthermore, the principle of the closest connection ensures that the legal systems involved are evenly and equally eligible for application.

More coherence is not only attained by the development of an EU choice of law methodology, but also by a uniform approach as regards the general doctrines of private international law, such as the public policy exception and characterisation.