The Dutch Private International Law Codification: Principles, Objectives and Opportunities

K. Boele-Woelki & D. van Iterson

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1. Preliminary Observation

This contribution has been drafted on the eve of the completion of the codification of the rules of Private International Law in the Netherlands. Within a short period of time – possibly in 2011 or 2012 – the core of Dutch Private International Law will be codified as part of the Dutch Civil Code. The present contribution to the 2010 Congress of Comparative Law focuses on the efforts which have been undertaken in the last thirty years in order to complete the national codification of Dutch Private International Law. According to Dutch law the term Private International Law is the generic term which covers the rules on jurisdiction, on the applicable law and on recognition and enforcement. The main focus of this exposé is on the rules on applicable law which are generally designated as conflict of laws or choice of law rules. The contribution aims to analyze and explain the coming into existence of Book 10 of the Dutch Civil Code containing the national codification of mainly conflict of laws rules, its underlying principles and objectives as well as its opportunities.

The national report for the Netherlands, which was prepared in 1998 for the Fifteenth International Congress of Comparative Law, contains a survey of the history of Private International Law in the Netherlands in the 19th and 20th centuries as well as an analysis of a number of its characteristics. The authors of the present contribution would like to stress that since the 1998 report no significant changes have occurred in the basic concepts and techniques used in this area of law in the Netherlands.

2. Historical Overview

2.1. Towards a National Codification of Private International Law

The decision to go ahead with a national codification of private international law was taken at the end of the 1970s. For twenty-five years, Belgium, Luxembourg and the Netherlands had been trying to reach an agreement on a Uniform Benelux code of private international law (conflict of laws). The name of the late Professor E.M. Meijers, the designer of the new Dutch

1 See on the terms private international law and conflict of laws: Boele-Woelki 2010, Vol. 6, Nos. 13 and 18.
Civil Code, remains indissolubly associated with this project which was regarded by the other two countries as a Dutch initiative. A first text had been drawn up in 1951. A final version had been drafted in the form of a convention in 1969. The failure of these attempts was announced in a formal letter addressed to the Dutch Parliament in 1976.

A second step which paved the way towards fresh efforts was the denouncement of five ‘old’ Hague Conventions of 1902 and 1905 concerning marriage, divorce, marital property regimes, custody and guardianship. These conventions were based on nationality as a connecting factor. The main problem lay in the fact that they gave priority to the husband’s national law in the event that the spouses’ nationalities differed.

A further element that motivated the government’s decision to proceed was that national codifications were being developed in several other European countries during that period. The main examples which inspired the initiators of the national project were the codifications of Austria, Switzerland and the Federal Republic of Germany. At later stages, inspiration was also drawn from the Italian and Belgian codifications. It was generally felt that there was surely enough scope for a project in the Netherlands, in particular for subjects which lent themselves less for international codification, such as personal status. Ever since the Second World War, no complete doctrinal work had seen the light of day in the Netherlands. This was generally seen as lacking by practitioners. It is indeed true that since 1963 the Dutch Supreme Court had always provided outstanding guidance in this field, but it is also true that the courts cannot adopt the role of the legislature.

2.2. The Step-by-step Method

A first comprehensive provisional draft, prepared by the services of the Ministry of Justice, was submitted for advice to the Dutch Standing Government Committee on Private International Law in the early eighties. That draft, which was never given an official status, was subsequently used by this advisory body as a working paper. It was agreed between the Standing Committee and the Government that Bills on the various subjects would be prepared separately, one after the other. At the end of the exercise the separate Acts would be merged into one single Act and there would be further consultation on the need, if any, to insert an introductory chapter containing general provisions. This working method was retained until the completion of the project.

One reason for using the step-by-step method was that it was preferred first to gain experience with the practical operation of legislation in selected areas and to see if legislation was at all helpful. The need for a national codification had indeed been questioned by some authors. Another important reason for adopting that method was that it leaves room for the incorporation of new international instruments. As set out in the previous report, the Dutch

3 Strikwerda 2008 is frequently referred to, but it specifically addresses itself to students and those who wish to obtain preliminary guidance on particular subjects of Private International Law.

4 The Standing Government Committee was established in 1897 by Royal Decree. Its statutory task is to assist the Dutch Government in all matters of Private International Law legislation. Moreover, until 1 April 2007 it was formally the governing body of the Hague Conference on Private International Law. Following the amendment of the Hague Conference’s Statute, it retained its role as an advisory body to the Council of the Hague Conference (Art. 4 of the Statute of the Hague Conference, as amended). The Committee’s reports are accessible at <http://www.justitie.nl/onderwerpen/wetgeving/over_wetgeving/privacyrecht/commissies(privarecht/staatscommissie-irp.aspx>.

5 See De Boer 1990 (Professor of Private International Law at Amsterdam University) who firmly objected to the efforts to codify Private International Law, whereas Polak 1990 (Professor of Private International Law at Leyden University) clearly favoured the government’s approach.
Government’s policy has always been to accept multilateral instruments – in particular, but not only, conventions of the Hague Conference on Private International Law – to the largest possible extent. The Netherlands’ openness towards international codification is understandable in view of the traditional international mobility of Dutch people and businesses. Moreover, the Netherlands, as the Hague Conference’s host country, has always been strongly committed to the work of that organisation. Conventions are usually incorporated in Dutch legislation by direct reference to the Convention rules, where necessary with the addition of specific provisions on aspects which are not covered and which the national legislature is free to regulate itself. In some specific cases, however, for practical reasons it was decided to reproduce provisions from conventions in the relevant Dutch Acts.

2.3. Discussions about the Codification Project

In 1993, as the codification project went on, an ‘Outline of a Code on Private International Law’ was published by the Ministry of Justice. This outline was commented by many legal authors. Among other things it triggered a discussion on the scope of the project. Was the codification to be comprehensive in the sense that it should include a complete set of rules on jurisdiction and recognition (the Swiss model), or was it to focus on the conflict of laws and become part of the Civil Code (the German model)? Early in the 1990s preparations had started for a revision of the Dutch Code of Civil Procedure. The draft for that Code included an initial chapter containing general rules on jurisdiction. This new Code entered into force in 2001. After this stage had been reached, it was preferred not to remove the chapter on jurisdiction from the Code of Civil Procedure but rather to insert a Book on the conflict of laws in the Civil Code. This solution was expected to make the subject-matter more accessible while retaining the links with Dutch internal law. It should be pointed out that in the scheme chosen, the borderline between rules of jurisdiction and recognition and enforcement, on the one hand, and conflict of laws rules, on the other, is not as strict as one might think. This can be partly explained by the references to conventions dealing with both aspects. Some of the existing Acts on conflict of laws issues also contain some provisions on the recognition of legal acts and legal facts.

2.4. The Preparation of General Provisions

Consultations with the Standing Committee on a set of general provisions started in 1997 and took until 2002. A printed edition of the Standing Committee’s report was published in 2004. It contains a summary in English and a translation of the proposed provisions.6 The actual consolidation, which started after 2004, consisted of carefully reviewing the existing provisions in the light of the general provisions proposed and, where appropriate, reassessing the need for certain general provisions. It also included the removal of inconsistencies in terminology and drafting and the testing of legislation in the light of case law and legal practice. These investigations led to the finding that no fundamental changes to the existing Acts are necessary. On the whole the consolidation turned out to be a highly technical operation. The outcome, in the form of a complete draft and explanatory memorandum, was submitted to the Standing Government Committee for advice before being finally prepared for submission to Parliament.

6 The Dutch version of the report can be consulted at the Ministry of Justice’s website, <www.justitie.nl> legislation – privaatrecht – commissies.
2.5. **Book 10 of the Dutch Civil Code**

The Bill providing for the establishment of Book 10 of the Dutch Civil Code and consolidating existing legislation, completed with a title containing general provisions, received the approval of the Council of State and was submitted to Parliament on 18 September 2009. It does not cover all issues of Private International Law which are considered worthwhile. Further pieces of legislation can be inserted. For example, a subtitle has already been reserved for the forthcoming ratification by the Netherlands of the 2001 Hague Convention on the international protection of adults. Existing titles may also be amended in order to take new international instruments into account. Thus, the subtitle on maintenance obligations will be changed in the foreseeable future so as to refer to the new 2007 Hague Convention and Protocol and the new Regulation on this subject, as well as legislation implementing those instruments.

