

New Dutch Private International Law, a step towards Europeanisation of private international law.

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If a client in a cross border case decides to issue proceedings in the Netherlands it is important to know which private international rules a Dutch court will apply. After all these rules determine which country's law should apply.

As of 1 January 2012 the Dutch have a new book 10 of their Civil Code. This book is a codification and consolidation of existing Dutch international private law. Although little seems to change it has made Dutch international private law much more accessible. In this article I will discuss the content of Book 10 and several general articles and Title 14 of Book 10, on the law applicable to non-contractual obligations. Finally, I will pay attention to Europeanization of Dutch private international Law.

1. Content of Book 10

A number of existing regulations regarding conflict law have been brought together in Book 10.

Book 10 contains fifteen titles:

Title 1: General provisions,

Title 2: Name,

Title 3: Marriage,

Title 4: Registered partnership,

Title 5: Parentage,

Title 6: Adoption,

Title 8: Corporations,

Title 9: Agency,

Title 10: Law of property,

Title 11: Law of trusts,

Title 12: Inheritance law,

Title 13: Contractual obligations,

Title 14: Obligations from a source other than contracts

Title 15: Some provisions with regard to maritime law, the law of inland shipping and aviation law.

The legislation encompasses mainly rules of reference that indicate which national law should apply in private legal relations with cross border or foreign elements. Reference is made to several European treaties and regulations.

The act doesn't contain rules of a procedural nature, such as rules on

jurisdiction and rules relating to recognition and enforcement of judgments. These rules are included in the Dutch Civil Procedure Code.

2. General principles

Title 1 of Book 10 includes a number of general principles (Articles 1-5), and articles that can correct the initial referral result (Articles 6-9).

Articles 10-14 contain a number of important legal concepts such as choice of law and form of legal acts.

Finally, there are some provisions relating to the nationality of a person and the personal status of a refugee (Articles 15-17).

All these rules are common rules which Dutch courts already applied but which are now codified.

Article 1: Priority of regulations of international and community law

For example, in article 1 priority of regulations of international and community law over national rules is included. Although this seems unnecessary, the minister of Justice was of the opinion that it was desirable to codify this principle. It would be useful for lawyers and would provide clarification. Furthermore it is also included in many foreign codifications of private international law.

Article 2: Application ex officio

Article 2 provides that rules of private international law and the law designated by rules should automatically apply. The court may, and thus need not wait until one of the parties invokes applicability of foreign law.

In case a judge considers application of another law, while parties have not indicated possible application of this law during court proceedings, he is obliged to give parties the opportunity to comment thereon.

Article 3: Procedural rules

As indicated Book 10 contains no rules of a procedural nature. Article 3 only provides that Dutch law shall apply to the rules of procedure of legal proceedings before Dutch courts.

Article 5: No renvoi

Renvoi is, briefly stated, the practice in which private international law of the forum that was chosen according to the international private law rules of the other country also applies. This could lead to the result that according to the private international law of the chosen forum the law of another country applies. Under Dutch law there is no place for renvoi.

Article 5 therefore states that the application of the law of a State means the application of the rules of law in that State, with the exception of its private international law.

Article 8: General exception

In article 8 a general exception is included. It offers a correction for cases in which application of a rule of conflict is based on a presumed connection which is only limited and where there is a closer relationship another law.

This involves a situation where, given all the circumstances of the case, apparently the presumed close relationship 'exists only in a very small extent "and" in which another country has a much closer connection.

The law designated by the conflict rule remains inapplicable and instead, the law with which the much closer connection can be used.

This article should be applied by the court *ex officio*. Of course sufficient facts must be stated by parties that lead to application of the exception clause. If the court is considering the use of this clause, and it has not been mentioned during proceedings, parties must be given the opportunity to give their opinion.

The provision only applies to statutory rules and can not set aside regulations of international and community law.

Article 10: Choice of Law

Article 10 provides that where a choice is allowed, this must be made explicitly or otherwise be sufficiently clear.

This rule was developed in international contract law and is for example enshrined in article 3 Rome Convention and Article 3 Rome I. The idea is that parties engaging in international agreements have the freedom to choose which law they want to apply.

