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## **The application of foreign law by judicial and non-judicial authorities. The Netherlands**

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## EUROPEAN PROJECT “THE APPLICATION OF FOREIGN LAW BY JUDICIAL AND NON-JUDICIAL AUTHORITIES” (Project JLS/CJ/2007-1/03)

### The Netherlands

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### Three preliminary remarks:

- This report is based largely on earlier studies of GEEROMS<sup>1</sup> and MOSTERMANS.<sup>2</sup> Of course, where appropriate, additions and updates are included – e.g. additional judgments of the Dutch Supreme Court (“Hoge Raad”)<sup>3</sup>, recent discussions on the Dutch project to codify Private International Law<sup>4</sup>, etc.
- I have taken the liberty to indicate briefly a number of additional issues which may be interesting in this project, as related to the process of Europeanization of PIL, such as:
  - The judgment of the Dutch Supreme Court of 15 September 2006 regarding especially the duty of the judge to take into account, when applying foreign law, the chances his judgment will have to be recognized afterwards in another country.<sup>5</sup>

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<sup>1</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, analyzing inter alia the Dutch legal system.

<sup>2</sup> P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996 and, more recently about facultative choice of law: P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004, p. 393-410 (this article is a translated version of her essay entitled “Bedenkingen tegen een facultatief conflictenrecht”, in R. KOTTING, J.A. PONTIER en L. STRIKWERDA, *Voorkeur voor de lex fori. Symposium ter gelegenheid van het afscheid van Prof. Mr. Th. M. de Boer*, Deventer: Kluwer 2004, p. 37-57).

<sup>3</sup> E.g. HR 15 September 2006, *NJ* 2006/505.

<sup>4</sup> On this project, see infra IV “Proposals for reform”.

<sup>5</sup> HR 15 September 2006, *NJ* 2006/505 and JBPR 2007/27, annotated by S. RUTTEN and commented by VAN DEN EECKHOUT, situating the judgment also in a European context, see V. VAN DEN EECKHOUT, “Toepasselijk recht en te verwachten erkenningsproblemen. Enkele opmerkingen in nationaal en Europees perspectief”, *Migrantenrecht* 2007, p. 193-206. In casu,

- The recent judgment of the European Court of Justice van der Weerd (7 June 2007, C-222/05-C225/05), as related to the earlier Judgment van Schijndel (14 December 1995, C-430/93-C-431/93, interpreted before by de Boer in his plea for facultative choice of law rules<sup>6</sup>).
- Some “curiosities” in Dutch practice I identified in earlier publications.<sup>7</sup> These “curiosities” are noteworthy, as some of them could be related to the questions regarding both *the issue of facultative choice of law and the application of rules by non-judicial authorities*, and in general the question of how judicial and non-judicial authorities treat foreign law *whereas these authorities are confronted with the intricacies of PIL when deciding about residence claims, social security claims and nationality claims of foreigners*. In fact, even though in the Netherlands, the principle of

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the lower court had pronounced divorce by applying Moroccan divorce law. The complaints of the women on an incomprehensible explanation of the Moroccan law, the absence of an investigation into the recognition of a Dutch divorce in Morocco and the conflict with the Dutch public policy when that decision would not be recognized and that there would be an unacceptable surprise decision, could none of them lead to cassation.

<sup>6</sup> DE BOER (Th. M. DE BOER, “Facultative Choice of Law. The Procedural Status of Choice-of-law Rules and Foreign Law”, in *Recueil des Cours* 1996, Vol. 257, p. 362). In reply to a preliminary question of the Dutch Supreme Court on the ex officio application of community law, the Court had hold in the case Van Schijndel that national law determines to what extent national courts have an obligation to apply community law on their own motion in an action concerning rights of which the parties are free to dispose. DE BOER: “It may not be too bold to conclude from these observations that the procedural status of choice-of-law conventions is determined by the principles of civil procedure prevailing in the forum State, and not by international law. Unless the convention contains specific rules on the extent and the manner of its application in civil litigation, international law does not interfere with the principle of procedural freedom of disposition. The Member States may have bound themselves to adhere to the régime of the convention, but that does not mean that they have surrendered their procedural rules and principles. For these reasons, I am convinced that international law does not stand in the way of facultative choice of law.” See on this issue V. VAN DEN EECKHOUT, “Europeanisatie van het ipr: aanleiding tot herleving van discussies over facultatief ipr, of finale doodsteek voor facultatief ipr?”, *NIPR* 2008, afl. 3, p. 258-262. On the case van der Weerd, see e.g. H. SNIJDERS, “Ambtshalve aanvulling van gronden van Europees recht in burgerlijke zaken herijkt”, *WPNR* 2008 (6761), p. 541-552; A.S. HARTKAMP, “Ambtshalve aanvullen van rechtsgronden”, *WPNR* 2008, 677 and H.J. SNIJDERS, *WPNR* 2008, 6779. See also infra, footnote 131.

<sup>7</sup> I already indicated these issues e.g. in V. VAN DEN EECKHOUT, “Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid”, *Nemesis* 2002, p. 75-88; V. VAN DEN EECKHOUT, “Tien jaar Europees internationaal privaatrecht: een verrassende metamorfose van exotisch muurbloempje tot goed geïntegreerde deelenemer in diverse gezelschappen”, *NTER* 2009, p. 289-303; V. VAN DEN EECKHOUT, “Europeanisatie van het ipr: aanleiding tot herleving van discussies over facultatief ipr, of finale doodsteek voor facultatief ipr?”, *NIPR* 2008, afl. 3, p. 258-262; V. VAN DEN EECKHOUT, Internationaal arbeidsrecht gemangeld tussen vrij verkeer van personen, vrij verkeer van diensten, vrijheid van vestiging en non-discriminatie. Enkele aantekeningen vanuit ipr-perspectief bij de uitspraken Viking, Laval, Ruffert en C./Luxemburg, to be consulted on [http://www.etui.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg/2-Articles-in-academic-literature-on-the-judgements/\(offset\)/60](http://www.etui.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg/2-Articles-in-academic-literature-on-the-judgements/(offset)/60), p. 28.

facultative choice of law is not officially accepted and the doctrine of facultative choice of law is even indicated<sup>8</sup> as being negligible<sup>9</sup>, and even though in the Netherlands, the guiding principle is that non-judicial authorities should act in the same way as judicial authorities do, the following “curiosities” can be observed and ask for attention:

