DUTCH PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PLURALISM OF METHODS

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1 Introduction

When in 1838 a Civil Code was introduced for the whole territory of the Netherlands it was not deemed necessary to include provisions on private international law. A statute of 1829, reflecting in some provisions the ancient statutist theory, provided the only statutory basis for dealing with problems of private international law. As a consequence the development of private international law befell largely to the courts, which in their turn sought guidance from scholarly writings. On account of a technicality in the appeal system, the highest court in the Netherlands, the "Hoge Raad" (Supreme Court), a highly influential institution in the development of Dutch law, was until 1963 practically excluded from deciding private international law cases. The result was that in the absence of any binding authority the (lower) courts were more or less left to their own devices and that in many instances the decisions were strongly result-oriented.

During the last decade of the ninetienth century two prominent Dutch scholars were particularly involved with private international law, representing almost opposite points of view with respect to the way in which private international law should develop: T.M.C. Asser advocated legal certainty by means of international uniformity; D. Josephus Jitta focussed on methodology (with ample room for substantive approaches) and on the gradual development of national codifications with primarily unilateral conflict rules. The view of T.M.C. Asser eventually prevailed. Jitta's methological concepts,

expounded in several studies[1] written in French, did not find favour with the contemporary European private international law-scholars. Asser succeeded in convincing the Dutch government to convene a conference for the purpose of drafting uniform rules of private international law in 1893. Many conferences were to follow. The strong involvement of the Netherlands Standing Government Committee on Private International Law, instituted in 1897, with the activities and aims of the Hague Conference on Private International Law has doubtlessly contributed to the fact that for a long period of time Dutch private international law has been geared towards the international codification efforts. This aspect also accounts for the fact that a national private international law-codification has so far not come into being, although since 1973 gradual steps have been taken by the Ministry of Justice in cooperation with the Standing Committe in the direction of eventually producing one as a complement to the private international law treaties, that so far provide the bulk of the conflict rules of Dutch private international law. In 1992 the Ministry of Justice published the outline of a draft code. The work on a final code is in full progress and will possibly be more or less completed around the turn of the century.

During the first half of this century the lower courts generally applied multilateral (hard and fast) conflict rules of the Savignian model, largely inspired (apart from the Hague Conventions) by a manual written by J. Kosters,[2] that has been aptly described as the "Bible of Dutch private international law", as it has acted for half a century as the highest authority. In practice it constituted the main source of Dutch private international law until in 1963 the Dutch Supreme Court on account of a statutory extension to its review powers was able to provide active guidance to the process of devising appropriate conflict rules. Since 1963 the Supreme Court has taken the lead in developing Dutch private international law, to be followed by the legislator during the eighties and the nineties in the form of separate statutes on certain private international law issues.

1. D. Josephus Jitta, La méthode du droit international privé, The Hague/Paris/Brussels/-London 1890; La codification du droit international de la faillite, The Hague/Paris/Brussels/London 1895; La substance des obligations dans le droit international privé, The Hague/Paris/Brussels/Berlin/Rome, 1906-1907.
2. J. Kosters, Het internationaal burgerlijk recht in Nederland, Haarlem 1917.

2 International uniformity versus national interests

In the Netherlands, the prevailing view is that private international law should promote international uniformity, whereas the promotion of Dutch national interest through conflict of law rules is of much less importance. Section 2.1 will describe the universalistic approach of Dutch private international law, whereas section 2.2 deals with the doctrine where the philosophy of promotion of national interests is predominant, that is the doctrine of the mandatory rules.

2.1 International uniformity

2.1.1 General

As has been stated in the Introduction, the involvement of the Netherlands with the Hague Conference on Private International Law since the first Conference in 1893 has been, and still is particularly intense. Asser was one of the champions of international uniformity and Dutch private international law has largely been moulded to that concept. Nowadays, conflict of law rules in the Netherlands consist mainly of multilateral rules, which can be regarded as exponents of the universalistic approach. Multilateral conflict of law rules are of a neutral nature, that is they apply regardless of the connected states and do not take into account the national interests of one of them. Furthermore, throughout the 20th century an often advocated principle for formulating private international law rules is that private international law rules should be drafted in a way which is internationally acceptable.

2.1.2 Application of the lex fori through multilateral conflict of law rules

Multilateral conflict of law rules do not distinguish between the *lex fori* and foreign law and are thus treated on an equal footing. Still, Dutch case-law demonstrates that in international cases the *lex fori* is more often applied than foreign law, one of the reasons being that the conflict of law rules are often attuned to the rules on jurisdiction (the principle of *Gleichlauf*, meaning that if a Dutch court has jurisdiction, the conflict of law rule leads to the application of the *lex fori*).[3]

However, the underlying justification is not the promotion of national interests, but the application of the *lex fori* can usually be justified by other interests. Thus, in some instances, it can be argued that the *lex fori* provides

3. E.g. Arts.l 1 and 2 of the Convention concerning the powers of authorities and the law applicable in respect of the protection of minors The Hague, 5 October 1961; Arts. 13-15 of the Brussels Convention and Art. 5 of the Rome Convention.

the best results for the parties from a substantive law point of view (see further section 6.7). Application of the *lex fori* may also have procedural advantages. For example, the application of foreign law may lead to the postponement of the court decisions and greater expenses due to an investigation of the content of the foreign law. As a result, courts sometimes explicitly invite parties to make a choice of law in favour of Dutch law in order to avoid these difficulties. Finally, the *lex fori* may be applied because it is not possible to find a suitable connecting factor, which means that the *lex fori* is a *Verlegenheidslösung*. An example is a collision on the open sea (Art. 7, 3 of the Act on international maritime and inland navigation).

2.1.3 Unilateral conflict-of-law rules

An unilateral conflict of law rule only informs one of when the *lex fori* should be applied. Nowadays, Dutch private international law contains only few unilateral conflict of law rules, as the bilateral conflict of law rules are predominant. However, these unilateral conflict of law rules cannot be regarded as rules which promote state or national interests.

For example, the one-sided conflict of law rule of Article 6 of the Act of 15 May 1829, containing General Provisions on the Legislation of the Kingdom [*Wet Algemene Bepalingen*] regulated for a long time a vast area of the law concerning personal status, although the introduction of new legislation has considerably reduced the scope of Article 6. Pursuant to this provision, "the laws concerning the rights, the status and the capacity of persons are binding on Dutch nationals, even when they reside abroad." However, in case-law[4] this provision is applied both to Dutch persons and to foreigners, that is the personal status of the foreigner is governed by his foreign nationality. Article 6 is thus 'bilateralised'.