The main body of the Bill submitted to Parliament contains 165 articles. The order of the subjects is the same as the order of corresponding parts of the Dutch Civil Code dealing with substantive law. The 15 titles are the following:

1. General provisions
2. The name of natural persons
3. Marriage, with subtitles on the celebration and recognition of marriages; legal relationships between the spouses; the matrimonial property regime; the dissolution of marriage and separation
4. Registered partnership (with subtitles corresponding to the subtitles of the Title on marriage)
5. Filiation
6. Adoption
7. Other issues of family law, including subtitles on parental responsibility and child protection; international child abduction; maintenance obligations
8. Corporations
9. Agency
10. Property law
11. Trust law
12. Succession to estates
13. Contractual obligations
14. Non-contractual obligations
15. Some provisions on the conflict of laws relating to maritime, inland water and air transport

3. **Current Legal Sources**

The current legal sources of Dutch Private International Law consist of three different types of instrument: Conventions, European Regulations and Statutes. Book 10 of the Dutch Civil Code will contain both statutory provisions of Private International Law and references to Conventions and European Regulations.

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7 *Vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek)*, Second Chamber, 32 137. An English translation of the 17 general provisions included in Title 1 of the Bill is appended to the present report.

3.1. **Conventions**

Although the precedence of international treaties over national legislation follows from Article 94 of the Dutch Constitution, for the sake of clarity it was considered appropriate to add a general provision in the Bill stating that the rules contained in the national legislation do not waive any international instruments in force. The following multilateral conventions, most of which contain conflict of laws rules, are expressly referred to in the Bill. They are listed in chronological order.

- The 1948 Geneva Convention on the international recognition of rights in aircraft;
- The 1956 Hague Convention on the law applicable to maintenance obligations towards children;
- The 1961 Hague Convention on the conflicts of laws relating to the form of testamentary dispositions;
- The 1961 Hague Convention on the jurisdiction of authorities and applicable law in matters of protection of minors;
- The 1962 ICCS Convention on establishment of maternal descent of natural children;
- The 1967 ICCS Convention on the recognition of decisions relating to the matrimonial bond;
- The 1970 Hague Convention on the recognition of divorces and legal separations;
- The 1970 ICCS Convention on legitimation by marriage;
- The 1971 Hague Convention on the law applicable to traffic accidents;
- The 1973 Hague Convention on the law applicable to products liability;
- The 1973 Hague Convention on the law applicable to maintenance obligations;
- The 1978 Hague Convention on celebration and recognition of the validity of marriages;
- The 1978 Hague Convention on the law applicable to matrimonial property regimes;
- The 1978 Hague Convention on the law applicable to agency;
- The 1980 ICCS Convention on the law applicable to surnames and forenames;
- The 1980 European Convention on recognition and enforcement of decisions concerning custody of children and restoration of custody of children;
- The 1980 Hague Convention on the civil aspects of international child abduction;
- The 1985 Hague Convention on the law applicable to trusts and on their recognition;
- The 1989 Hague Convention on the law applicable to the estates of deceased persons;
- The 1993 Hague Convention on protection of children and co-operation in respect of intercountry adoption.

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3.2. **European Regulations**

The legislative technique which consists of directly referring to international texts is also used for Community legislation. This process began with references to the Brussels I and Brussels II Regulations in the Code of Civil Procedure. It continued with the insertion of references to the Rome I and Rome II Regulations in the Bill which is under consideration. The above-mentioned general provision also reminds the reader of the precedence of Community instruments over national law, a precedence which follows from general Community law. The following Regulations containing rules on the applicable law are or will soon become binding law in the Netherlands:

- Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (‘Rome I’);

3.3. **Statutes**

The following pieces of national legislation came into force during the 30-year period between 1980 and 2010:

- 1981: Act on the conflict of laws relating to divorce, also implementing the Hague and ICCS Conventions on the recognition of divorces listed above.
- 1990: Act on the conflicts of law on marriage, also implementing the 1978 Hague Marriage Convention.

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11 The Regulation is due to apply from 18 June 2011.

- 1990: Act on the conflict of laws relating to names, also implementing the 1980 ICCS Convention on names. This Act was supplemented in 1999 with provisions on the recognition of names recorded abroad.
- 1992: Act on the conflict of laws relating to matrimonial property regimes, also implementing the 1978 Hague Convention on the law applicable to matrimonial property regimes. This Act was supplemented in 1999 with a provision on the equalization of pension rights, which in the Netherlands is regarded as an issue falling under matrimonial property regimes.
- 1993: Act regulating the conflict of laws on the spouses’ legal relationships not covered by the rules on matrimonial property regimes.
- 1993: Act regulating conflicts of laws issues of maritime and inland water transport.
- 1997: Act regulating the conflict of laws on corporations.
- 2001: Act regulating the conflict of laws on tort.
- 2003: Act regulating the conflict of laws on filiation.
- 2004: Act regulating the conflict of laws on adoption.
- 2004: Act regulating the conflict of laws on registered partnerships. The Act implementing the Marriage Convention was amended in such a manner as to take into account registered partnerships and same-sex marriages.
- 2006: Act implementing the 1996 Hague Child Protection Convention and the Brussels IIbis Regulation. This Act anticipates the entry into force of the Hague Convention for the Netherlands and other EU Member States, which will hopefully take place in the course of 2010.
- 2008: Act regulating the conflict of laws relating to property rights. As the latter subject is regarded as a cornerstone of the codification, the consolidation was not finalized until early 2009.

4. Legal Certainty and Flexibility

On the whole, the statutory provisions in specific areas are detailed. They contain hard-and-fast rules for a large spectrum of cases. The proposed general provisions include various escape clauses and therefore leave a certain degree of discretion to the courts when applying the conflict of laws rules.\textsuperscript{13} This is in line with developments in case law. The 1998 national report states that since 1963, in nearly every case which was finally decided by the Supreme Court, it was held that a conflict of laws rule which was considered appropriate in the case at hand was to be applied only \textit{in principle}.\textsuperscript{14} In certain circumstances, which were frequently not further specified, another connecting factor could have been applied. This trend in Dutch case law is clearly reflected in both the overall structure and individual provisions of the Bill

\textsuperscript{13} See Struycken 2004, in particular Chapters VI (The ‘classical’ approach); IX (Conclusions as to the classical approach); X (Abandoning the classical approach); XIII (Public policy in its Private International Law function); and XIV (‘Lois de police’).

under consideration. The answer to the question whether the Dutch conflict of laws system contains any devices granting courts discretion in deciding individual cases is therefore yes.

In exceptional circumstances Sections 6 to 9 of the Bill permit an adjustment of the outcome of the application of rules on particular subjects. These escape rules will be discussed below under 4.1. Another feature of the codification, to be discussed under 4.2, is the use of so-called soft or composite connecting factors. In several instances the last step of a multi-stage rule designates the law which has the closest connection with the case. There is only one example in the Dutch conflict of laws system of a so-called ‘malleable approach’ which is described under 4.3.

4.1. Escape Clauses

4.1.1. Public Policy

Like many other codifications, the Dutch draft codification contains a general public policy clause (Section 6) which is worded in a way which is similar to provisions of this kind in international instruments. The Explanatory Memorandum draws the courts’ attention to the words ‘manifestly incompatible’. A waiver of the application of foreign law may only be based on public policy considerations in exceptional cases. It is explained that a distinction should be made according to whether the content of foreign law is concerned (the ‘outer limit’ of public policy) or the consequences of its application in the actual case (the ‘inner limit’ of public policy).

Examples of the ‘outer limit’ criterion are a foreign law which provides for a person’s ‘civil death’, i.e. his loss of all rights and capacities, or a foreign law which contains an impediment to marriage based on race. An example of the ‘inner limit’ criterion is the case where under the foreign law designated by the conflict of laws rules, a bigamous marriage concluded between two Dutch nationals is valid.15

Section 6 also covers the case of incompatibility with supranational public policy. Public policy has a European and an international dimension which the courts may not neglect. However, the clause does not cover foreign public policy as such. But obviously the court may take into account the incompatibility of a provision of the applicable law with the public policy of a state with which the case bears a close connection.