- First, the Dutch practice of solving complications about double nationality when applying e.g. the Family Reunion Directive, more specifically when dealing with the question whether rules of PIL regarding double nationality (e.g. practices about preferring or not systematically the “own” nationality, about handling a “test of effectiveness”), should be either applied or ignored in such a context. It appears that the way Dutch authorities deal with this question often leads to the exclusion of residence rights of the persons involved. This issue could be seen in relation to judgments of the Court of Justice such as Micheletti, Devred, Gilly, Garcia Avello etc.<sup>10</sup>
- Secondly, the (old) Dutch practice of judicial and non-judicial authorities of ignoring PIL-rules of *recognition*, when it appears that the way issues of international family law are handled is crucial to solve a dispute about a social security claim (e.g. child allowance rights).<sup>11</sup>

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<sup>8</sup> See P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004, p. 394-395: “In the Netherlands, the doctrine of optional choice of law has never been given much attention in conflicts literature. Under present Dutch law, the courts are bound to apply the choice of law rules, as well as the applicable foreign law, ex officio and most scholars seem to advocate this system. One exception is the Dutch conflicts scholar De Boer, who pronounced himself to be an ardent proponent of an optional choice of law in his Course for the Hague Academy of International Law in 1996 (Th. M. DE BOER, “Facultative Choice of Law. The Procedural Status of Choice-of-law Rules and Foreign Law”, in *Recueil des Cours* 1996, Vol. 257, p. 225-427).” On the ideas of DE BOER concerning judicial and non-judicial authorities, see *infra* under IV.

<sup>9</sup> But probably still drawing more attention than in several other European countries.

<sup>10</sup> See on this issue e.g. Raad van State 29 maart 2006, *JV* 2006/172, obs. C. GROENENDIJK versus Rb. 's Gravenhage 18 oktober 2006, *JV* 2006/462, obs. P. BOELES, Raad van State 31 juli 2006, *JV* 2006/355 noot C. GROENENDIJK. In the Report from the Commission to the European Parliament and the Council of the application of Directive 2003/86/EG on the Right to Family Reunification (9 October 2008, COM(2008)610/F), the issue is ignored. Cfr. also C. GROENENDIJK, “Europese kritiek op toepassing Gezinsherenigingsrichtlijn in Nederland”, *Migrantenrecht* 2008, afl. 7, p. 242.

<sup>11</sup> See on this practice e.g. V. VAN DEN ECKHOUT, “Uw kinderen zijn uw kinderen niet ... in de zin van artikel 7 AKW”, *FJR* 2001, p. 171-176 and on the change of the practice V. VAN DEN ECKHOUT, “Erkenbaarheid van een “erkenning” in sociaalrechtelijke context: redeneren aan de hand van ipr of los van ipr?”, *NIPR* 2006, p. 7-10. See also on old Dutch practices of ignoring the rules of recognition when confronted with a foreign judgment containing a change of age a foreigner, and the implications thereof for social security claims (e.g. retirement claims) and residence claims of the persons involved, H.U. JESSURUN D'OLIVEIRA, “Kromme rectificaties”,

- Finally, the *inconsistent* way in which judicial and non-judicial authorities often independently solve issues of PIL, and/or the *negative* way (seen from the perspective of the persons involved) in which judicial and non-judicial authorities often interact if they do “look” at each others way of dealing with issues of PIL, *especially* when solving a dispute on nationality claims, social security claims or residence claims that is linked with an international family relationship.<sup>12</sup>
- In the report a frequent use is made of “internal references” (by referring to what is explained “infra” or “supra”): several aspects are repeated in varied ways in answering the questions. However, some consecutive questions are also answered in a combined way (e.g. the questions under IV).

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*Ars Aequi* 1983, p. 663-673. See also recently S. RUTTEN, “De gevaren van sluimerende polygame huwelijken”, *Migrantenrecht* 2009, p. 196-201.

<sup>12</sup> See e.g. V. VAN DEN EECKHOUT, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21<sup>ste</sup> eeuw”, *Migrantenrecht* 2002, p. 144-158; V. VAN DEN EECKHOUT, “Internationaal privaatrecht: een discipline in de luwte of in de branding van heftige juridisch-maatschappelijke debatten?”, *FJR* 2005, p. 236-244; V. VAN DEN EECKHOUT, “Communitarization of International Family Law as seen from a Dutch perspective: what is new? A prospective analysis”, in A. NUYTS en N. WATTE, *International civil litigation in Europe and Relations with Third States*, Bruxelles: Bruylant 2005, p. 509-561. Dutch authorities sometimes tend to use PIL rules in such a way as to prevent non-European migrants from claiming residence, social security and nationality. See also P.B. BOELES, obs under Raad van State 9 July 2008, *JV* 2008/448 in a critical comment on the judgment of the Raad van State (on the implications on nationality claims of the refusal of recognition of a foreign judgment in which a date of birth had been changed), analyzed inter alia from a European PIL-perspective.

## I. OVERVIEW

1. **What are the main features of the model adopted in your country with regard to the application of foreign law by judicial authorities? Within your answer please address the following issues:**
  - 1.1. **What is the legal nature of foreign law in your country? Is it considered as 'law'; as fact; or is it hybrid in nature? If it is considered as a fact, is the judge bound by the facts agreed on by the parties?**
  - 1.2. **Is the principle of *iura novit curia* applicable in the case of foreign law?**
  - 1.3. **Do the parties need to plead and prove foreign law?**

### 1.1. The legal nature of foreign law

In the Netherlands *foreign law is regarded as law*, not as fact, as established in case law.<sup>13</sup>

Under present Dutch law, the courts are bound to apply the choice of law rules, as well as the applicable foreign law, ex officio. Article 25 of the Dutch Code of Civil Procedure (former article 48) has been interpreted in that way.<sup>14</sup> The proof of foreign law is a matter for the court. Neither party is required to plead or prove its content.

- This principle also applies in the appellate phase (“Hoger beroep”): the duty to apply choice of law rules and foreign law ex officio is not limited to the first stages of the litigation and continues to exist in the subsequent phase.<sup>15</sup> However, in view of the restraining (“devolutieve”) effect the appeal has towards the appellate judge, this principle has to be qualified: where the parties or the judge did discuss the applicable law at trial, and parties subsequently failed to contest this in appeal, the appellate judge has no power, apart from public order matters, to raise the issue of the applicable foreign law on his own motion.<sup>16</sup> If neither the parties nor the judge invoked

<sup>13</sup> See e.g. cfr. Hr 4 June 1915, *NJ* 1915, p. 865; HR 20 March 1931, *NJ* 1931, p. 890; HR 9 November 1990, *NJ* 1992, 212; HR 22 February 2002, *NJ* 2003, 483). See also e.g. P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004, p. 398.