In other treaties, such as Rome II (Article 4), the possibility of choice is also included. It is therefore codification of existing law.

Article 14: Limitation and lapse of claims

Article 14 provides that whether a legal claim has prescribed or lapsed shall be determined pursuant the law applicable to the legal relationship giving rise to such a right or legal claim.

This is in accordance with Dutch case law and with prevailing doctrine. (Dutch Supreme Court of 27 May 1983, NJ 1983, 561).

3. Title 14: Obligations other than contracts

Title 14 refers to Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations). This not only includes tort, but also commitments arising from unjust enrichment (including undue payment), case detection and pre-contractual liability. Rome II is universally applicable. This means that any law specified by Rome II

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shall be applied whether or not it is the law of a Member State.

Article 158 Hague Traffic Accidents Convention and Hague Products Liability Convention

The application of Rome II does not affect the application of the Hague Traffic Accidents Convention and the Hague Products Liability Convention verdrag. These conventions take precedence over Rome II (see also article 28 Rome II). This means that for cross border road traffic accidents and cross border product liability cases a Dutch court shall apply these conventions.

Article 159 Rome II to apply to non contractual obligations outside its scope

Before Rome II the Dutch court applied the WCOD (the Act regarding Conflict law of Non Contractual Obligations) in cases other than cross border road traffic accidents and product liability cases. The difference between the rules of the existing Dutch WCOD and Rome II is that the basic rule of WCOD is the *lex loci delicti*, with some exceptions, while the general rule of Rome II is the *lex loci damni* (the country where the damage occurs), with some exceptions.

The substantive scope of Rome II coincides to a large extent with WCOD, with the exception of torts mentioned in Article 1 paragraph 2 of the Regulation including the liability for nuclear accidents and liability for breach of privacy and personality rights, such as defamation and libel. In these cases the Dutch WCOD still applied (unless other conflict law applied).

Because it was deemed undesirable that different regimes exist next to each other, it was decided to apply Rome II *mutatis mutandis* to unlawful acts outside the scope of Rome II, provided that they are regarded as a tort. This means that there is now only one regime for cross-border torts in the Netherlands.

Whether this is a good choice remains to be seen as in the drafting of the Rome II these torts have been excluded with reason.

There is another category of non-contractual obligations from sources other than tort which neither fall under Rome II, nor under the WCOD, namely the non-contractual obligations mentioned in the list of exceptions in Article 1 paragraph 1 Rome II. This category does not fall under the Article 159 of Book 10 BW.

Transitional rules

The transitional law is governed by the Rome II treaty and is applicable

to non contractual obligations from 11 January 2009.

4. Europeanization of private international law

In book 10 reference is made to various European treaties and regulations . The interference of Europe in the Dutch private international law is carried out through enactment of international private law regulations and amendments to existing regulations but also in the form of interpretation of European regulations and rulings by the Court of Justice of the EU (ECJ) on the compatibility of national Private International Law with European law. This European process began after the Treaty of Amsterdam and has been further extended after the entry into force of the Treaty of Lisbon. European interference is a fact and will keep going.

It is possible that within the foreseeable future parts of book 10 refer to a supranational source which has by then been modified or that a particular article appears to be in conflict with European law according to a ruling by the ECJ . One should be aware of this.

Furthermore both Rome I and Rome II contain review clauses and chances are that there will be alterations to the treaties. These might conflict with Dutch Private International Law. For example it might be decided that the Hague treaties will not prevail above Rome II.

5. Conclusion

As of 1 January 2012 the Dutch have a new book 10 added to their Civil Code, in which a large number of already existing legal regimes of conflict law are housed. It thus codifies and consolidates large parts of Dutch private international law.

In order to create one regime the legislature chose to apply Rome II to non contractual obligations which are not covered by this regulation. The question is whether this is a good choice, as these particular obligations were left outside the scope of the treaties for good reasons.

Furthermore one also need to be increasingly aware that European rules may change or that new rules be imposed from Europe. Europeanisation of Private International Law is a fact.