When a court determines that a foreign law rule is incompatible with public policy the question arises what other law should be applied to the case at hand. The Explanatory Memorandum stresses the exceptional nature of the application of the public policy provision. The designated foreign law is only left aside to the extent that it is incompatible with public policy. However, no general rule is given in the event that the public policy exception does apply. The decision is left to the courts. One possibility is to resort to the application of the lex fori.

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15 Boele-Woelki, Curry-Sumner & Schrama 2009. An important conclusion of this report which was drawn up at the request of the Dutch Ministry of Justice is that, measured by standards of comparative law, the Dutch legal system with regard to polygamous marriages generally functions well. Dutch law generally resembles the law of other jurisdictions examined (Denmark, England and Wales, France and Germany). No points of contention or other problems have emerged from legal practice. Furthermore, it was established that the number of registered polygamous marriages is insignificant.
4.1.2. Overriding Mandatory Rules of Dutch Law

Section 7 deals with mandatory rules or rather (in the terminology adopted in the Rome I Regulation) overriding mandatory rules. The notion and the way in which such rules were applied in Dutch case law were discussed at length in the 1998 national report. The wording of Section 7, the first subsection of which contains a definition of the term ‘overriding mandatory rules’, is very similar to that of Article 9 of the Rome I Regulation, but extends its application beyond the area of contract law. The second subsection makes it clear that an overriding mandatory rule of the lex fori takes precedence over the law designated by the conflict of laws rule only to the extent that such an overriding mandatory rule applies. Otherwise, the law designated by the conflict of laws rule continues to apply.

Some statutory overriding mandatory provisions of Dutch law contain a scope rule, i.e. unilateral rules delineating the scope of application of the relevant provisions of Dutch substantive law. Book 10 does not contain all the conflict of laws rules in force in the Netherlands. In particular, it was preferred not to move provisions on Private International Law which are part of existing statutes implementing several European directives on consumer law. These statutes were incorporated in Book 6 of the Civil Code. For example, Section 247 of Book 6 provides a scope rule for the provisions of Dutch substantive law implementing the European directive on unfair terms in consumer contracts. Other examples of scope rules which are not part of Book 10 are Section 4 of the Minimum Wages and Minimum Holiday Allowances Act and Section 46 of the Consumer Credit Act. Where there is such a statutory scope rule, there is no need to verify if the rule of substantive law to which it applies is an overriding mandatory provision. In the field of labour contracts, if the employer wishes to dismiss an employee, Section 6 of the Extraordinary Labour Relations Decree (Buitengewoon Besluit Arbeidsverhoudingen) requires him to request permission from the Employee Insurance Schemes Implementing Institute (Uitvoeringsinstituut werknemers-verzekeringen). This provision includes no statutory scope rule but is consistently regarded as an overriding mandatory provision in Dutch case law. In the absence of a statutory scope rule, it is up the court to assess whether a mandatory Dutch provision indeed has the nature of an overriding mandatory rule. No hard-and-fast criteria are given. The overriding mandatory nature of a rule should not be too readily assumed.

4.1.3. Overriding Mandatory Rules of Foreign Law

In line with several other national codifications in Europe and with the Rome I Regulation, Section 7 contains, in its third subsection, a provision which allows a court to take into account foreign overriding mandatory rules. The provision covers not only third countries’ overriding mandatory rules, but also overriding mandatory rules of the lex causae. In fact, under Dutch Private International Law, the lex causae designated by a conflict of laws rule or by the parties’ choice does not automatically include rules which could be overriding mandatory rules, as these rules (also) aim to protect the public interest. The court will therefore have to assess in each particular case whether these rules should be taken into account. The Dutch courts are not formally bound by a foreign scope rule. In accordance with the criteria in the third subsection they will have to determine the extent to which effect has to be given to a foreign overriding mandatory rule.

16 The 1998 national report, p. 207-209.
17 See Art. 9, para. 2, Rome I.
4.1.4. General Escape Clause – the Social Reality Test and the Accessory Connection

Section 8 contains a general escape rule. It offers a device for adjusting the result of the application of conflict of laws rules if, in a given case, the close connection which is presumed in a conflict of laws rule actually only exists to a very limited extent, whereas there is a much closer connection with another law. In such a case the much more closely connected law may be applied instead of the law designated by the conflict of laws rule. A similar rule is contained in Section 15 of the Swiss Private International Law Act and Section 19 of the Belgian Code of Private International Law. The Explanatory Memorandum sets out that this provision may also be applied only in exceptional cases.

Those who have proposed the Bill reject the idea of a ‘broad’ escape clause in the sense of a public policy clause which would be applicable if the outcome of applying the law designated by the conflict of laws rule is manifestly unfair or unreasonable. The application of such broad clauses might lead to a ‘better law approach’ and might thus reduce legal certainty.

The wording of the provision is neutral in the sense that whatever law is designated by a conflict of laws rule – even if it is the lex fori – that law may be replaced by another law with which there is a far closer connection.

The clause should be applied ex officio (see the general provision in Section 2). Of course, if the court contemplates doing so, it should offer the parties the opportunity to express their opinion on its application. The provision only applies to statutory conflict of laws rules and it cannot be used to waive the application of a rule contained in a Convention or a European Regulation.

The second subsection of Section 8 provides that the escape clause does not apply if the parties have made a valid choice of the applicable law, even if the case is much more closely connected with another law.

The Explanatory Memorandum establishes that the closest connection should only be determined on the basis of objective factors and that these factors should be weighed using only arguments borrowed from private international law concerning the uniformity and effectiveness of solutions. Arguments borrowed from substantive law, such as the content of the designated law or the result aimed at, should be disregarded. The application of conflict of laws rules based on the ‘favour principle’ or the ‘protection principle’ cannot be waived by using this clause. The escape clause may not be used in order to resort to the lex fori when the application of the foreign law designated by a conflict of laws rule gives rise to problems.

In the Explanatory Memorandum it is observed that the so-called social reality test (i.e. the check as to whether a party’s actual social ties with the country of his nationality are strong enough to justify the application of a rule which designates the law of (common) nationality is to be considered as a species of this general escape rule. The same is said in the Memorandum with respect to the so-called accessory connection. See for an example of such a connection Article 4, paragraph 3, of the Rome II Regulation.

4.1.5. Recognition of Acquired Rights

Section 9 offers a device for adjustment in a category of cases in which the application of a Dutch conflict of laws rule would lead to an unacceptable result. It embodies the so-called doctrine of the accomplished fact, which is also known as the doctrine of recognition (or

20 Reference was made to the debate on this topic in the 1998 national report, p. 210-211.
protection) of acquired rights. It addresses the question whether legal consequences may be attached to a legal fact in accordance with the law designated by a foreign conflict of laws rule, even though such consequences are not attached to that fact by the law designated by the Dutch conflict of laws rule. The question is therefore whether the Dutch conflict of laws rule may be set aside by the foreign conflict of laws rule. The clause answers this question in the affirmative, though only in exceptional cases, i.e. ‘to the extent that failure to attach such consequences would constitute an unacceptable violation of the parties’ justified expectations or of legal certainty’. The clause cannot be applied where the case is governed by a convention or a European Regulation. The doctrine of the accomplished fact was inspired by the Supreme Court’s case law in the field of matrimonial property law. The idea underlying this doctrine is that the principle of respect for justified expectations places a certain limit on the applicability of Dutch conflict of laws rules.

The application of this clause presupposes that legal consequences are attached to the fact by the law applicable according to the Private International Law of a ‘concerned foreign state’. The clause will therefore not apply where different legal consequences ensue from different laws designated by two successive Dutch conflict of laws rules. Such a difference may occur when a conflict of laws rule developed in Dutch case law is replaced by a statutory rule with a different content.