<sup>14</sup> The judge’s duty to apply foreign law on his own motion finds its origin in the landmark case of Ehlers & Loewenthal v. van Leeuwen, decided by the Supreme Court in 1915 (HR 4 June 1915, *NJ* 1915, 865, 870 (Ehlers & Loewenthal)). To sustain the claim Article 48 of the Dutch Code of Civil Procedure (presently numbered 25) was invoked according to which the judge has a general ex officio duty to supply legal grounds whether or not advanced by the parties (See also S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 50).

<sup>15</sup> See e.g. HR 23 February 2001, *NJ* 2001, 3229.

<sup>16</sup> See e.g. HR 31 May 2002, HR 4 April 1986, *NJ* 1987, 678.

the application of foreign law at trial, the appellate judge is still under a duty to apply foreign law on his own motion.<sup>17</sup>

- The same principle also applies in summary proceedings (“kort geding”): even in summary proceedings the courts are under an obligation to rule of their own motion that foreign law is to be applied whenever this is indicated by the relevant choice of law rule.<sup>18</sup> However, in case-law, a trend can be observed<sup>19</sup> to apply the *lex fori* because ascertainment of foreign law is found to be too complicated.

- Regarding the Supreme Court, the principle does *not* apply.<sup>20</sup>

In the Netherlands foreign law is regarded as law, *but*

- o Contrary to domestic law, foreign law falls outside the power of examination of the Dutch highest court: under Article 79(1)(b) of the Judicial Organization Act, errors in the application of foreign law by the lower courts are not subject to review by the Supreme Court: review does not extend to application of foreign law.<sup>21</sup> Here is the famous “paradox” of art. 25 Rv and Art. 79 RO<sup>22</sup>. Foreign law in this respect falls between shore and ship, between fact and law.

<sup>17</sup> See e.g. HR 23 February 2001, *NJ* 2001, 3229, 3243; HR 22 February 1991, *NJ*, 376; HR 8 April 1927, *NJ* 1927, 1110, 1111. See also S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 49, P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 179 and L. Th.L.G. PELLIS, “P.M.M. Mostermans, Het processuele conflictenrecht”, *RM Themis* 1998, p. 276.

<sup>18</sup> See e.g. X.E. KRAMER, *Het kort geding in internationaal perspectief – een Rechtsvergelijkende studie naar de voorlopige voorziening in het internationaal privaatrecht*, Recht en Praktijk nr. 116, Deventer: Kluwer 2000, p. 313-314; P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004, p. 397, see also the “Advies omtrent een voorstel voor een wettelijke regeling houdende Algemene Bepalingen van de Wet op het internationaal privaatrecht” nr. 29 (on this document, see *infra*, footnote 121).

<sup>19</sup> As noted e.g. by the Dutch Standing Committee of PIL in the “Advies omtrent een voorstel voor een wettelijke regeling houdende Algemene Bepalingen van de Wet op het internationaal privaatrecht”, nr. 29. See also *infra*, footnote 124.

<sup>20</sup> HR 23 Februari 2001, *NJ* 2001, 3229, 3243.

<sup>21</sup> What the Supreme Court found on this, is that the Court allows an *indirect* review: the Supreme Court can review on the basis of “incomprehensible reasoning”, and thus refer back a case to the lower judge. Cfr. *infra* under III. In a remarkable decision (HR 27 March 1997, *NJ* 1998, 568), the Supreme Court handled the case itself, explaining itself the meaning of the foreign – German – law. Below (*infra* footnote 60), I will discuss the problems as put forward by PELLIS (L.Th. L. G. PELLIS, “Door selectie behoud van kwaliteit”, *WPNR* 1998, 6325, p. 537-542) in the – rare – case – that the Supreme Court handles a case himself, without referring the case to a lower judge.

<sup>22</sup> See also on this paradox e.g. E.N. FROHN, “Toepassing van buitenlands recht door de Nederlandse jurist”, in P. VLAS, *Globalisering van het IPR in de 21<sup>e</sup> eeuw*, Deventer: Kluwer 1999, p. 76-77; S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 368 and L.Th. L. G. PELLIS, “Door selectie behoud van kwaliteit”, *WPNR* 1998, 6325, p. 538.

- Another point is that, although the lower judges have the duty to ascertain foreign law, the courts often make use of means that are normally used for discovering facts.<sup>23</sup> For instance, they ask the parties for assistance, consult experts, use the European Convention on Information on Foreign Law, or they consult the Hague Internationaal Juridisch Instituut.<sup>24</sup> Moreover<sup>25</sup>, foreign law differs from domestic law because the judge may return to a “subsidiary” law if the foreign law appears to be inaccessible, whereas, by application of national law the judge must continue this investigation until the specific item is known.

From the foregoing it appears that foreign law has both characteristics of law *and* fact.<sup>26</sup> Therefore, according to some authors, foreign law should not be seen as law, but as “between” law and fact<sup>27</sup>, or as a kind of “tertium”.<sup>28</sup>

## 1.2. Iura novit curia

As is clear from the foregoing, in the Netherlands the principle of *iura novit curia* is *applicable* in the case of foreign law.<sup>29</sup>

According to the Dutch Supreme Court, it is for the judge<sup>30</sup> to ascertain foreign law.

*However*, the principle “*iura novit curia*” is sometimes said to be “not fully” applicable, having a “lower status” when applying foreign law than domestic law,<sup>31</sup> e.g.:

<sup>23</sup> See also S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 101 and p. 154 and P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004, p. 398.

<sup>24</sup> This institution was established in 1918 to advise the courts, the Bar and public notaries on questions of Dutch private international law and of foreign private (international) law.

<sup>25</sup> See also e.g. P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, 176-177. See also *infra* under 14.

<sup>26</sup> See e.g. MOSTERMANS (P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, enumerating several characteristics of foreign law as “law” and “fact”, but still regarding foreign law as “law”), see also e.g. H.J. SNIJDERS, obs. under HR 19 December 1997, *NJ* 1999, 399.

<sup>27</sup> See L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2008, nr. 35.

<sup>28</sup> See H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 106 and 109.