Other unilateral conflict of law rules can be regarded as procedural rules. For example, pursuant to Article 4 of the International Marriages Act, a marriage ceremony which takes place in the Netherlands should, as regards its form, be celebrated in accordance with Dutch regulations.

Another example is Article 10 of the International Matrimonial Property Act, which regulates the applicability of Article 1:131 of the Dutch Civil Code concerning the settlement of the separation of property after divorce in cases where none of the parties can prove that certain chattels belong to him or her. In order to facilitate business efficiency, Article 1:131 applies as a rule of evidence, notwithstanding the fact that the case is further governed by foreign law.

4. Supreme Court 31 May 1907, W. 8553; Supreme Court 5 January 1917, W. 10073.

2.2 National interests

2.2.1 Mandatory rules of the lex fori (voorrangsregels)

Mandatory rules (*règles d'application immédiate*, *voorrangsregels*) are unilateral conflict of law rules which should be applied in order to safeguard the general interests of the forum. These are rules which, according to the *lex fori*, should be applied irrespective of the law otherwise applicable to the contract. In the Netherlands, the doctrine was introduced by De Winter, who described the mandatory rules as follows:

> "A Dutch mandatory provision is applicable to international contracts when it fulfills an important socio-economic function and if it flows from its purpose that the rule should be applied in the case concerned.'[5]

A distinction can be made between statutes containing and statutes lacking a written scope rule. As regards the first category, there are only a few Dutch statutes or statutory provisions which have a written scope rule, i.e. a rule which describes the application *ratione loci* of one or more statutory provisions. An example of such a scope rule is Article 6:247 (4) of the Dutch Civil Code [*Burgerlijk Wetboek*]. Pursuant to this Article, the provisions on standard contract terms in consumer contracts have to be applied if the consumer has his habitual residence in the Netherlands.

Another example is the Act on technically foreign legal persons [*Wet op de formeel buitenlandse vennootschappen*].[6] Pursuant to this Act, a foreign legal person which develops its activities completely or almost completely in the Netherlands and which does not have a significant connection with its country of origin, should comply with certain Dutch provisions of company law, such as the requirement to enter certain information in the Register of Commercial Enterprises [*Handelsregister*]. Dutch law provides some other examples of written scope rules,[7] but mostly no written scope rule is available.

If a statute lacks a written scope rule, the court may, through interpretation, apply the statute as a mandatory rule. This can be illustrated by the case-law concerning Article 6 of the Labour Relations Decree [*Buitengewoon*

5. L.I. De Winter, Dwingend recht bij internationale overeenkomsten, Nederlands Tijdschrift voor Internationaal Recht (hereafter: NTIR) 1964, pp. 329-365. See also J.E.J.Th. Deelen, De blinddoek van Von Savigny (Amsterdam 1966).
6. Act concerning foreign legal persons which develop their activities completely or almost completely in the Netherlands and which have no significant connection with the country of origin.
7. E.g. Art. 4 of the Minimum Wages Act (*Wet op het Minimumloon*); Art. 46 of the Consumer Credit Act (*Wet op het Consumentenkrediet*)

Besluit Arbeidsverhoudingen 1945 (BBA)]. If an employer wishes to dismiss an employee, Article 6 BBA requires him to request permission from the Director of the District Employment Office. The question was raised whether Article 6 BBA is applicable to international employment contracts, which have some connection with the Netherlands but are governed by foreign law. In a series of judgments the Supreme Court held that Article 6 BBA is a mandatory rule, because it serves the general interests of the Dutch employment market.[8] In recent case-law the Supreme Court has explicitly recognized the interest of the foreign state that its law (the *lex causae*) is applied entirely and is not affected by the application of a mandatory provision of the *lex fori*. As a result, the interests of both countries should be weighed in order to assess which interest prevails.[9]

Another example is the case of the Bredius Musuem case[10] concerning a legacy by a testator with Monegasque nationality, who had bequeathed his art collection to the Bredius Museum with the explicit stipulation that the art collection should be permanently exhibited in the Bredius Museum (which was situated in the Prinsengracht in The Hague). Due to declining public interest, the municipal administration proposed to relocate the Museum – which was, however – contrary to the stipulation in the legacy. The municipal administration therefore commenced proceedings pursuant to the Dutch *Museumwet* [Museum Act] in order to amend the legacy so that the collection could be exhibited at a different location. As the testator had Monegasque nationality, the law of the state of Monaco was applicable on the issue. This raised the question whether the legacy could be changed pursuant to the Dutch *Museumwet*. The Supreme Court held that in view of the existing connection between the legacy and the Netherlands (the beneficiary was a Dutch governmental body and the art collection was exhibited in the Netherlands), Dutch general interests were directly and closely concerned with the amendment of the legacy. Therefore, the Museumwet could be applied.

In both cases the Supreme Court held that the applicability of a Dutch statute followed from the general interests which are served by the statute in view of the close connection between the case and the statute concerned. Some Dutch authors, however, have questioned the practicability of the doctrine of "*voorrangsregels*", especially because the concept of 'general interest' is not as straightforward as it seems to be at first glance. Article 6

8. Supreme Court 5 June 1953, Nederlandse Jurisprudentie (hereafter: NJ) 1953, 613 (Melchers); Supreme Court 18 January 1991, NJ 1991, 296 (Sanchez Martinez); Supreme Court 8 January 1971, NJ 1971, 129 (Mackay I).
9. Supreme Court 23 October 1987, NJ 1988, 842 (Sorensen/Aramco).
10. Supreme Court 16 March 1990, NJ 1991, 575.

BBA does not only serve the general interests of the Dutch employment market, but the provision may also protect the individual employee,[11] whereas the *Museumwet* is not only concerned with changing a legacy from a general interest point of view, but also protects the interests of the family of the deceased and other beneficiaries.[12] (See further section 6.6)

2.2.2 Mandatory rules of third countries

Notwithstanding the difficulties in applying the doctrine of the *voorrangsregels*, it is clearly the doctrine's aim to safeguard the application of certain provisions or statutes because of the general interests concerned. Thus, through the application of mandatory rules of the *lex fori* Dutch general interests are served. However, even with regard to the mandatory rules Dutch private international law takes into account the principle of reciprocity, for it is also possible to apply foreign mandatory rules. In 1966, the Supreme Court held in the case of Alnati:[13]

> "that, in connection with contracts (…), it may occur that compliance, also outside the territory of a foreign state, with provisions emanating from the state, involves such important interests of the state in question that the Netherlands judiciary, too, has to take them into consideration and, therefore, shall have to apply such provisions in prevailance to the law chosen by the parties and emanating from some other state (…)."