The Explanatory Report states that the question of what is a ‘concerned foreign State’ cannot be addressed in a general way. It will have to be answered in the light of the particular circumstances.

4.2. Determination of the Closest Connection: the Use of ‘Soft’ Connecting Factors

As mentioned in par. 15, the Dutch codification contains various examples of ‘soft’ connecting factors. However, this type of connection is only used as a last resort, when other connections do not apply to the particular case at hand. Examples can be found both in the general provisions and in the titles devoted to specific subjects. The factors to be taken into account do not depend on the location of a single contact but rather on multiple elements and circumstances to be evaluated in the light of the particular case. Two categories can be distinguished. The first category is that of open rules. The second category requires the court to select one law or another, depending on which has the closest connection. In many instances the Explanatory Memorandum offers guidance as to which criteria are relevant when applying such open formulae. Moreover, the Memorandum refers to the Supreme Court’s case law which in some cases further refines the application of certain statutory conflict of laws rules.

4.2.1. Examples of Open Rules

Section 15 provides general rules for cases where a conflict of laws rule designates the law of a multi-unit state. In its two first subsections, which deal with rules based on nationality and habitual residence, it refers to the relevant rules in force in the multi-unit state in order to establish the unit whose legal system applies. In the absence of any such local rules or if these rules do not identify an applicable legal system, the legal system with which – having regard to all circumstances – the person concerned is most closely connected shall apply.

Section 36 determines the law which is applicable to the spouses’ non-property relationships. It provides that in the absence of a choice of the applicable law by the parties, such relationships are governed by the law of the state of their common nationality or, failing this, by the law of the state where they both have their habitual residence or, failing this, by
the law of the state with which – having regard to all the circumstances – they are most closely connected.

Similarly, Article 4, paragraph 3 of the 1978 Hague Convention on the law applicable to matrimonial property regimes provides that if the spouses do not have their habitual residence in the same State, nor have a common nationality, their matrimonial property regime is governed by the internal law of the State with which, taking all the circumstances into account, it is most closely connected.

Unlike Article 4 of the Rome Convention, Article 4 of the Rome I Regulation contains hard-and-fast rules for determining the law which is applicable to a number of specific contracts in the absence of a choice of applicable law. However, where the applicable law cannot be determined on the basis of those rules, the contract is governed by the law of the country with which it is most closely connected.

4.2.2. Examples of Open Rules which require a Selection

The general provision of Section 11 designates a person’s national law as applicable to issues of capacity. It states that where the person concerned is a national of more than one state and has his habitual residence in one of those states, the law of that state shall be deemed to be his national law. Where he does not have his habitual residence in any of those states, the law of the state of his nationality with which – having regard to all the circumstances – he is most closely connected shall be deemed to be his national law.

Section 19, second subsection, contains a rule which designates the law which is applicable to the names of a non-Dutch person who has several nationalities. It contains the same rule for cases of multiple nationalities as Section 11. Section 146 governs a person’s capacity to make a will. The rule for cases of multiple nationality is, again, identical to that of Section 11.

4.2.3. An Example of the Two Categories: ‘Open Rules’ and ‘Open Rules which require a Selection’

Rules of both categories are found in Article 3 of the 1989 Hague Succession Convention. In the absence of a choice of applicable law, succession is governed by the law of the State in which the deceased was habitually resident and of which he was a national at that time. The law of the State of the deceased’s habitual residence also governs succession if at the time of his death he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if, at the time of his death, he was manifestly more closely connected with the State of which he was then a national, the law of that State applies. In other cases the law of the State of the deceased’s nationality applies, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

4.3. Rules providing a List of Factors which the Court must consider in choosing the Applicable Law (‘Malleable Approach’)

There is one example of a malleable formula in the Dutch codification. It is contained in Article 7 of the 1985 Hague Trust Convention. That Article provides that where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected reference shall be made in particular to: the place of administration of the trust designated by the settlor; the
situs of the assets of the trust; the place of residence or business of the trustee; and the objects of the trust and the places where they are to be fulfilled.

4.4. The Application of the Laws of different States to different Aspects or Issues in the same Cause of Action (dépeçage)

In the Dutch legal literature the mere fact that different aspects or issues of a certain type of cross-border legal relationship fall within different Private International Law categories and are therefore governed by different laws is not regarded as dépeçage. Moreover, the fact that overriding mandatory rules may claim application in a case which is otherwise governed by one particular law is not regarded as dépeçage either. Consequently, in Dutch Private International Law the notion of dépeçage is used in a narrow sense. Dépeçage only occurs when the parties designate different laws to be applicable to different issues falling within a single Private International Law category (for example, different laws governing different sets of terms in one contract) (subjective dépeçage) or when, in the absence of such a designation by the parties, a court determines that different rules apply to different aspects in such a case (objective dépeçage). The fragmentation of conflict of laws rules is a very common phenomenon in Dutch Private International Law. By contrast, there are few examples of conflict of laws rules which allow subjective or objective dépeçage. The examples provided below (4.4.1. differentiation of applicable laws, 4.4.2. subjective dépeçage and 4.4.3. objective dépeçage) follow the basic structure of the proposed Book 10.

4.4.1. Examples of a Differentiation of Applicable Laws within the same Cause of Action

By way of a general remark it is observed that the application of escape clauses (Sections 6, 7, 8 and 9, as discussed in Chapter III) is likely to lead to a differentiation of applicable laws within the same cause of action.

In addition, Section 4 of the Bill contains a general provision addressing the issue of preliminary questions. It provides for an autonomous connection of preliminary questions and may thus lead to a differentiation within one cause of action. There are, however, exceptions to this general rule in the individual titles of the Bill. One example of such an exception is in Title 2 on names. Section 19, first subsection, provides that the names of a non-Dutch person are governed by the law of the state of his nationality. In this provision the term ‘law’ is to be understood as including the rules on private international law in that law. For the sole purpose of determining a person’s names, the elements on which these depend shall be assessed in accordance with that law (which is not necessarily the same law as the law that governs the person’s filiation).

Family Relations

Title 3, subtitle 1, differentiates between the material and the formal aspects of the conclusion of a marriage. Moreover, certain impediments to marriage are considered to belong to Dutch public policy and are thus governed by Dutch law. The latter aspect is dealt with in more detail in chapter IV below.

Title 3, subtitle 2, contains different rules for different aspects of the non-proprietary relationships between spouses. Under Section 35 the parties may choose the law which is applicable to their mutual personal relationships. In the absence of such a choice these relationships are governed by the law of their common nationality; failing this, by the law of

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21 See in particular Polak 1994.
the state where they both have their habitual residence and, failing this, by the most closely connected law. Under Section 39, a spouse’s liability for debts incurred by the other spouse in the normal running of the household is governed by the law of the state where they both have their habitual residence; failing this, by the law that governs the obligation. Finally, under Section 40, the question whether a spouse needs the other spouse’s consent for certain legal acts, whether such consent can be replaced by a court decision and what are the consequences of a lack of such consent, are governed by the law of the state where the spouse who performed the act – i.e. the person who is to be protected – was habitually resident at that time.

Title 3, subtitle 3, contains a number of provisions supplementing the 1978 Hague Matrimonial Property Convention. It provides for the applicability of some provisions of substantive Dutch law regarding, in particular, the spouses’ liability towards third persons in certain specific cases, and this may lead to a differentiation. Similar provisions can be found in Title 4 on registered partnerships.

Title 5, on filiation, contains a good example of differentiation. According to Section 95, a man’s capacity to acknowledge a child’s paternity and the conditions for such acknowledgement are, in principle, governed by that man’s national law. However, the mother’s and/or the child’s consent to the acknowledgement are, in principle, governed by the mother’s and the child’s national law, respectively.

Title 6, on adoption, provides in Section 105 that an international adoption is governed by Dutch law. By contrast, the consent, the consultation or the informing of the child’s parents or other persons or bodies are governed by the child’s national law.