<sup>29</sup> See the interpretation of article 25 Rv. On the resemblance c.q. the difference between the principle laid down in article 25 Rv. on the one hand, the principle “*jus curia novit*” on the other hand, see H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 109.

<sup>30</sup> Including summary proceedings and appellate proceedings and regarding not only foreign law, but also rules of PIL themselves (see also *supra* under 1.1.).

- as explained above, since the landmark cases of *Zwitsers Kind I* and *Ehlers & Loewenthal* *parties are no longer required to prove the foreign law; but the parties stay in the picture*. They are expected to help in the task of ascertaining the foreign law. It is widely accepted that courts are allowed to request parties to provide some information on foreign law.<sup>32</sup> As will be mentioned below, the Netherlands has established domestic academic institutions with the specific task of providing information on foreign law, and which are in this regard very helpful; but despite these special institutes, the *parties* are not discharged from helping in the process of ascertaining the foreign law. In fact, parties are required to co-operate with the judge in this regard, and in most cases automatically present a legal opinion obtained from an academic institute. Parties or third persons/institutions can assist and do assist<sup>33</sup> the courts in their task, although declarations given by the parties or third persons/institutions are *not binding* on the courts.

Indeed, Dutch courts are required to assess critically information received on foreign law: a Dutch judge is free to evaluate the information on foreign law provided to him by parties or by expert witnesses; the judge is actually required to approach this

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<sup>31</sup> See e.g. the quotation in HR 15 September 2006, *NJ* 2006/505; H.J. SNIJDERS, obs. under HR 19 December 1997, *NJ* 1999, 399; HR 17 December 1989, *NJ* 1990, 427, obs. JCS, with an extensive advisory opinion of advocate-general STRIKWERDA.

<sup>32</sup> Yet, the judge cannot *order* parties to do so, for the final task of ascertaining foreign law remains one of his responsibilities. See also e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 101 and the critical comments as put forward by H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 100 - especially on the issue that only *one* party is ordered to provide information, and P.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 62-63). Following from this, if the parties fail to comply with this request, the judge cannot reject the claim for their failure.

<sup>33</sup> According to GEEROMS (S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 99-100) Dutch practice reveals that the judge *usually* delegates the ascertainment of foreign law to the parties. "When the parties agree on the substance of foreign law, the judge very often does not even engage in the ascertainment of foreign law and accepts the investigation of parties" and "There are very few reported judgments from which one can deduce that the lower court ascertained foreign law independently of the parties." See also E.N. FROHN, "Toepassing van buitenlands recht door de Nederlandse jurist", in P. VLAS, *Globalisering van het IPR in de 21<sup>e</sup> eeuw*, Deventer: Kluwer 1999. But JESSURUN D'OLIVEIRA (H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 103), warns for a distorted picture if one only looks at the published cases, because case-law is only published in a selective way, giving too much attention to the "atypical" cases: according to JESSURUN D'OLIVEIRA, in the vast majority of cases the court successfully identifies the content of foreign law in an independent way.

information in a critical way. In practice, however, it appears that the courts accept the information of the parties where these agree: where the parties agree on the substance of foreign law, the judge will usually take their presentation of foreign law for granted.<sup>34</sup>

- In doctrine, it is said that the duty of the judge to apply foreign law *ex officio* in all matters is *not absolute in that*,
  - first, the courts have to respect at the same time *party autonomy in some matters* and,
  - secondly, the right of defense in general should be respected:<sup>35</sup> if the judge decides to intervene *ex officio*, he should apply the foreign law with respect for the right of defense; the judge must hear the parties and give them a chance, if necessary, to set out their legal position, as well as the underlying fact pattern, with legal arguments and/or facts material for the new applicable law. Thus, through the respect for the right of defense, parties have input in the application of foreign law.<sup>36</sup> According to the doctrine<sup>37</sup>, Dutch lower courts seem to afford great respect to the right of defense; therefore, the risk that the judge may surprise parties by applying foreign law, of which they had no knowledge, would be very small in particular.<sup>38</sup>
  - Moreover, finally, courts are not obliged to apply the foreign law when the result would be the same as with the

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<sup>34</sup> See e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 178 and 215. According to GEEROMS (p. 178), when a court-appointed expert investigates foreign law or the task is delegated to specialized authorities, such as the International Legal Institute, “less room” is left for the judge to assess independently the information on foreign law.

<sup>35</sup> See also e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 215.

<sup>36</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 72.

<sup>37</sup> See S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 103. GEEROMS: “Either the judge makes no effort at all to ascertain foreign law, or he requests the parties to provide information on the applicable law. (...) Moreover, parties often, without being requested, present legal arguments on foreign law in the same way that they would argue in court a dispute under domestic law. The judge is also required to ensure that one party does not take the other by surprise. When parties apparently disagree on the application of foreign law, this is often because one party submitted arguments based on foreign law whereas the other relied on domestic law. When the judge decides that foreign law governs the issue, he should still give the opposing party the chance to submit his version of the foreign law.”

<sup>38</sup> See *infra* under III on this issue, as related to the power of the Supreme Court to review the application of foreign law. See also, in this context, *infra* on HR 15 September 2006, NJ 2006/505 en JBPR 2007/27, obs. S. RUTTEN.

application of the domestic law (de “Antikiesregel” or “non-choice rule”).<sup>39</sup>

- *Parties have their say about the introduction of foreign law through the presentation of the facts of their case:* the Dutch judge is not allowed to apply foreign law if the facts presented by the parties do not show a foreign element. Parties cannot blame the court for failure to apply foreign law if the facts of their case insufficiently indicate the relevance of foreign law.<sup>40</sup>

### 1.3. Do the parties need to plead and prove foreign law?

As explained above, parties do *not* need to plead and prove foreign law. If parties do not provide information on foreign law, the judge has to ascertain the content of foreign law in another way. Parties *can* assist the judge in his task, but if they do so, the judge is not bound by the information provided by them.

However, the nuances and remarks as put forward above should be taken into account, e.g.