This rule is now codified in Article 7 (1) of the 1980 Rome Convention. However, the application of foreign mandatory rules has remained largely an academic exercise, because there are no cases where the doctrine has been successfully applied.[14] Even in the famous Alnati case the Supreme Court ultimately denied the application of the foreign statutory provision (Article 91 of the Belgian Commercial Code). From a theoretic point of view, however, the admission of the application of foreign mandatory rules means

11. L. Strikwerda, Semipubliekrecht in het conflictenrecht (Alphen a/d Rijn 1978), pp. 68-72; J.G. Sauveplanne, Inländische zwingendem Verbraucherschutzrecht und europäisches Vertragsstatut des Arbeitsrecht, IPRax 1989, pp. 119-121; M.V. Polak, Arbeidsverhoudingen in het Nederlands internationaal privaatrecht (Deventer 1988), p. 116.
12. Th.M. de Boer, Ars Aequi 1990, p. 556.
13. Supreme Court 13 May 1966, NJ 1967, 3. This rule is now codified in Art. 7(1) of the 1980 Rome Convention.
14. Supreme Court 12 January 1979, NJ 1980, 526; Court of Appeal Den Haag 24 April 1986, NIPR 1988, 129; Court of Appeal Amsterdam 11 April 1991, NIPR 1991, 389; President of the District Court Den Haag 17 September 1982, Rechtspraak van de Week 1982, 167.

a growing internationalization of private international law and is helpful for the realization of a new 'comity'.[15]

> "(....)that the Belgian provisions, applied by the Court of Appeal in the present case, are not of such a nature that the Netherlands judiciary, with an eye to the Belgian interests involved, shall be bound to give them preference over the Netherlands law chosen by the parties."

3 Tension between the goals of legal certainty and flexibility

3.1 Hard-and-fast rules and open-ended-rules

In Dutch private international law many of the rules may be qualified as hard and fast rules. However, open-ended rules are also used in case-law and statutory law. Since 1963, the year when the possibility of cassation by the Supreme Court was made available, the highest court has developed a new approach in respect of rules of private international law. In nearly every case which was finally decided by the Supreme Court, it was held that the rule which in a certain case was to be applied only *in principle* designated the applicable law. Under certain circumstances, which were frequently not further specified, it could have been possible to apply another connecting factor and therefore another conflict of law rule. This method was often used, especially in the field of international matrimonial property law. In the near future, when Dutch private international law will be codified, this principle-exception system will hopefully be one of the points of departure. If not, it is our belief that the Dutch courts will always find a way out of a straight-jacket system which only contains hard and fast rules. In the planned code this can be prevented by formulating special exception clauses for each field of law or by including a general exception clause in the general part of the code.

3.2 Exception clauses

At the XIVth International Congress of Comparative Law in 1994 in Athens the subject "Exception Clauses in Conflicts of Laws and Conflicts of Jurisdictions" was discussed.[16] The Dutch report was delivered by K. Boele-

15. L.I. de Winter, Dwingend recht bij internationale overeenkomsten, NTIR 1964, pp. 329-365.
16. The general and the national reports were published by D. Kokkini-Iatridou in 1994.

Woelki. Four years have gone by since the writing of this report. However, according to the view of the authors of the present report the conclusions drawn up there are still valid. Only two relevant remarks are to be made.

Firstly, the most important decision in the field of exception clauses is still the decision of the Supreme Court delivered on 25 September 1992. The restrictive application of Article 4, paragraph 5 of the EC Contracts Conventions which was followed by the Dutch highest court has been critizised by some authors.[17] However, it is not to be expected that the lower courts will deviate from the interpretation chosen by the Supreme Court, nor that the Supreme Court itself will change its view in this respect.

Secondly, in December 1996 the Dutch Standing Government Commission on Private International Law presented a draft for conflict of law rules for non-contractual obligations. It is worth mentioning that this proposal does not contain a special open exception clause.[18] Obviously the view is taken that an open exception clause for the area of law in question should not be included in addition to a general exception clause. The decision as to whether the General Part of the Dutch Private International Law Act will contain such a general clause will be taken in the near future. The Standing Government Commission on Pivate International Law recently started with the preparation of a draft for this part of the planned codification. A general exception clause applies to all private international law rules. Such a rule is likely to be included in the new code, which will not be in force by the end of this century.

3.3 Party autonomy

Party autonomy plays an important role in Dutch private international law. Under section 6.5 of this report the development of this conflict of law rule in the different areas of law is briefly described. With regard to the title of this paragraph, under which the tension between the goals of legal certainty

17. See for instance F. de Ly, Het Balenpers-arrest en de eenvormige uitleg van artikel 4 (5) EVO, in: Het NIPR geannoteerd 1996 pp. 125-133.

18. On the contrary, the draft for a European Convention on the law applicable to non-contractual obligations (version September 1997) prepared by the European Group for Private International Law contains a special open exception clause. Article 3 follows the structure of Article 4 of the EC Contracts Convention. In the first paragraph of this article the law of the country with which the non-contractual obligation is most closely connected is designated. In the second and third paragraph two presumptions for the closest connection are formulated. The fourth paragraph declares that the presumptions shall be disregarded if it appears from the circumstances, taken in their entirely, that the obligation is more closely connected with another country.

and flexibility needs to be illustrated, special attention should be given to the recent decision of the Dutch Supreme Court of 27 February 1997 in the field of international maintenance law.[19] In this case the question arose as to whether former spouses were allowed to determine the applicable law. The Supreme Court held that Article 8 of the Hague Convention on the Law Applicable to Maintenance Obligations of 1973 can be set aside by national law, in this case the rule of party autonomy designating another applicable law. The conventional provision was overruled in favour of party autonomy, by rupturing the link between maintenance obligation and fault in the divorce. The Supreme Court demonstrated at great length that the overruling was in conformity with the Convention. According to the Supreme Court the issue pertained to the interpretation of the Convention and therefore must be answered according to the criteria of Article 31 and Article 32 of the 1969 Vienna Convention on Treaties. It was stated that the absence of any provisions on party autonomy regarding maintenance obligations (maintenance contracts where party autonomy is allowed do not fall within the scope of the Convention) was not contrary to the objectives of the Convention. Since under the Dutch Divorce Act of 1981 the former spouses may designate the *lex divortii*[20] the Supreme Court held that they should also have the freedom to designate the applicable law to their maintenance obligations. It must be admitted that this interpretation is based on a Dutch concept, but undoubtely Article 8 of the said Convention has been the source of the most sensitive problems in the past. In many cases the law applicable to the maintenance obligations was "manipulated" by choosing the most convenient divorce law in this respect. Furthermore, Article 8 was felt to be too stringent in practice. Article 8 is a hard-and-fast conventional rule and no exception is possible, except by means of the *ordre public* clause which is generally understood to be applied very cautiously. According to the view of the Supreme Court Article 8 must be interpreted in the light of the unawareness of the evolution of party autonomy in family law. It is important to indicate that party autonomy is a subjective conflict of law rule. The objective conflict of law rules of the Maintenance Convention will not be changed if the former spouses are allowed to designate the applicable law, which is a different law to the divorce law. In other words, party autonomy is to be regarded as a (preliminary issue) in cases where the parties have reached an agreement. If such an agreement is lacking the rules of the

19. RvdW 1997, 56, NIPR 1997 Nr. 70, See K. Boele-Woelki, Artikel 8 Unterhaltsabkommen steht einer Rechtswahl nicht entgegen, IPRax 1998 issue 3. Critically M. Sumampouw in her annotation to be published in NILR 1998.