The 1989 Hague Succession Convention governs the actual succession to the estate. Article 7 does not include the settlement of the estate within the scope of the applicable law (although a Contracting State is not precluded from extending the Convention’s regime to this matter). Title 12 of the Bill supplements the Convention with specific rules for the settlement and the distribution of the estate, which differ from the rules in the Convention. Section 149 provides that the settlement is governed by Dutch law if the deceased had his last habitual residence in the Netherlands. The same rule applies to the distribution of the estate unless the heirs agree to designate the law of another country. These rules are without prejudice to the requirements of the property law of the country in which the assets are situated.

**Patrimonial Law**

Title 9 deals with agency and refers to the 1978 Hague Agency Convention. That Convention contains several provisions, the application of which leads to differentiation. In particular the principal’s relations with the third party are determined by rules which are different from the rules governing the relations between the principal and the agent.

Title 10 on property law contains some examples of a differentiation. Under Section 128, the proprietary effects of a reservation of title are governed by the law of the state where the property is situated at the time of delivery. This is without prejudice to the obligations which may arise from the reservation of title clause under the law which is applicable thereto.

Section 129 provides that the creation and content of a right of retention are determined by the law that governs the underlying legal relationship. However, a right of retention may only be enforced insofar as the law of the state in whose territory the tangible property is situated permits this.

Article 14 of the Rome I Regulation partially regulates the assignment of claims. It provides that the relationship between the assignor and the assignee is governed by the law that applies to the contract between them. The law governing the assigned claim determines
whether the claim is assignable as well as the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor’s obligations are discharged. Pending the possible addition of a provision to the Regulation, Section 135 of the Bill completes this regime by providing that the law governing the contract which lays down the obligation to transfer the claim not only determines the contractual relationship between the assignor and the assignee, but also governs the proprietary aspects of the transfer. The conditions for the validity of the transfer in respect of third parties other than the debtor are therefore governed by the law which is applicable to the contract. Section 135 reflects a decision by the Dutch Supreme Court in a case decided on 16 May, 1997, which was welcomed by practitioners.

4.4.2. Examples of Subjective Dépeçage

Family relations

Article 6 of the 1978 Hague Matrimonial Property Convention provides that the spouses, whether or not they have designated a law applicable to their matrimonial property regime, designate with respect to all or some of the immovables the law of the place where these immovables are situated. They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated. A similar rule is contained in Section 70 of the Bill for property regimes of registered partners. However, in this case the choice is limited to law systems which have introduced registered partnership.

Article 6 of the 1989 Hague Succession Convention provides that a person may designate the law of one or more States to govern succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1.

Patrimonial law

For contracts see in particular Article 3, first paragraph, last sentence, of the Rome I Regulation which explicitly allows the parties to select the law applicable to the whole or to part of a contract. Subjective (or objective) dépeçage in respect of a particular non-contractual obligation would not appear to be possible under Article 14 of the Rome II Regulation.

Title 11 concerns trusts and refers to the 1985 Hague Trust Convention. That convention provides in its Article 9 that in applying its rules on the law applicable to a trust, a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

4.4.3. Examples of Objective Dépeçage

Patrimonial law

Title 12 addresses issues of contract law. Reference is made here to the ECJ’s first preliminary ruling on the 1980 Rome Convention on the law applicable to contractual obligations, dated 6 October, 2009. One of the questions put forward by the Dutch Supreme Court was concerned with the court’s possibility to divide a contract into a number of parts for the purpose of determining the law applicable under Article 4 of the Convention. The ECJ

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23 C-133/08, Intercontainer Interfrigo SC (ICF)/Balkenende Oosthuizen BV, MIC Operations BV.
holds that the second sentence of Article 4(1) of the Convention must be interpreted as meaning that a part of the contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent. Unlike Article 4 of the Rome Convention, Article 4, second paragraph, of the Rome 1 Regulation forbids objective dépeçage with respect to contracts which are not the subject of a choice of applicable law.24

Objective dépeçage is also possible under Article 9 of the 1985 Hague Trust Convention.

5. The Closest Connection Approach combined with Content-oriented Law Selection

Most conflict of laws rules in force in the Netherlands are based on the traditional centre of gravity approach or, rather, the ‘closest connection’ approach. However, even where this is the case, the courts are allowed, within certain limits, to consider the content of the conflicting laws and to make the choice dependent on that content. This is the main function of the general provisions described in Chapter III (public policy, general escape clause, mandatory laws and accomplished facts). A combined approach was also taken in a number of provisions on specific subjects and was described in some detail in the 1998 national report and the information provided there has not become obsolete.25

In the next few paragraphs examples of this combined approach are provided. The following distinctions are made: 1. choice of law rules which are, to a greater or lesser extent, determined by the underlying substantive law policies (functional allocation); 2. choice of law rules which are not impartial with respect to the substantive outcome of the dispute (favour approach); 3. choice of law rules which are aimed at protecting the interests of one of the parties of a certain relationship (protective rules) and 4. conflict of law rules which allow the parties to designate the applicable law (party autonomy).

5.1. Functional Allocation

5.1.1. Family Relationships

Reference is made to the comments on this category of rules in the 1998 national report.26 The international instruments mentioned there as examples of a functional approach have been replaced by other instruments containing provisions of the same type. The 1996 Hague Child Protection Convention contains rules on the applicable law which take into account underlying substantive law policies to a larger extent than its 1961 predecessor. A functional approach is also taken in the 2007 Hague Maintenance Protocol, which was borrowed from the 1973 Convention on this subject: under Article 3 the law which basically applies to maintenance obligations is that of the creditor’s habitual residence. However, this rule is subject to an exception in the case of spousal maintenance in Article 5 if one spouse objects and ‘if another state, in particular the State of their last common habitual residence, has a closer connection with the marriage’.

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25 An outline of the two conflict of laws approaches generally indicated as ‘State-Selection’ combined with ‘Conflicts Justice’, on the one hand, and ‘Content-Oriented Law Selection’ combined with ‘Material Justice’, on the other, as is apparent in Dutch Private International Law, was given in paragraph 6, headed ‘Dilemma between conflicts justice and material justice’, of the 1998 national report, p. 215-224.
5.1.2. **Multiple Nationality**

The existing Dutch codification contains a core of provisions relating to personal status which use nationality as a basic connecting factor. In its 2002 opinion on the general provisions, the Dutch Government Standing Committee proposed a general provision for cases of multiple nationalities. According to that proposal, in such cases the law of the country of which the person was a national and where he was habitually resident was to be applied. In the absence of such habitual residence in such a country, the law of the person’s nationality with which he was most closely connected was to be applied. In the course of the preparations for the consolidation the Standing Committee changed its mind and accordingly it was decided to drop the idea of a general provision. In fact, the provision proposed did not properly address cases where the law applicable is that of the common nationality of the parties involved. Moreover, in certain instances the rule is inconsistent either with the favour approach or with the protection approach envisaged. Consequently, in the Bill submitted to Parliament issues of multiple nationalities are dealt with in the individual sections using nationality as a connecting factor. Examples of the use of the basic rule described above are in the two general provisions on the status of stateless persons and of refugees (Sections 16 and 17), in Section 19 on the name of a non-Dutch person who has several nationalities, and Section 146 on a person’s capacity to make a will.

The conflict of laws rules using common nationality as a connecting factor contain the following provision on multiple nationality. Where the parties have a single common nationality, the law of that nationality applies irrespective of whether a party has yet another nationality. Where the parties have several common nationalities, they are deemed to have no common nationality and the fall-back rule (usually the law of the State of their common habitual residence) will apply. This type of solution was chosen in Section 37 (non-proprietary spousal relationships), Section 92 (filiation of children born within the marriage, Section 93 (denial of paternity) and Section 97 (judicial establishment of paternity).

It should be stressed once again that the functional approach does not necessarily lead to the application of the law which is most favourable to the weaker party. There are mechanisms which allow for an adjustment of the rule for that particular purpose and these mechanisms will be discussed in the next paragraph.

5.2. **The Favour Approach**

The favour approach focuses on the actual outcome of the application of a rule which favours a party or the parties in a relationship.

5.2.1. **Marriage**

An alternative is available for future spouses who wish to marry in the Netherlands. Section 28 provides that either a. the parties should each meet the requirements of Dutch substantive law and at least one of them should be a Dutch national or be habitually resident in the Netherlands, or b. the parties should each meet the requirements of their national law, it being understood that in the event of multiple nationality it is enough that the party concerned complies with the requirements of any of those national laws.