- parties have their say about the introduction of foreign law through the presentation of the facts of their case (facts with or without “international” elements)

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<sup>39</sup> See e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p.52-53 and 215; H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971. When a Dutch judge finds that the relevant foreign rules are similar to the Dutch rules and would achieve the same results, he is released from choosing explicitly which law he prefers to apply. See e.g. HR 19 May 1967, *NJ* 1968, 102, 104-5; Hof 's-Hertogenbosch, 8 March 1993, *NIPR* 1993, 274. De “antikiesregel” is seen as an exception available under Dutch law to the general duty of applying foreign law *ex officio*: the Dutch judge appears to be not obliged in all circumstances to apply foreign law to the facts of the case, even if transnational elements invite him to do so. But see P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 40 for some critical comments on the “non-choice rule”, whereas she argues that, in many cases, the application of the non-choice rule is not effective seen from a procedural perspective: the process of the non-choice rule requires a comparative examination of various legal systems, mostly the Dutch legal system and at least one foreign system; in this examination, the court must not rely only on the claims of parties that there are no relevant differences between the Dutch and foreign system. The court must ascertain the content of the foreign law *ex officio*. After a thorough examination, it will often become clear that the legal systems lead to different results. According to MOSTERMANS, application of the non-choice rule is more appropriate in summary proceedings: as the judge doesn't need to find out the case to the bottom in summary proceedings, *in those proceedings*, the judge could rather assume that there are no substantial differences. According to MOSTERMANS, the non-choice rule is more often applied in summary proceedings.

<sup>40</sup> See e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 49-50. See also H.J. SNIJDERS, noot bij HR 19 December 1997, *NJ* 1999, 399.

- when applying foreign law, the judge always has to respect the rights of defense. As the power to review the application of foreign law of the Supreme Court in this respect shows, the attitude of the parties appears to be also very important in this respect: important is what parties have argued about the content of foreign law and how the court has included those statements in its decision: the more the parties argue about the foreign rules, the greater the burden for the judge, especially when his opinion differs from that of the parties.<sup>41</sup>

**2. What are the main features of the model adopted in your country with regard to the application of foreign law by non-judicial authorities?**

**Within your answer please address the following issues:**

- 2.1. What kind of non-judicial authorities apply foreign law**
- 2.2. What is the legal nature of foreign law in your country in the case of its application by non-judicial authorities? Is foreign law considered as 'law'; as fact; or is it hybrid in nature? If it is considered as a fact, is the non-judicial authority bound by the facts agreed on by the parties?**
- 2.3. Is the principle of *iura novit curia* applicable to foreign law in these cases?**
- 2.4. Do the parties need to plead and prove foreign law?**

In the Netherlands, choice-of-law issues may certainly come up in other settings than the courtroom, and other authorities than the judiciary may certainly be confronted with the question whether or not to apply their own law or foreign law: the question as to which law is applicable can arise in judicial proceedings as well as in extrajudicial proceedings.<sup>42</sup>

Examples<sup>43</sup> are the registrar of births, deaths and marriages, the notary public, the Immigration and Naturalization Office and the tax inspector.

<sup>41</sup> Cfr. on this issue the extensive advisory opinion of advocate-general STRIKWERDA with HR 17 March 1987, NJ 1990, 427, *infra*. See also e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 353.

<sup>42</sup> See also P.M.M. MOSTERMANS, "Optional (facultative) choice of law? Reflections from a Dutch perspective", *NILR* 2004, p. 395-396.

<sup>43</sup> See the many examples given by JORDENS-COTRAN (L. JORDENS-COTRAN, "Ambtenaar burgerlijke stand worstelt met Marokkaans familierecht" *Staatscourant* 29 mei 2007), E. GUBBELS in answering question 2 of the "short questionnaire" –mentioning e.g. the examples of recognition of a child, celebration of marriages, registration of "registered partnerships" – as well as in answering question 6, whereas he also mentions the issue (and difficulty) of the application of foreign law when the registrar has to solve "*preliminary questions*"; and DE BOER (Th.M. DE BOER, "Facultative Choice of Law in Extrajudicial Proceedings", in J.-F. GERKENS a.o., *Mélanges Fritz Sturm, offerts par ses collègues et ses amis à l'occasion de son soixante-dixième anniversaire*, Vol. II Liège, Editions Juridiques de L'Université de Liège 1999, p. 1409-1424). De BOER means by "non-judicial authorities" state-appointed officers of the law whose primary function is not an adjudicatory one. He narrows the subject of his analysis to those officials who

The same principles as explained above are valid for judicial *and* non-judicial authorities.

However, some “curiosities” in Dutch *practice* are noteworthy, namely the practices I already mentioned in the preliminary remarks concerning the *ignorance* of PIL-rules of recognition by some non-judicial authorities, concerning the *independent* way in which judicial and non-judicial authorities sometimes solve issues of PIL, sometimes leading to *inconsistent* ways of solving issues of PIL, and the *negative* way in which they sometimes interact.

3. **What are the legal rules on which your answers are based with regard to both judicial and non-judicial authorities?**  
**Within your answer please address the following issues:**
  - 3.1. **Is there one general provision or various different provisions regarding the application of foreign law in the legal system of your country?**
  - 3.2. **Please detail the relevant provisions.**

The main legal rules are article 25 Rv and article 79 Wet RO.

\* *Article 25 Rv* (formerly 48<sup>44</sup>) codifies the court’s duty to apply the law of its own motion:

*“The judge supplies the grounds of law ex officio”*<sup>45</sup>

Neither the wording of article 25, nor the correspondent provision in the explanatory memorandum clarifies what exactly “legal grounds” means.

The judge’s duty to apply foreign law on his own motion finds its origin in the landmark case of Ehlers & Loewenthal v. van Leeuwen, decided by the Supreme Court in 1915.<sup>46</sup> In this case, article 48 of the Dutch Code of Civil Procedure according to which the judge has a general ex officio duty to supply legal grounds whether or not advanced by the parties, was invoked to sustain the claim. The Supreme Court imposed a duty upon the lower court to apply German law on its own motion to decide the validity of a bill of exchange drawn in Germany.

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deal with private law issues on a day-to-day basis, and in that capacity are most likely to encounter problems of private international law. Out of this group, he has selected three categories: the state-appointed notary (e.g. concerning ante nuptial agreements and wills), the keeper of official records (registrar), and the tax inspector.

<sup>44</sup> On the occasion of the revision of the Dutch Code of Civil Procedure in 2002 (Act of 6 December 2001, *Stb.* 2001, 580), article 48 was renumbered into article 25, without substantive change.

<sup>45</sup> In Dutch the article reads as follows: “*De rechter vult ambtshalve de rechtsgronden aan.*”

<sup>46</sup> HR 4 June 1915, Ehlers & Loewenthal, *NJ* 1915, p. 865.