20. See K. Boele-Woelki, Der favor divortii im niederlaendischen internationalen Scheidungsrecht, in: Comparability and Evaluation 1994 pp. 167-181.

Convention still remain applicable. This view is supported by Dutch case law and doctrine with respect to the Hague Traffic Accident Convention of 1971 and the Hague Product Liability Convention of 1973, where the drafters also did not or only to a minor extent allow for party autonomy. Lower courts accepted choice of law made by the parties although the Conventions were respectively applicable. The decision of the Dutch Supreme Court is a new example of the flexibility which characterises Dutch private international law. One should keep in mind that the Convention is more than 25 years old and since the drafting of the conventional rules more and more authors and court decisions favour party autonomy in many fields of law, like divorce law, matrimonial property law[21] and the law of succession.[22] In our view, Article 8 should be changed in the near future by the Hague Conference on Private International Law in an new revised Convention or an Additional Protocol. Meanwhile, the Dutch legislator has the possibility to include a rule in conformity with the ruling of the Supreme Court in the Dutch private international law code which is currently being prepared. Furthermore, it is to be expected that lower courts will follow the decision of the Supreme Court. Another field of family law has thereby been conquered by party autonomy.

4 The antagonism among, or the co-existence of, the multilateral, unilateral and substantive approaches

In Dutch private international law the multilateral approach prevails. The unilateral approach has been dealt with in 2.2.1., were the place of mandatory rules in Dutch private international law has been described. Although much attention was given to the phenomenon of mandatory rules by Dutch private international law scholars during the seventies, and article 7 of the 1980 Rome Convention was directly inspired by the Alnati decision of the Supreme Court, in practice the unilateral approach has found little or no application. The substantive law approach is also exeptional. An example of the substantive law approach is to be found in article 11 of the Hague Convention on the Law Applicable to Maintenance Obligations of 1973. Article 11, second sentence, provides, that even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance.

21. Due to the ratification of the Hague Matrimonial Property Convention of 1978.
22. Due to the ratification of the Hague Convention on Succession of Estates of Deceased Persons of 1986.

5 The antagonism between, or the co-existence of, choice-of-law rules and choice-of-law "approaches"

In Dutch private international law choice of law rules, based on the Savignian concept of allocating a specific category of law to a specific legal system by means of pre-formulated allocation factors are the accepted tools of the trade. In cases where the Supreme Court has acted as "deputy-legislator" for private international law, "approaches" have sometimes (and by way of exception) been given a subsidiairy function. Thus the Supreme Court decided in 1976[23] that in respect to the law to be applied to establish the matrimonial property regime of the spouses the court must in the absence of a common nationality or a first place of residence after the marriage apply the law of the state of the closest connection with the parties, having due regard to all the circumstances. Some of the Hague Conventions ratified by the Netherlands also employ "approaches", such as the 1985 Convention on the Law Applicable to Trusts and on their Recognition (article 7), the 1978 Convention on the Law Applicable to Matrimonial Property Regimes (art. 4,3) and the 1978 Convention on the Law Applicable to Agency (Articles 6,3 and 11). Another example (in the field of conventions) is article 4,1 of the 1980 Rome Convention.

A certain and sometimes vehemently outspoken antagonism between choice of law rules and "approaches" has periodically been the subject of academic writings and discussions, but in practice the choice of law rules have always prevailed. In this respect the methodological writings of D. Josephus Jitta at the turn of the century, (referred to in the Introduction) provide an interesting example. Jitta flatly rejected the Savignian concept and instead developed a methodology, based on the comparison of the legal systems connected with the issue, that can be described as an "approach". Jitta's successor to the Chair of Private International Law of the University of Amsterdam, I. Henri Hijmans, equally rejected the Savignian approach and developed a methodology based on the premise that "the law of reality" should be applied to questions of private international law.[24] Hijmans' ideas and influence on several prominent Dutch private international law scholars contributed to the fact that after the Second World War the courts generally attached more importance to the facts of the case when deciding private international law

23. Supreme Court 10 December 1976, NJ 1977, 275 (Chelouche-Van Leer).

24. I. Henri Hijmans, Algemeene Problemen van Internationaal Privaatrecht, Zwolle 1937.

cases than was the case before.[25] During the sixties and seventies private international law scholars connected with the University of Amsterdam attacked the Savignian method and called upon the development of other, more result-oriented solutions for dealing with problems of private international law, without providing clear new methods however.[26] This "Amsterdam School", as it was sometimes called at the time, seems at present to have more or less given up its resistance to the Savignian method.[27]

6 Dilemma between conflicts justice and material justice

6.1 General

Although Dutch conflict of law is largely based on the theories of Savigny, Dutch legal authors have rejected the idea that private international law is indifferent to substantive law values. In 1947, the Dutch scholar De Winter argued that private international law should contribute to the realization of the social functions of substantive law.[28] Nowadays, it is generally recognized that substantive values should be integrated in the choice of law

25. See for an overview of the various methodological concepts of Dutch private international law-specialists between 1862 and 1962: G.J.W. Steenhoff, De wetenschap van het Internationaal Privaatrecht in Nederland tussen 1862 en 1962, Zwolle 1994.
26. In particular L. Strikwerda in his thesis "Semipubliekrecht in het conflictenrecht. Verkenningen op een kruispunt van methoden", Alphen aan den Rijn 1978 and H.U. Jessurun d'Oliveira in his inaugural lecture "De ruïne van een paradigma: de konfliktregel", Deventer 1976. See however TH.M. de Boer, Forty Years On: The Evolution of Postwar Private International Law in Europe, Deventer 1990, p. 5: "Unfortunately, none of this critisism was very constructive. Although the European dissenters were voicing their objections against traditional choice of law in unission, they were unable to come up with a valid methodological alternative other than some vague suggestion of interest analysis".
27. In his thesis "Beyond Lex Loci Delicti. Conflicts Methodology and Multistate Torts in American Case Law", Deventer 1987, Th. M de Boer seems to have renounced all hope that the methods employed in the United States can provide viable alternatives to the Savignian method, at least for Europe. However, L. Strikwerda is still fighting against the lack of conceptual unity and the pluralism of methods that characterizes Dutch private international law at present.
28. L.I. de Winter, De sociale functies der rechtsnormen als grondslag voor de oplossing van internationaal privaatrechtelijke wetsconflicten, Rechtsgeleerd Magazijn Themis 1947, pp. 101-166.

process.[29] In this section, the influence of substantive law is discussed in relation to the techniques which are used in private international law: the centre of gravity approach; functional allocation; the favour approach; party autonomy; mandatory rules; application of the lex fori; facultative choice of law.