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27 See the examples below.
5.2.2. Paternity

A cascade system was adopted in the rules determining the law that is applicable to the requirements which a man must meet in order to acknowledge paternity. These rules are laid down in Section 95. The primary rule refers to the man’s national law and specifies that in the event of multiple nationality, any of his national laws which allows for the acknowledgement will be accepted. If the national law thus designated denies him the right to acknowledge paternity, the law of the child’s habitual residence applies; if, again, the result is negative, the law of the child’s nationality applies, it being understood that in the event of multiple nationality any one of the national laws is accepted. If the result is still negative, the law of the man’s country of habitual residence applies. It should be noted, however, that the favour approach taken here is mitigated by the protective rules in subsection 2 of the same Section. This approach is discussed in paragraph 3.

The 1970 Convention on legitimation by marriage was incorporated in the Dutch codification by reference in Section 98. It uses a number of alternative connections in order to achieve the desired result, i.e. the child’s legitimate status. Section 98 even adds a further reference to the law of the child’s habitual residence.

5.2.3. Maintenance

In the 1998 national report reference was made to the two Hague Maintenance Conventions of 1956 and 1973.29 The new 2007 Hague Maintenance Protocol uses the ‘cascade technique’ which can be found in Articles 4 to 6 of the 1973 Convention in order to make sure that the creditor will obtain maintenance (although the order of the steps to be taken in this cascade has been changed and although the provision has a more limited material scope).

5.2.4. Form of Testamentary Dispositions

The 1961 Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions, which was incorporated in the Bill by reference thereto in Section 151, uses a number of alternative factors with a view to favouring the validity of wills as to their form. Likewise, Section 12 contains general provisions on the formal validity of acts providing for an alternative connection in cases where the parties are, or are not, in the same state.

5.3. Protective Rules

Some of the rules mentioned under 2., which embody a favour approach, are combined with rules which aim to protect another party in the same relationship from the possible adverse effects of the favour regime.

5.3.1. Marriage

Public policy in matters of marriage is specified in Section 29, which provides that on grounds of public policy a marriage may, in any event, not be entered into in the Netherlands if the future spouses have not reached the age of 15; if they are related as parent and child or brother and sister either by birth or by adoption; if the free consent of the future spouses is lacking; if either spouse is mentally disturbed to the extent that he/she cannot express his/her will or understand his/her statements; or if the marriage would contravene the monogamy

29 The 1998 national report, p. 218.
principle. The same section provides that the conclusion of a marriage may not be refused on the grounds of an impediment which would be manifestly incompatible with public policy (for example, an impediment based on race).

5.3.2. Matrimonial Property Law

Section 47 on the settlement of the matrimonial property regime contains a rule on so-called Näherberechtigung. If, as a result of the application of the law applicable under Private International law of the situs of property, a spouse has enjoyed a benefit which he/she would not have enjoyed if the law applicable under Dutch Private International Law had been applied, the other spouse may claim compensation on the occasion of the settlement of the matrimonial property regime. A similar rule can be found in Section 147 on succession.

5.3.3. Paternity

Section 95, second subsection, mitigates the favour regime for the acknowledgement of paternity described under 2. by providing that irrespective of the law applied under the first subsection, Dutch law determines whether a married Dutch national may acknowledge the paternity of the child of a woman who is not his wife. This rule applies irrespective of whether in addition to Dutch nationality the man has another nationality. This rule was included in the existing statute in order to take account of the restrictive approach taken in Dutch substantive law towards married men acknowledging the paternity of children born out of wedlock. Under Section 95, subsection 4, the mother’s or the child’s consent to the acknowledgement of paternity are governed by the mother’s (or the children’s) national law. In the event of multiple nationalities any of her national laws that require consent shall apply. Where the mother (or the child) is a Dutch national, Dutch law shall apply even where the mother (or the child) also has another nationality. This regime, which aims to protect the mother against an acknowledgement of paternity against her will, is completed with an equally protective set of rules for cases where the applicable law does not contain the institution of acknowledging paternity. An identical rule can be found in Section 105 on adoption.

5.3.4. Recognition of Filiation Relationships

Sections 100 and 101 deal with the recognition of filiation relationships which have come into being abroad. Recognition is afforded, in principle by operation of law, irrespective of the law that was applied by the foreign court or civil status authorities. It suffices that the local formal conditions were met. There is, however, one important restriction to this regime. An acknowledgement of paternity is not recognized if the man was a Dutch national and did not meet the requirements of Dutch substantive law. The acknowledgement is also not recognized if the mother was a Dutch national and she did not consent to the acknowledgement. Both rules apply irrespective of whether the parties concerned had yet another nationality. An acknowledgement of paternity is not recognized either if it was fraudulent (which is the case if it was made for the sole purpose of acquiring Dutch nationality).
5.4. **Party Autonomy**

Party autonomy is quite common in Dutch Private International Law. Examples can be found in the titles on both family law and patrimonial law. Section 10 contains a general provision providing that where a choice of the applicable law is admissible, it should be express or otherwise sufficiently manifest. As stated in the 1998 national report, the underlying objective of party autonomy is usually to achieve maximum legal certainty, but there are other objectives as well.\(^{30}\) The 1998 report mentions matrimonial property law and succession law as examples. The relevant Hague Conventions both provide for (limited) possibilities to choose the applicable law. Title 3, subtitle 2, of the Bill, which deals with the non-proprietary relationships between spouses, now also introduces party autonomy. Under Section 35 the parties may designate the law of (any) common nationality or the law of their common habitual residence. The corresponding rule can be found in Section 64 on registered partnerships. The partners may designate any law which has introduced the institution of registered partnership.

5.4.1. **Divorce**

The 1998 report mentions matrimonial property law and succession law as examples. The relevant Hague Conventions both provide for (limited) possibilities to choose the applicable law. Title 3, subtitle 2, of the Bill, which deals with the non-proprietary relationships between spouses, now also introduces party autonomy. Under Section 35 the parties may designate the law of (any) common nationality or the law of their common habitual residence. The corresponding rule can be found in Section 64 on registered partnerships. The partners may designate any law which has introduced the institution of registered partnership.

5.4.2. **Maintenance**

The new 2007 Maintenance Protocol introduces party autonomy in two ways. Under Article 7, the parties are allowed to jointly designate the _lex fori_ for the purposes of any specific maintenance proceedings. This rule was introduced for practical reasons. The _lex fori_ is easy to ascertain and apply and may make proceedings more expeditious and cheaper. It also allows spouses to escape from the uncertainty inherent in the rule on spousal maintenance which applies in the absence of a choice. Alternatively, for forms of maintenance other than child maintenance the parties can avail themselves of the wider possibilities of Article 8, which allows them to designate inter alia the law applicable to their divorce or the law applicable to their matrimonial property regime. This Article was introduced specifically in order to take into account the practice of maintenance agreements which is developing in a

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\(^{30}\) The 1998 national report, p. 220-222.

\(^{31}\) The 1998 national report, p. 222.
number of countries. A designation of an applicable law under Article 8 can be made at any time. However, the court may set aside the law chosen if it leads to manifestly unfair results for any of the parties.

5.4.3. **Denial of Paternity**

Section 93 of the Bill regulates the judicial denial of paternity. Such an action is, in principle, governed by the same law as the existence of the *ex lege* filiation (the primary connecting factor is the parents’ common nationality, failing this their common habitual residence, and failing this the child’s habitual residence). If paternity cannot be denied under the law thus designated, the court may, at the parents’ request and if this is in the child’s best interest, apply one of the other laws listed in the first subsection or the law of the child’s habitual residence. This type of court-controlled party autonomy was inspired by the court-controlled party autonomy in divorce proceedings.

5.4.4. **Torts/Delicts**

Party autonomy in the field of tort was already accepted in the 2001 statute regulating the conflict of laws in matters of tort. That statute has now been replaced by the Rome II Regulation to which Title 14 of the Bill refers. The same title supplements the Regulation with some additional provisions and lays down that the Regulation’s rules shall also apply to non-contractual obligations not included in the material scope of the Regulation.