The 1915 Ehlers & Loewenthal's ruling reversed the *previous* position, according to which the parties had to invoke foreign law if they wished that it would govern their case.<sup>47</sup> In 1927<sup>48</sup> the Supreme Court confirmed the view that the judge has to apply foreign law on his own motion. Since then the Supreme Court has confirmed this principle several times. The doctrine of ex officio application of and ascertainment of the content of the applicable foreign law, as set out by the Supreme Court in these early years, remains the rule.

\* *Article 79 Wet RO* (formerly 99<sup>49</sup>) sums up the grounds for cassation: a breach of procedural law or a breach of substantive law:

*““Grounds for cassation”*

*The Supreme Court quashes acts, appeal judgments, judgments and orders*

*(1) (...)*

*(2) because of breach of the law, with the exception of the law of foreign states.*<sup>50</sup>

\* On the implementation in the Dutch Code of Civil Procedure of the London Convention, see below, under 4.

4. **Is your country party to any international convention –either bilateral or multilateral- on the proof and application of foreign law?**  
**Within your answer please address the following issues:**
  - 4.1. **Which international conventions?**
  - 4.2. **Are there any problems concerning the consistency of approach between these conventions?**
  - 4.3. **If your country is party to any of these conventions, what is the practical relevance of these international instruments in the normal legal practice of your country? Is it the same in the case of judicial and non-judicial authorities?**
  - 4.4. **Is there any relevant or significant case law authority with regard to the application of these international conventions in**

<sup>47</sup> See H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 79; S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 51 and 367-368 and P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 31: In the Netherlands in the nineteenth century the foreign law was usually treated as a “fact”. Until the nineteenth century, the Supreme Court considered foreign law as a question of fact (HR 21 april 1876). In the early twentieth century, specifically in a decision of 1903, it began to recognize foreign law as a question of law (HR 20 February 1903). A few years later, in the 1915 landmark case of Ehlers and Loewenthal v. Van Leeuwen, the Supreme Court explained for the first time the effects of the law approach to foreign law at the trial level (HR 4 June 1916, *NJ* 1915, 865).

<sup>48</sup> HR 8 April 1927, *NJ* 1927, 1110, 1111. See also HR 20 March 1931, *NJ* 1931, 890, 891 (the *Zwitsers Kind I* case).

<sup>49</sup> See *infra* under III on the change of the article.

<sup>50</sup> In Dutch the article reads as follows: ““Cassatiegronden”. De Hoge Raad vernietigt handelingen, arresten, vonnissen en beschikkingen: 1 (...) 2 wegens schending van het recht met uitzondering van het recht van vreemde staten).”

### your country?

The Dutch judge may rely on the London Convention on Information on Foreign Law of 1968 to obtain information on the law of the respective foreign legal system. The European Convention on Information on Foreign Law of 7 June 1968 was concluded in London under the auspices of the Council of Europe.<sup>51</sup> The London Convention entered into force in the Netherlands on 2 March 1977.<sup>52</sup> The Convention is incorporated into the Dutch Code of Civil Procedure<sup>53</sup>.

#### Remarks/problems:

- Whether or not the Dutch judge prefers to rely on the London Convention is within his discretion.<sup>54</sup>
- If the judge wishes to rely on the London Convention, he must address his question on foreign law to the Department of Private Law within the Ministry of Justice, which operates not only as a transmitting but also as a receiving organ. In fact, the Department of Private Law delegates incoming requests on Dutch law to the International Legal Institute in The Hague. Until the 1980s it did the same with outgoing requests on foreign law.
- If the judge decides to rely on the London Convention, he is obliged to involve the parties in the wording of the question to be addressed to the foreign authority. The court has to formulate the request for information in consultation with the parties and, upon receipt of the answers, allow them to give their opinion.<sup>55</sup> Moreover, the London Convention clearly states in its Article 8 that no information obtained through the Convention is binding upon the judicial authorities<sup>56</sup>. In the doctrine, the fact that parties are assured of being involved in the formulation of the question on foreign law – which might be of decisive importance for the outcome of the case – is seen as a positive characteristic of the Convention and an advantage compared to the International Legal Institute in The Hague.<sup>57</sup>
- But the convention is called a “problem child”, “half-dead”, because it is only sparingly used.<sup>58</sup> Dutch judges hardly use the Convention to obtain

<sup>51</sup> See also the Protocol, signed on 15 March 1978.

<sup>52</sup> Convention of 7 June 1968, Trb. 1968, nr. 142.

<sup>53</sup> See Art. 67 and 68 Rv (previously Art. 150 Rv. And 151 Rv.).

<sup>54</sup> See also HR 9 August 1985, NJ 1985, 2677, 2678, Rb. Amsterdam 31 October 1990, NIPR 1991, nr. 222 and Rb. Zwolle 8 July 1998, NIPR 1999, nr. 263. About the costs, see *infra*, footnote 99.

<sup>55</sup> Cfr. Art. 67 and 68 Dutch Code of Civil Procedure.

<sup>56</sup> GEEROMS (S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 175) adds “What applies to the information obtained through the London Convention naturally applies also to information obtained through other channels or means”. See already *supra* (under 1.2) and *infra* (under 12) on the non-binding character of the information provided by parties/third parties.

<sup>57</sup> See e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 10.

<sup>58</sup> See H.U. JESSURUN D'OLIVEIRA, ‘Het Verdrag van Londen (1968): Een halfdode letter’, in G.E. SCHMIDT, M. SUMAMPOUW e.a. (ed.) *Het NIPR geannoteerd. Annotaties opgedragen aan*

information on foreign law. In a period of three years, from 1993-1996, the Ministry of Justice received only five outgoing requests. As a court indicated in a judgment of 1990<sup>59</sup>, the lack of popularity of the Convention among the Dutch judiciary might have its cause in its time-consuming procedure.

- Another point of attention, put forward in the doctrine<sup>60</sup> is related to the judgment of the Supreme Court of 21 March 1997.<sup>61</sup> In this case, the Supreme Court reviewed – in an indirect way<sup>62</sup> – the application of foreign law by the lower Judge *without* referring the case afterwards to a lower judge: as *the Supreme Court* decided about the content of foreign law, but doesn't have the possibilities lower judges have to ascertain foreign law *such as* reliance on the London Convention, this way of handling by the Supreme Court was criticized, especially from the perspective of respect of article 6 ECHR (the principle of “audi alteram partem”).