6.2 Centre of gravity approach

Most Dutch conflict rules are based on the centre of gravity approach, which goes back to Savigny's notion that all international legal relationships have a 'natural connection' with a particular legal system. His theory serves the ultimate goal of achieving international harmony among the world's legal systems. Nowadays, the idea is not so much that a legal relationship has a 'natural connection', but the ideal of international harmony is to be achieved through the 'objective' principle of the closest connection. The principle of the closest connection, however, uses objective factual patterns, e.g. the place where the tort occurred or the habitual residence of one of the parties, in order to find the applicable law. These types of choice of law rules are jurisdiction-selecting rules, that is the content of the substantive law is not officially a factor to be taken into account in the court's choice of the applicable law.

The multilateral conflict of law rules can be distinghuished by closed rules on the one hand, and open or semi-open ended rules on the other. A closed conflict of law rule operates with a specific connecting factor which does not leave any room for appraisal of the situation in question, whereas an open or semi-open ended conflict of law rule does. An example of the latter is Article 4(1) of the 1980 Rome Convention which states that a contract shall be governed by the law of the country which is most closely connected. Some Dutch authors have argued that due to 'interpretative ambiguities', the open and semi-open ended conflicts rules present an open invitation to a covertly result-selective choice of law. "Whether it is motivated by a wish to avoid unfamiliar foreign law or by a vague better law notion or by a principled

29. E.g. J.E.J.Th. Deelen, De blinddoek van Von Savigny, inaugural lecture, (Amsterdam 1966); H.U. Jessurun d'Oliveira, De ruïne van een paradigma: de konfliktregel, inaugural lecture (Deventer 1976); L. Strikwerda, Naar een gereduceerd conflictenrecht? Iets over bescherming, begunstiging en *better law* in het internationaal privaatrecht (Groningen 1986).

preference for a certain substantive policy, the choice is easily wrapped in the objective geographical terms of closest connection.[30]

6.3 Functional allocation

In the functional allocation approach, the connecting factor in the choice of law rule is determined by the underlying substantive law policies. It is not the closest "physical" connection that counts, but the centre of gravity in a normative or "legal" sense. Two useful examples are Article 5 and 6 of the Rome Convention concerning consumer contracts and employment contracts. Pursuant to Article 5, the law of the habitual residence of the consumer is applicable to a consumer contract.[31] The underlying policy of Article 5 is that it is the *function* of the law of the consumer's habitual residence to protect the consumer as being the weaker party in the contract, hence the concept of *functional* allocation.

Dutch private international law contains several other examples of functional allocation, for instance as regards the protection of children. The Netherlands has ratified the Convention concerning the powers of authorities and the law applicable in respect of the protection of minors The Hague, 5 October 1961. Pursuant to Arts. 1 and 2, the court applies the law of the state where the child has its habitual residence. In cases where the Convention does not apply, i.e. where the minor does not have its habitual residence in a contracting state (Art. 13), the Convention is often applied by way of analogy.

Dutch case-law provides several examples of functional allocation. In the area of patrimonial law, before the ratification of the 1980 Rome Convention, several cases demonstrated that the Dutch Supreme Court developed conflict of law rules based on the functional allocation principle. A very good example can be found in the case of Jurgens/ Van Heesch[32] concerning the promise of a gift from Jurgens, living in the United Kingdom, to Van Heesch, residing in the Netherlands. Jurgens' promise was accepted in writing by Van Heesch. Jurgens, however, refused to pay, because he had not incorporated the gift in a deed. The Supreme Court held that the law of the donor governed the gift, because the focus of the substantive law was to

30. Th.M. de Boer, The EEC Contracts Convention and the Dutch Courts, RabelsZ 1990, p. 24. Th.M. de Boer, De wisselwerking tussen materieel recht en internationaal privaatrecht, preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking, no. 47, p. 17.

31. Provided the requirements of Article 5 are met.

32. Supreme Court 2 April 1942, NJ 1942, 468.

protect the interests of the donor. Other examples are the cases of Mackaay II[33] concerning an employment contract and Topsoe/Del Prado[34] concerning commercial agency. Pursuant to Mackaay II an employment contract is governed by the law of the state where the employee habitually carries out his work, whereas in Topsoe/ Del Prado the Supreme Court applied the habitual residence of the agent as the connecting factor.

The functional approach does not automatically lead to the application of the law which is most favourable to the weaker party. This can be illustrated by the case of Jurgens/Van Heesch, where English law was applied, because the donor was domiciled in the United Kingdom. However, in this particular case the outcome was not favourable to the donor, because under English law the promise was valid, whereas under Dutch law the promise would have been invalid.[35]

6.4 The favour approach

Under the favour approach the choice-of-law rule is not impartial to the substantive outcome of the dispute. The law of the applicable jurisdiction has to achieve a certain result. If not, another law will have to be applied. The favour approach comes close to the American doctrine of better law. However, the favour approache's aim is to apply the more favourable law in the interest of the favoured party, whereas the better law approach focuses more on the intrinsic quality of the rules involved.[36]

The Netherlands ratified several Conventions where the favour principle is applied. For example the The Hague Convention on the law applicable to maintenance obligations towards children of 24 October 1956 (Art. 3, in favour of the child who claims maintenance); The Hague, Convention on the law applicable to maintenance obligations of 2 October 1973 (Arts. 4, 5 and 6, in favour of the maintenance creditor); and The Hague Convention on the conflicts of laws relating to the form of testamentary dispositions of 5 October 1961 (*favor negotii*).

33. Supreme Court 8 June 1973, NJ 1973, 400.
34. Supreme Court 6 April 1973, NJ 1973, 371
35. Other examples are the cases of Mackaay II (Supreme Court 8 June 1973, NJ 1973, 400) where the Supreme Court held that an employment contract is governed by the law of the state where the employee habitually carries out his work and Topsøe/Del Prado (Supreme Court 6 April 1973, NJ 1973, 371) where the Supreme Court applied the habitual residence of the agent as the connecting factor on a contract of commercial agency.
36. Th.M. de Boer, Beyond Lex Loci Delicti (Deventer 1987), p. 70.