5.4.5. **Contracts**

Likewise, in the field of contract law, party autonomy under the Rome I Regulation is similar to that provided for in the 1980 Rome Convention. Title 13 of the Bill refers to the Regulation and contains some additional provisions on contract law. In the context of Rome I specific reference is made to Section 135 of the Bill (in the title on property law) which deals with the proprietary aspects of the assignment of claims. An element of party autonomy is contained in this section, according to which the law applicable to the contract which provides for the assignment also governs the proprietary aspects of the assignment.

5.4.6. **Property Law**

Section 128 of the Bill concerns the proprietary aspects of the reservation of title. Such effects are governed by the law of the situs of the property at the time of delivery. This is without prejudice to the (contractual) obligations arising from the reservation of title clause under the law applicable to it. Section 128 is completed with a rule that provides that where the goods are to be exported, the parties may designate the law of the country of destination to be applicable to the proprietary effects of the reservation of title, provided that under that law the reservation does not lose its effect before the price has been paid in full and provided that the goods are actually imported into the country of destination.

Section 133 regulates the proprietary regime with respect to goods transported under an international contract of carriage. The law of the country of destination applies in principle. However, in the event of a contract providing for the transfer of the goods, the law designated as applicable in that contract is deemed also to cover the proprietary aspects of the transaction.
5.4.7. Trusts

In Title 11, Section 142, reference is made to the 1985 Hague Trust Convention. Article 6 of that Convention stipulates that a trust shall be governed by the law chosen by the settler. A choice is not effective where the law chosen does not provide for trusts or the category of trust involved.

6. Unilateral Conflict of Laws Rules

The Dutch Private International Law codification contains a number of ‘inward-looking’ unilateral rules, i.e. rules which designate the law of the forum (in this case Dutch law) to be applicable and delineate its reach. The codification contains no ‘outward-looking unilateral rules’, i.e. unilateral rules which designate a specific foreign law as applicable.

6.1. Differentiation according to the Place where the Relevant Facts occur or where the Relevant Relationships are established

In dealing with the issue of unilateral rules it should be borne in mind that in a number of areas the Dutch rules on Private International Law differ according to whether the relevant facts have occurred in the Netherlands or abroad. Some rules in these areas provide for the applicability of Dutch law where the relevant facts occur in the Netherlands. Examples are Section 28, sub. a, for marriages and Section 60 for registered partnerships. Where the relevant facts have occurred abroad, they are recognized in the Netherlands when they have been validly established abroad, no matter what law was actually applied under foreign Private International Law, except where such facts are manifestly incompatible with (Dutch) public policy. See also Chapter VII, sub. 1 below on renvoi.

6.2. Unilateral Rules addressing Specific Issues of Applicable Law

Other unilateral rules address specific issues of applicable law solely by designating Dutch law and delimiting their scope of application. Some of these rules leave open the question of what law applies in cases which do not fall within that scope. These rules are mainly concerned with the settlement of certain proprietary issues in the Netherlands.

6.2.1. Matrimonial Property

For example, under Section 48 of the Bill, the applicability of Section 92, subsection 3, Book 1 of the Dutch Civil Code is limited to redress sought by a third party in the Netherlands against a spouse whose matrimonial property regime is governed by Dutch law or against a spouse whose matrimonial property regime is governed by foreign law and against whom redress is possible under the conditions specified in Section 46. A similar rule is contained in the Title on registered partnerships (Section 82).

Section 50 of the Bill provides that Section 131 of Book 1 of the Dutch Civil Code (concerning the distribution of assets between the spouses where there is a dispute as to ownership) applies even where the spouses’ matrimonial property regime is governed by foreign law. Again, a similar rule is contained in the Title on registered partnerships (Section 83).

Section 51 of the Bill provides that the equalization of pension rights is governed by the same law as the spouses’ matrimonial property regime. However, under Section 1, subsection 7, of the Act on the Equalization of Pension Rights upon Divorce, pension rights acquired
under Dutch pension schemes and certain foreign schemes are equalized between the ex-
spouses in accordance with that Act, irrespective of the spouses’ matrimonial property
regime. A similar rule is contained in the Title on registered partnerships (Section 85).

6.2.2. Denial of Paternity

Section 93 (which was discussed earlier in par. 77) concerns the law which is applicable to
the denial of paternity. It provides that Section 212 of the Dutch Civil Code (which requires
the representation of the child by a guardian *ad litem*) applies irrespective of the law which is
applicable to such a denial.

6.2.3. Company Law

In the area of company law, Section 121 of the Bill provides for the applicability of a number
of provisions of Dutch substantive law on the directors’ liability in the event of the
bankruptcy of a foreign company which is subject to Dutch taxation. Likewise, under Section
122 certain provisions of Dutch law will apply where, at the request of the Public Prosecutor,
the court determines that the object or activity of a foreign company is incompatible with
public policy.

6.2.4. Law of Succession

Section 149 provides that Dutch law applies to the settlement of the deceased’s estate where
the deceased had his last habitual residence in the Netherlands. No rule was provided for
cases where the deceased’s last habitual residence was abroad. The assumption is that in such
cases part of the estate will in any event have to be settled in the country of the deceased’s last
habitual residence. If assets have to be settled in the Netherlands, the most likely solution is to
apply the law which is applicable under the rules of the Private International Law of the
country of the deceased’s last habitual residence.

Under the same Section, Dutch law equally applies to the distribution of the estate where
the deceased had his last habitual residence in the Netherlands, except where the parties
entitled to the estate have jointly chosen another law.

Likewise, Section 150 provides that the task and powers of the executor appointed by the
deeased are governed by Dutch law if the deceased had his habitual residence in the
Netherlands. In the event that the deceased had his habitual residence abroad, upon the
request of an interested party the court may order that with respect to assets situated in the
Netherlands the law which is applicable under the 1989 Hague Convention must be respected.

6.3. Scope Rules for overriding Mandatory Laws

In par. 20 the issue of overriding mandatory laws was discussed. As explained, some statutes
which were not incorporated in Book 10 contain scope rules for overriding mandatory laws.
7. Other General Principles

7.1. Exclusion of Renvoi

7.1.1. Exceptions to the General Exclusion – Gesamtverweisung

Section 5 contains a general provision excluding renvoi. The provision was formulated along the same lines as the model which can be found in a number of Hague Conventions. However, the titles of Book 10 on specific subjects do contain several provisions which refer not only to the substantive rules but also to the rules of Private International Law of the foreign law which they designate (Gesamtverweisung). Examples mentioned in the 1998 national report are Article 4 of the 1989 Hague Succession Convention and what is now Section 19, subsection 1, of the Bill (on the law applicable to the names of a non-Dutch person). A more recent example is Section 65 on the non-proprietary relations between registered partners. In the absence of a choice of the applicable law, these are governed by Dutch law where the registered partnership was entered into in the Netherlands. Where the partnership was concluded abroad, they are governed by the law of the state where the partnership was concluded, including its rules on Private International Law. An identical rule is that in Section 71 on the registered partners’ property regime. A Gesamtverweisung was introduced for the latter two subjects in order to avoid designating a substantive law which does not regulate registered partnerships.

7.1.2. Rules on the Recognition of Facts and Relationships – Gesamtverweisung

The rules providing for the recognition of relationships or facts established abroad, as previously discussed in par. 93, can also be regarded as implying a Gesamtverweisung. Examples are Section 25 (recognition of names acquired abroad); Section 31 on the recognition of marriages (implementing Article 9 of the 1978 Hague Marriage Convention); Section 61 on the recognition of registered partnerships concluded abroad) and Sections 100 and 101 on the recognition of parent-child relationships established abroad. It should be stressed, however, that recognition cannot be refused on the mere ground that the authorities of the country where the facts occurred applied a law other than the law that would have been applied if the facts had occurred in the Netherlands.