Apart from the London Convention, the Netherlands also has concluded several bilateral agreements with foreign countries, in order to facilitate the exchange of information on foreign law.<sup>63</sup>

## **5. How is foreign law pleaded and proved before judicial and non-judicial authorities in your country?**

### **5.1. Has this always been the same or has this practice changed throughout history?**

#### **5.1.1. Please address the previous point in relation to judicial authorities.**

#### **5.1.2. Please address the previous point in relation to non-judicial authorities.**

### **5.2. Is there any relevant case law authority that has been particularly significant in relation to this issue or that has particularly affected the development of this issue in your country?**

#### **5.2.1. Please address the previous point in relation to judicial**

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*Dr. Mathilda Sumampouw*, Den Haag: TMC Asser Instituut 1996, p. 13-19; S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 156-157; E.N. FROHN, “Toepassing van buitenlands recht door de Nederlandse jurist”, in P. VLAS, *Globalisering van het IPR in de 21<sup>e</sup> eeuw*, Deventer: Kluwer 1999. It appears that simple questions from elsewhere are answered by the Ministry itself, while the International Legal Institute of the Hague is engaged for more difficult issues; this institute provides its information within one or two months.

<sup>59</sup> Rb. Amsterdam, 31 October 1990, *NIPR* 1991, 309, 311.

<sup>60</sup> L. Th. G. PELLIS, “Door selectie behoud van kwaliteit”, *WPNR* 1998, 6325, p. 537-542.

<sup>61</sup> HR 21 March 1997, *NJ* 1998/568.

<sup>62</sup> On the possibilities to review the application of foreign law by the Supreme Court, see *infra* under III.

<sup>63</sup> E.N. FROHN, “Toepassing van buitenlands recht door de Nederlandse jurist”, in P. VLAS, *Globalisering van het IPR in de 21<sup>e</sup> eeuw*, Deventer: Kluwer 1999 and S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 157.

**authorities.**

**5.2.2. Please address the previous point in relation to non-judicial authorities.**

As explained above (under 3), until the nineteenth century, the Supreme Court considered foreign law as a question of fact. In the early twentieth century, specifically in a decision of 1903, it began to recognize foreign law as a question of law. In the 1915 landmark case of Ehlers and Loewenthal v. Van Leeuwen, the Supreme Court explained for the first time the effects of the law approach to foreign law at the trial: the courts are bound to apply the foreign law *ex officio*.<sup>64</sup> The Supreme Court has confirmed this principle several times.<sup>65</sup>

Above, I also already mentioned the “non-choice rule” (*antiekiesregel*), often seen as a kind of exception to the principle that the judge should apply foreign law on his own motion.<sup>66</sup>

## **II. How the system works**

### **(6 and 8, cfr. 7 and 9)**

- 6. If foreign law needs to be pleaded by the parties:**
  - 6.1. Who has to plead it?**
  - 6.2. What does this pleading consists of?**
    - 6.2.1. Please answer the previous point with regard to judicial authorities.**
    - 6.2.2. Please answer the previous point with regard to non-judicial authorities.**
  - 6.3. How and before whom does it need to be done?**
    - 6.3.1. In the case of the pleading of foreign law in judicial proceedings: when does this have to be done, i.e. at which stage of the proceedings?**
    - 6.3.2. What is the situation in the case of the pleading foreign law in non-judicial proceedings?**
  - 6.4. What effect does this pleading of foreign law have, if any?**
- 7. If foreign law does not need to be pleaded by the parties themselves, in what way is foreign law considered pleaded in your country?**
  - 7.1. Before judicial authorities.**
  - 7.2. Before non-judicial authorities.**
- 8. If foreign law needs to be proved by the parties:**

<sup>64</sup> Cfr. *supra*, footnote 39. See also e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 367-368.

<sup>65</sup> Cfr. e.g. also HR 9 November 1990, *NJ* 1992, 212. The judgment of the Supreme Court of 19 May 1967 (*NJ* 1968, 35) is seen as a rather weird exception to this, see e.g. P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 58, footnote 157.

<sup>66</sup> Cfr. *Supra*, footnote 39.

- 8.1. **Who has to prove it?**
  - 8.2. **When does it have to be proved?**
  - 8.3. **Which aspects of the foreign law need to be proved?**
    - 8.3.1. **Before judicial authorities.**
    - 8.3.2. **Before non-judicial authorities.**
  - 8.4. **How does proof of foreign law take place in practice?:**
    - 8.4.1. **Before judicial authorities.**
    - 8.4.2. **Before non-judicial authorities.**
9. **If foreign law does not need to be proved by the parties themselves, in what way is foreign law considered proved in your country?**
- 9.1. **Before judicial authorities.**
  - 9.2. **Before non-judicial authorities.**

As already explained, neither party is required to plead or prove the content of foreign law in the event of a defended action (“bij tegenspraak”). The proof of foreign law is a matter for the court. Courts must determine and apply foreign law *ex officio*.

However

- although the courts have the duty to ascertain foreign law, the courts often make use of means which are normally used for discovering the facts: for instance, they ask the parties for assistance, consult experts, use the European Convention on Information on Foreign Law, or they consult the Hague Institute. The judge is free to choose his sources to obtain information.<sup>67</sup>
- In doctrine<sup>68</sup>, it is said that the Dutch Judge *usually* delegates the ascertainment of foreign law to the parties: to comply with his duty, Dutch lower courts appear to co-operate often with parties and request information from them.

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<sup>67</sup> HR 28 June 1937, *NJ* 1938, 1. The power of judges in the Netherlands to choose the means of obtaining necessary information on foreign law came up as a complementary power associated with the authority to ascertain foreign law.

<sup>68</sup> See e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 99, “There are very few reported judgments from which one can deduce that the lower court ascertained foreign law independently of the parties”. See also already *supra* (footnote 33, with the remark of JESSURUN D’OLIVEIRA about the distorted picture created by the selective publication of judgments). According to GEEROMS (p. 53), “Case-law shows that Dutch courts usually use the means “Compulsory attendance of the parties”, *undermining* to a certain extent the rule that it is a duty of the judge to ascertain foreign law.” Also, according to GEEROMS, “Other common practices include appointing an expert and consulting academics from Dutch universities or institutes specializing in foreign law and international law, such as the International Legal Institute at The Hague. As already explained above (*supra* under 4), Dutch judges can also obtain information from the European Convention on Information on Foreign Law, but they do not seem to rely on it frequently.