The favour notion is also applied in statutory choice of law rules. One of the earliest examples is contained in Article 9 (3) of the 1969 Benelux Uniform Law, which, however, never entered into force. According to Article 9 (3) a maintenance claim of a child against its father is governed by either the national law of the child or the national law of the father, whichever is the most favourable to the child.[37] Art. 2 of the International Marriages Act [*Wet conflictenrecht huwelijk*] favours the celebration of marriages (*favor matrimonium*), which, for the substantive marriage requirements, refers either to the lex fori, (if one of the future spouses possesses the Dutch nationality or if he/she has his/her habitual residence in the Netherlands), or for each of the future spouses to his/her national law.[38]

Case-law concerning children often focuses on the interest of the child. In cases of custody after divorce where the Dutch child has its habitual residence abroad, the Dutch courts will have jurisdiction and apply Dutch law if this is in the interest of the child.[39] In cases of filiation, the point of departure is the application of the national law of the parent concerned. However, this law is frequently set aside in order to apply the law of the child's habitual residence or the *lex fori*, because the court considers this law to be more closely connected. Still, another reason seems to be that its application serves the interest of the child.[40]

The outline of a draft private international law code of 1992 contains several protective choice of law rules for children. Article 41 of the Draft, for example, contains rules on denial of paternity. Pursuant to section 1, denial of paternity is governed by the same law as the law which is applied on the issue of filiation.[41] However, in case this law does not allow the denial of paternity, section 3 provides an escape which is based on the favour approach. Upon the request of both parents, the court applies another law

37. Kisch, La loi la plus favorable, in: Ius et Lex, Festschrift für Max Gutzwiller 1959, pp. 373-393.

38. This provision is based on Art. 2 of the Convention on Celebration and Recognition of the Validity of Marriages The Hague, 14 March 1978 which also applies the favor approach.

39. Art. 4 of the Convention concerning the powers of authorities and the law applicable in respect of the protection of minors The Hague, 5 October 1961. This provision is also applied by way of analogy in cases where the child does not have its habitual residence in a contracting State.

40. De Boer, Wisselwerking, p. 45.

41. Pursuant to Art. 40, filiation is governed by the joint national law of the parents. If the parents do not have a joint nationality, filiation is governed by the law of the state where they have their joint habitual residence. If they lack a joint habitual residence, filiation is governed by the law of the state where the child has its habitual residence.

(either the law of the place where the child has its habitual residence or the *lex fori*) if it is in the interest of the child.[42]

The draft's conflict of law rules as regards the acknowledgment (*erkenning or aan- vaarding*) of a child (legitimation) are also based on the favour approach (Art. 43 (1). The acknowledgment is governed by the national law of the male who wishes to acknowledge the child. However, if this law does not allow for acknowledgment, the law of the state where the child has its habitual residence is applicable. If this law does not allow for acknowledgment, the national law of the child applies. If acknowledgment by virtue of this law is also impossible, the courts may apply the law of the state where the male has his habitual residence. Similar rules apply to the issue of approval of the mother of the child (Art. 43 (4)

The draft also favors the *favor negotii*-principle, for Article 112 states that a juristic act (*rechtshandeling, Rechtsgeschäft*) is valid as regards form, if parties fulfil the requirements either of the law of the *locus actus* or of the law which governs the juristic act.

6.5 Party autonomy

In the first half of this century, party autonomy was the subject of passionate discussion amongst the legal authors.[43] Although some acknowledged the freedom of the parties to choose the applicable law, several others were opposed to party autonomy as a general principle of private international law, because they felt that parties could not raise themselves above the law by choosing another law. However, in the second half of the century the opinion prevailed that parties are allowed to set aside mandatory provisions of the objectively applicable law if that power is granted by the forum's conflict of law rules.

For a great part of this century, the discussion as regards party autonomy centred around international contract law. Although, in 1924, the Supreme Court had allowed party autonomy,[44] some of the lower courts and the legal authors refused to embrace it as a principle of international contract law,

42. The Draft's conflict of law rules as regards the (annulment of) acknowledgment (*erkenning* or *aanvaarding*) of a child and the approval of the mother of the child are also based on the favor approach (Art. 43). See also Art. 46 with regard to legitimization, which provision codifies the rules of the Convention on the legitimization resulting form marriage, Rome, 10 December 1970.

43. E.g. Josephus Jitta, Internationaal Privaatrecht (Haarlem 1916), pp. 61-62; A.C.J. Mulder, Internationaal Privaatrecht (Arnhem 1947), p. 92.

44. Supreme Court 13 June 1924, *NJ* 1914, p. 859 (Nicolaas).

because party autonomy would allow the parties to place themselves above the law.[45] Others argued that the need for legal certainty in cases where the choice of law rules are unclear or ambiguous was an important justification for allowing parties to choose the applicable law.[46] It was only in 1966 that the Supreme Court put an end to this discussion and unequivocally recognized the parties' freedom to choose the applicable law.

Article 3 of the 1980 Rome Convention concerning the applicable law on contracts also states that a contract is governed by the law chosen by the parties. However, this freedom is restricted in areas where substantive law contains mandatory provisions for the protection of one of the parties, that is in consumer law and employment law (Art. 5 and 6).[47] Here the idea prevails that the freedom to choose the applicable law is justified by reference to the freedom of disposition the parties enjoy in the corresponding substantive law.

As regards tort law, both the lower courts and legal doctrine have for a long time admitted the freedom to choose the applicable law as regards tort law,[48] although it was not before 1993 that the Dutch Supreme Court explicitly agreed.[49] One of the reasons for allowing party autonomy is the acceptance in substantive tort law of the freedom of disposition.[50] Furthermore, Jessurun d'Oliveira advocated that, especially in a bilocal environmental tort, the victim of a tort should be able to choose the applicable law unilaterally. The freedom of choice is based on the notion of *favor laesi*.[51] However, this idea is generally rejected.[52]

Only during the last few decades has party autonomy become a topic of discussion in family matters. In case-law and statutory law, it is increasingly

45. For an overview of authors and courts, see J.E.J.Th. Deelen, Rechtskeuze in het Nederlands internationaal contractenrecht (Amsterdam 1965), p. 82 ff., pp. 221-224.

46. E.g. De Winter, De grenzen van de contractsvrijheid in het internationaal privaatrecht, WPNR (3675-3676) 1940, pp. 245-249 and pp. 257-261; Strikwerda, Inleiding tot het Nederlands internationaal privaatrecht (Groningen 1995), p. 61.