7.1.3. Characterization

As explained in chapter IV, sub. D, in the last few decades there has been a clear trend towards an ever stricter delimitation of the material scope of application of conflict of laws rules on specific subjects (fragmentation of Private International Law) both in international and national Private International Law legislation. Characterization has become an intrinsic element in the process of determining the applicable law in most cases. No general provision on characterization was inserted in the draft of Book 10. To the extent that issues of characterization arise in national Dutch Private International Law, they are usually addressed in accordance with the law of the forum.

8. Final Observations

The issues which national reporters were instructed to address in their contributions to the 2010 Private International Law topic of the Washington conference on Recent private international law codifications are largely the same as those selected for the 1998 Private International Law topic of the Bristol conference on Private International Law at the End of the 20th Century: Progress or Regress? However, current legislative developments concerning the Dutch codification of Private International Law provide a good opportunity to present an updated description of a number of approaches taken in this field of law in the Netherlands and illustrate these with examples. With the given selection of issues, regrettably there was no room for a more in-depth analysis of the substance, title by title, of the Bill which is currently being considered by the Dutch Parliament. In addition to the conclusions drawn in the 1998 national report the following observations can be made.

After 1980 a large number of issues of Dutch Private International Law were regulated by statute. The Bill establishing Book 10 of the Dutch Civil Code compiles the existing statutes into one Private International Law Act and adds an introductory title containing general provisions. This first title sets out the main principles underlying the codification and reflects the general approaches taken to conflict of laws in the Netherlands. The consolidation project included a careful examination of existing provisions in the light of the general provisions proposed and of case law during the period since the entry into force of individual statutes. It was found that no significant amendments were necessary except in the title on divorce. The Explanatory Memorandum refers to case law of the Supreme Court which offers further guidance for the application of a number of provisions. From a comparative law perspective the legislative method applied in the past 30 years is unique. As far as these authors were able to verify, a step-by-step codification of Private International Law was not undertaken in any other jurisdiction.

In early 2006, at an advanced stage of the codification project, parliamentary questions were raised following the publication of an article which, once again, questioned the need to complete the codification of Dutch Private International Law in view of, inter alia, the growing body of European legislation. In his response the then Minister of Justice reminded Members of Parliament of the main purpose of this codification, which is to facilitate the access to and understanding of Dutch Private International Law by legal practitioners and to show them the way to non-Dutch sources of law. In his opinion, precisely the plurality of those sources is an overriding reason to carry on with the codification. The fact that the subject-matter falls within the competence of a number of international organisations is not a valid argument to renounce the project. Three years later, this view was confirmed in the present minister’s Explanatory Memorandum concerning the Bill.

The Netherlands will continue to actively participate in efforts to achieve a global unification of Private International Law. At the European level the Netherlands is involved in the drafting and adoption of regulations in the field of cross-border relationships. As was also put forward in the minister’s response just quoted, the national codification of Dutch conflict of laws rules is not an obstacle to the process of unifying Private International Law through Conventions and European Regulations. The national codification takes the international and Communitarian obligations into account by referring and incorporating international and European instruments while adding national provisions where necessary. In areas not covered by international and European legislation, the need for national legislation is obvious. The

Bill reveals the coherence and articulation of legislation from the various sources mentioned. It will facilitate, in the future, the integration of new international and European instruments. At this stage no redundant overlap of or disharmony between the various provisions can be detected. The national codification will make Dutch Private International Law more accessible and transparent.
APPENDIX
Sections 1-17 of the Bill establishing and introducing Book 10 (Private International Law) of the Dutch Civil Code, Book 10 – Private International Law

Title 1 – General Provisions

Section 1
The rules of private international law contained in this Book and in other statutes shall not prejudice the effect of international and Community legislation that is binding on the Netherlands.

Section 2
The rules of private international law and the law designated by those rules shall be applied ex officio.

Section 3
Dutch law shall apply to matters of procedure before Dutch courts.

Section 4
Where the question whether legal consequences ensue from a fact arises as a preliminary question in connection with another question that is subject to foreign law, the preliminary question shall be regarded as an autonomous question.

Section 5
Application of the law of a state means application of the rules of law that are in force in that state other than its rules of private international law.

Section 6
Foreign law shall not be applied to the extent that such application is manifestly incompatible with public policy.

Section 7
1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a state for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable.

2. The law designated by a rule on the conflict of laws shall not be applied in so far as rules of overriding mandatory Dutch law apply to the case at hand.

3. Where the law designated by a rule on the conflict of laws is applied, effect may be given to overriding mandatory rules of the law of a foreign state with which the case has a close connection. In deciding whether to give effect to such overriding mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
Section 8
1. The law designated by a statutory rule based on the presumption of a close connection with that law shall exceptionally not be applied if – having regard to all circumstances of the case – the close connection assumed in that rule manifestly exists only to a very small degree and a far closer connection exists with a different law. In such a case, that other law shall be applied.

2. Subsection 1 shall not apply where the parties make a valid choice of the applicable law.

Section 9
Where legal consequences ensue from a fact under the law that is applicable according to private international law of a concerned foreign state, the same legal consequences may be attached to that fact in the Netherlands – even where this would depart from the law that is applicable according to Dutch private international law – to the extent that failure to attach such legal consequences would constitute an unacceptable violation of the parties' justified expectations or of legal certainty.

Section 10
Where a choice of the applicable law is admissible, such choice shall be express or be otherwise sufficiently manifest.

Section 11
1. Whether a natural person is a minor and to what extent he is capable of performing legal acts, is determined by his national law. Where the person concerned is a national of more than one state and has his habitual residence in one of those states, the law of that state shall be deemed to be his national law. Where he does not have his habitual residence in any of those states, the law of the state of his nationality with which – having regard to all circumstances – he is most closely connected, shall be deemed to be his national law.

2. With respect to a multilateral legal act which falls outside the scope of application of Regulation (EC) no. 539/2008 of the European Parliament and the Council of 17 June, 2008 on the law applicable to contractual obligations (Rome I) (OJ EU L 177), Article 13 of that Regulation shall apply by analogy to a plea of incapacity by a natural person who is a party to such a legal act.

Section 12
1. A legal act is formally valid if it satisfies the formal requirements of the law that is applicable to the legal act itself, or of the law of the state where the legal act was performed.

2. A legal act performed between persons who are in different states is formally valid if it satisfies the formal requirements of the law that is applicable to the legal act itself, or of the law of one of those states, or of the law of the state where any of those persons has his habitual residence.

3. Where the legal act has been performed by an agent, a state as referred to in subsections 1 and 2 means the state in which the agent was present at the time of performing that act, or of the state where he had his habitual residence at that time.
Section 13
The law governing a legal relationship or legal fact shall also apply to the extent it establishes a presumption of law or contains rules apportioning the burden of proof with respect to that legal relationship or that legal fact.

Section 14
Whether an action is barred or a right extinguished by a statute of limitations shall be determined by the law that is applicable to the legal relationship on which that right or claim was based.

Section 15
1. Where a person’s national law is applicable and the state of that person's nationality has two or more legal systems that are applicable to different categories of persons or in different territorial units, the relevant rules in force in that state shall determine which of these legal systems applies.

2. Where the law of a natural person's habitual residence is applicable, and the state of that person's habitual residence has two or more legal systems that are applicable to different categories of persons, the relevant rules in force in that state shall determine which of these legal systems applies.

3. In the absence of any rules as referred to in subsections 1 and 2 in a state, or if these rules do not, in the particular circumstances, identify an applicable legal system, the legal system of the state with which – having regard to all circumstances – the person concerned is most closely connected, shall apply.

Section 16
1. Where a natural person’s national law applies and where that person is stateless or where his nationality cannot be ascertained, the law of the state of his habitual residence shall be deemed to be his national law.

2. The rights previously acquired by such a person, which are based on his personal status, in particular the rights arising from marriage, shall be respected.

Section 17
1. The personal status of an alien who has been granted a residence permit as referred to in section 28 or section 33 of the Aliens Act 2000, or of an alien who has been accorded equivalent residence status in another state shall be governed by the law of his domicile, or, if he has no domicile, by the law of his residence.

2. The rights previously acquired by such an alien, which are based on his personal status, in particular the rights arising from marriage, shall be respected.
References

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