47. Th.M. de Boer, The EEC Contracts Convention and the Dutch Courts, RabelsZ 1990, p. 37; E. Mostermans, Party Autonomy: Why and When?, in: Forty years on: the evolution of postwar private international law in Europe (Deventer 1990), pp. 123-127.

48. C.W. Dubbink, De onrechtmatige daad in het Nederlands internationaal privaatrecht (Den Haag 1947), p. 31.

49. Supreme Court 19 November 1993, NJ 1994, 622 (Cova).

50. E.g. C.W. Dubbink, De onrechtmatige daad in het Nederlandse internationale privaatrecht (Den Haag 1947), pp. 31-32.

51. H.U. Jessurun d'Oliveira, La pollution du Rhin et le droit international privé, in: R. Hueting et.al., Rhine pollution, legal, economic and technical aspects (Zwolle 1978), pp. 92-104. checken

52. It was explicitly rejected by Th.M. de Boer, Beyond lex loci delicti (Kluwer 1987), p. 73.

recognized that party autonomy is admissible in international family law,[53] even though the choice is usually restricted to a limited number of closely connected legal systems. Often, the admission of party autonomy can be explained by the need for conflict of law certainty, especially in the areas of international matrimonial property[54] and international succession.[55]

However, there are also other arguments to allow parties the freedom to choose the applicable law. As regards maintenance, for example, legal writers have argued that party autonomy in private international law is justified because the Dutch domestic rules on maintenance allows parties to make an irrevocable maintenance agreement even if this means that they deviate from statutory rules.[56]

As regards divorce, the International Divorce Act 1981 introduced a restricted freedom of choice in the area of divorce. Parties were allowed to choose between their common national law and the *lex fori*. Especially the possibility to choose the *lex fori* seems to be inspired by the *favor divortii* notion, as Dutch law allows spouses to divorce at will. Thus, if it turns out that the national law of the spouses refuses the divorce, the spouses can always opt for the application of Dutch law, which is possibly more liberal.[57]

6.6 Mandatory rules (voorrangsregels)

Mandatory rules (*règles d'application immédiate*, *voorrangsregels*) are intended to safeguard the application of provisions which promote general socio-economic interests (see section 2.2). However, with regard to the issue

53. For example, maintenance, where it was only recently recognized by the Supreme Court that parties are free to stipulate which law is applicable on maintenance claims (Supreme Court 21 February 1997, *Rechtspraak van de week* 1997, 56).

54. Party autonomy was first recognized in the case of Chelouche/ Van Leer (Supreme Court 10 December 1976, NJ 1977, 275). Furthermore, the Netherlands have recently ratified the Convention on the Law applicable to Matrimonial Property Regimes, The Hague, 14 March 1978, which also allows parties to choose the applicable law (Arts. 3 and 6).

55. For about 25 years, authors have advocated party autonomy because of the need for conflict-of-law-certainty (For an overview M.H. ten Wolde, Internationaal en interregionaal erfrecht in het Koninkrijk der Nederlanden (Deventer 1996), pp. 45-55), but only recently it was unequivocally introduced by the ratification of the Convention on the Law applicable to Succession to the Estates of deceased persons, The Hague, 1 August 1989 (Art. 5), which is applicable by virtue of the International Succession Act of 4 September 1996, *Staatsblad* 1996, 457.

56. Mostermans (1990), p. 137.

57. Mostermans (1990), p. 138; De Boer, De wisselwerking..., p. 66-67.

of material justice in private international law, it should be noted that this doctrine is sometimes applied in order to defend the interests of the weaker party. In 1964, De Winter argued that mandatory rules with an important social function should apply notwithstanding the *lex causae*, among which he included rules on installment sales, employment contracts and commercial agency.[58] In these cases mandatory rules do not only serve general interests, but also provide material justice between the parties. Case-law concerning international commercial agents' contracts may serve as an example where the doctrine of *voorrangsregels* is sometimes applied in order to protect the agent.

6.7 Application of the lex fori

It is sometimes argued that the *lex fori* provides the best results for the parties from a substantive law point of view. For example, Article 1 of the International Divorce Act of 1981 favours divorce (*favor divortii*), because its conflict of law rules lead, most of the time, to the application of Dutch law.[59] Dutch law considers adults capable of deciding whether or not they wish to continue their marriage and therefore has a rather liberal divorce law. Through the combination of conflict of law rules and rules on jurisdiction, foreign law is only applied in a few situations, the most important being where the spouses have a common foreign nationality. In such a case, the Dutch courts only have jurisdiction if one or both of the spouses has his/her domicile in the Netherlands for at least twelve months (Art. 814 Code of Civil Procedure) and foreign law is applied pursuant to Article 1 (1a) of the International Divorce Act, provided the spouses do not have closer social links with the Netherlands.[60]

Furthermore, the ouline of a draft code on private international law of 1992 contains several examples in the area where, under certain circumstances, the *lex fori* is applied, because it is considered to provide the best

58. L.I. de Winter, Dwingend recht bij internationale overeenkomsten, NTIR 1964, pp. 329-365.

59. Before 1981, the conflict-of-law rules were based on the case law of the Supreme Court. Pursuant to a decision of 13 December 1907 (W. 8636), Dutch law always applied on international divorces brought before a Dutch court, because of the relationship between divorce and public policy and morals. Only in the 70's the Supreme Court agreed that divorce could be subject to a law other than Dutch law (Supreme Court 23 February 1973, *NJ* 1973, 366; Supreme Court 27 May 1977, NJ 1977, 600; Supreme Court 9 February 1979, NJ 1979, 546).

60. If they have closer social links with the Netherlands, the joint national law will nevertheless be applied on the joint request of both parties (Art. 1(2)).

substantive solutions, or because it is felt that the underlying policies should be applied.[61]

6.8 Facultative conflict-of-law rules

Pursuant to the theory of facultative conflict of law, the *lex fori* is applied whenever the conflict of law issue is not raised by the parties. The court should not apply conflict of law rules *ex officio*. Facultative conflict of law is not part of Dutch law, but is particularly advocated by De Boer who argues that it serves both procedural efficiency and the quality of the judicial process. According to De Boer, high quality adjudication is put at risk by applying foreign law and this may in the end prove to be detrimental to the interests of the parties.[62]

7 General doctrines of private international law

The present authors are under the impression that Dutch courts occassionally invoke general doctrines of private international law for no other purpose than to substantially strengthen the decision. Also doctrine pays little attention to these questions. In the following this will be briefly demonstrated.

7.1 The doctrine of renvoi

In nearly all Dutch handbooks on private international law the reader is told that it is generally accepted that renvoi is rarely used or, even stronger, is not admissible. There are only a few decisions to be cited here, where renvoi was used as a means to determine the applicable law. However, in the last fifteen years a slight change towards the possibility of also looking at foreign conflicts of law rules in certain areas of law can be determined. This development has been influenced by three international conventions,[63] which

61. For example, Art. 42 (1) concerning the filiation between a mother and her illegitimate child and Art. 43 (5) concerning acknowledgment.
62. Th.M. de Boer, Facultative Choice of Law. The Procedural Status of Choice-of-Law Rules and Foreign Law, *Recueil des Cours* 1996 (vol. 257), pp. 317-324.
63. The Convention of Munich on the Law Applicable to Names of 1980, the Hague Convention on the Law Applicable to Marriage of 1978 and the Hague Convention on the Law Applicable to Succession to the Estate of Deseased Persons of 1989.

were ratified by the Dutch Parliament. These conventions do not provide for the possibility to declare a reservation with respect to the principle of *Gesamtverweisung*, which is formulated in their rules on applicable law respectively. In all the other conventions, ratified by the Netherlands, renvoi is not permitted. The term 'law', in the sense of the law which is designated by the conflict of law rules of the convention, means the law in force in a State other than its choice of law rules. The recent ratification of the Hague Convention on Succession to Estates of 1989 by the Netherlands leads to the acceptance of a renvoi in the second degree. Article 4 of this convention states that if the law applicable to Article 3 is that of a non-contracting State, and if the choice of law rules of that State designate, with respect to the whole or part of the succession, the law of another non-Contracting State which would apply its own law, then the law of that latter State applies. As usual, the Convention will enter into force after the third ratification and today the Netherlands is at the forefront. This means that if Article 3 of the Convention designates a foreign law, this law will always be the law of a non-Contracting State with the consequence that according to Article 4 it must be checked whether the conflict of law rules of this law do not designate still another law. Article 4 will require much thought in practice. In spite of this prediction one can conclude that in Dutch private international law the *Gesamtverweisung* is gradually gaining ground, if we think of comparable rules like Article 1 (1) of the International Names Act and Article 5 (3) of the Internatinonal Marriage Act. However, especially the practioners, like notaries, see no great problems with respect to finding the correct foreign conflict of law rules with regard to succession. And, it can be admitted, the possibility of the testator determining the applicable law will remove the sting from the tail.

In the Netherlands, a distinction is made between negative and positive *ordre public*.[64] As for the negative *ordre public*, the application of a rule of foreign law is refused if such application is manifestly incompatible with the public policy of the forum, that is if it is incompatible with the fundamental principles of justice. The doctrine of the negative *ordre public* is developed in case-law[65] and is also codified in several Treaties which the Netherlands has ratified. Nowadays, the doctrine of negative *ordre public* is seldom applied in case-law and almost always in the area of family law.

64. R.D. Kollewijn, Het beginsel der openbare orde in het internationaal privaatrecht (Den Haag 1917).

65. Supreme Court 13 March 1936, NJ 1936, 280; Supreme Court 13 March 1936, NJ 1936, 281; Supreme Court 11 February 1938, NJ 1938, 787; Supreme Court 28 April 1939, NJ 1939, 895.

The Draft code on private international law codifies the doctrine of the negative *ordre public* in Article 8. However, a singular provision is added in section 2, which states that foreign law can be set aside if it provides a substantive solution which would be contrary to the principles of good faith under the circumstances concerned. However, the proposal is rejected by most of the authors, as this rule would tempt the courts to apply Dutch standards of good faith in a case which is governed by foreign law. As a result, the *ordre public* exception would be used too often.[66]

Where positive *ordre public* is concerned, this doctrine is used for the application of one or more specific provisions of the *lex fori* or of another law. This doctrine is nowadays better known as the doctrine of *voorrangsregels* (mandatory rules, *règles d'application immédiate*)[67] and is extensively discussed in sections 2.2 and 6.6.

7.3 The process of qualification

In Dutch Private International Law the process of qualification is not used as a tool of formulating conflict of law rules. It never has been an accepted method of finding the applicable law and there are no noteworthy recent developments regarding this general doctrine. The main rule is that qualification of a legal relationship takes place accoording to the rules of the *lex fori*.

7.4 The dépeçage phenomenon

Dutch private international law permits *dépeçage*. Although an inaugural speach was delivered in 1994[68] was devoted to the subject this topic has generally received little attention.

66. E.g. H.L.J. Roelvink, Artikel 6:2 BW en het Nederlandse IPR, in: Grensoverschrijdend Privaatrecht (Kluwer 1993), pp. 219-230.
67. Strikwerda, Inleiding tot het Nederlands internationaal privaatrecht (Groningen 1995), pp. 78-79.
68. M.V. Polak, Dépeçage: Een rechtsbegrip dat in het internationaal privaatrecht misstaat?, Leiden 1994.

Conclusion

Whether the theory and practice of private international law has progressed or regressed at the end of the twentieth century depends in our view on the perspective one assumes. Looking at this question from the perspective of the legal practitioner the answer is undoubtedly that private international law has progressed enormously. Considering that at the beginning of the century the lower courts were almost completely devoid of guidance from the legislator (be it on a national or on an international level) and that the highest court in the land was practically out of reach for private international law cases and therefore not in the position it assumed after 1963 to act as "deputy legislator", courts and legal practitioners must often have been entirely at a loss with respect to (advising or deciding) private international law cases. At the end of the century this situation has completely changed. In the first place a great many international conventions have come into being, the bulk of which have been ratified by the Netherlands. Dutch private international law has on this account really become "international". In the second place the Supreme Court has from 1963 onwards progressively acted as a "deputy legislator" with respect to private international law cases. The legislator has also become more and more active. Some matters are now entirely covered by statute, either independently (divorce) or in connection with the coming into force of an international convention. The Ministry of Justice and the Netherlands Standing Government Committee on Private International Law are preparing a fully-fledged detailed codification of the Dutch law of conflicts. It is not to be excluded that in the year 2000 Dutch private international law will be completely codified. From the point of view of legal certainty this is undoubtedly a satisfactory state of affairs.

From a theoretical point of view a different assesment is possible. Although around the year 2000 most private international law issues will probably be covered by rather detailed statutory or treaty provisions, the question remains whether this patchwork of often rather pragmatic solutions (in the case of conventions in many instances based on compromises), that are clearly lacking a conceptual unity can satisfy the academic mind of the private international law scholar. Private international law problems have traditionally provided great intellectual challenges. After completion of the private international law codification the solutions will be more or less "christalized". The development from almost total anarchy to almost total legal certainty that has taken place during the twentieth century also has its price.