- Dutch judges can *request* information from the parties, but they cannot *order* parties to provide sufficient information on foreign law.<sup>69</sup>
- Parties and third persons/institutions can assist the courts in their task, but declarations given by the parties or third persons are *not binding on the courts*<sup>70</sup>, as I already mentioned above<sup>71</sup>: courts are allowed to seek advice from the parties, but remain responsible for the ascertainment of the relevant foreign law. Courts are not bound by the opinion or interpretation of parties regarding the content of foreign law.<sup>72</sup> The judge is always free to evaluate the information on foreign law provided to him by parties or by expert witnesses: the Judge is actually required to approach this information in a critical way.<sup>73</sup> In *practice*, however, the situation seems to be the following<sup>74</sup>: when the parties agree on the substance of foreign law, the judge will usually take their presentation of foreign law for granted; when the parties agree on the substance of foreign law, the judge very often does not even engage in the ascertainment of foreign law and accepts the investigation of the parties.<sup>75</sup>
- Parties have their say about the introduction of foreign law through the presentation of the facts of their case. Parties cannot blame the court for failure to apply foreign law if the facts of their case insufficiently indicate the relevance of foreign law.<sup>76</sup>
- The possibility to “blame” the court for “wrong” application of foreign law is related to the principle of respect for the right of defense.<sup>77</sup>

<sup>69</sup> See already supra, footnote 32. See the critical comments on this issue - why this is not an appropriate mean - of H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 100 and P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 62-63.

<sup>70</sup> See e.g. P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 176-177 and P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004, p. 398.

<sup>71</sup> Cfr. supra, under 1.2.

<sup>72</sup> See also L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2008, p. 35-38, citing Rb. Rotterdam 10 October 1996, *NIPR* 1997, nr. 108; Rb. Rotterdam 13 February 1997, *NIPR* 1997, nr. 227 and Rb. Den Haag 7 April 2000, *NIPR* 2000, 182.

<sup>73</sup> See also e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 178.

<sup>74</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 100 and p. 178.

<sup>75</sup> As already explained (cfr. supra, footnote 34), GEEROMS (S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 178) adds to this, that when a court-appointed expert investigates foreign law or the task is delegated to specialized authorities, such as the International Legal Institute, *less room* is left for the judge to assess independently the information on foreign law. On the London Convention, see already supra under 4.

<sup>76</sup> See already supra, footnote 40.

<sup>77</sup> See also e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 53: “If the Judge does decide to intervene ex officio, he should apply the foreign law with respect for the right of defense. The judge must hear the parties and give them a chance, if necessary, to set out their legal position, as well as the

An extensive enumeration of the “general” and “special” means of proof, is provided by GEEROMS.<sup>78</sup>

Among the “General Means of Ascertainment”, she mentions

- that Dutch courts usually obtain the necessary information on foreign law from the parties, whom they require to appear personally in order to supply such information;
- that Courts and parties can also appoint experts to obtain the necessary information;
- and that in rare cases, judges are able to rely on their general knowledge of the material foreign law.

Among the “Special Means of Ascertainment”, she mentions

- that the Netherlands has an academic institute with the specific mission to ascertain foreign law: the International Legal institute in the Hague. Thus, the Netherlands has created an academic institute, charged specifically to ascertain foreign law;<sup>79</sup>
- that The Dutch judge may also address his questions on foreign law to The TMC Asser Institute for International Law. This Institute has been involved in providing legal opinions on foreign law;<sup>80</sup>
- that both the court and the parties may rely on the 1968 London Convention to obtain information on foreign law;
- that courts are also empowered to consult the foreign law directly.

## 10 and 11

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underlying fact pattern, with legal arguments and/or facts material for the new applicable law.” On the possibilities of the Supreme Court, see more *infra*, under III.

<sup>78</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 153 and following. See also e.g. E.N. FROHN, “Toepassing van buitenlands recht door de Nederlandse jurist”, in P. VLAS, *Globalisering van het IPR in de 21<sup>e</sup> eeuw*, Deventer: Kluwer 1999, p. 77-78. FROHN mentions that one can also visit specialized libraries such as the Vredespaleis (“Peace Palace”, see [www.vredespaleis.nl](http://www.vredespaleis.nl)), that notaries can contact their own professional organization (“KNB”, Royal Dutch Notarial Organization) and that often, individual law firms have networks in which cooperation is sought with foreign firms.

<sup>79</sup> This International Legal Institute, set up in 1918 in The Hague, is the Dutch institute specialized in advising the judiciary, the Bar and public notaries on questions of foreign private law, and of Dutch and foreign private international law (see [www.iji.nl](http://www.iji.nl)). The Dutch Ministry of Justice, which also bears its costs, established it. Most of its reports are drafted for the benefit of the Bar and public notaries, and only a minority at the request of the judiciary. According to GEEROMS, compared to the other specialized means such as the London Convention, the International Legal Institute seems to be very popular with the Dutch judiciary, who seem to consider it as a preliminary aid.

<sup>80</sup> The Asser Institute (see [www.asser.nl](http://www.asser.nl)) was created in 1965, following a joint initiative of all the Dutch scientific educational entities where international law was taught, to promote the teaching of and research into private international law and international law.

- 10. What is the role of judicial authorities with regard to the proof of foreign law?**
  - 10.1. Is this a merely passive role, or does the judicial authority intervene in the process to assist the parties with the proof?**
  - 10.2. If so:**
    - 10.2.1. What does this assistance consist of?**
    - 10.2.2. How far does it go?**
    - 10.2.3. What are the mechanisms available to the judge to assist the parties with the proof?**
  - 10.3. Could the judge act in lieu of the parties in this regard?**
- 11. What is the role of non-judicial authorities with regard to the proof of foreign law?**
  - 11.1. Is this a merely passive role, or does the non-judicial authority intervene in the process to assist the parties with the proof?**
  - 11.2. If so:**
    - 11.2.1. What does this assistance consist of?**
    - 11.2.2. How far does it go?**
    - 11.2.3. What are the mechanisms available to the non-judicial authority to assist the parties with the proof?**
  - 11.3. Could the non-judicial authority act in lieu of the parties in this regard?**

In principle, judicial and non-judicial authorities are required to fulfill a rather active role. But from the analysis above, a picture emerges in which they appear to fulfill in practice a rather passive role – see, for instance, the frequently required assistance from the parties; the acceptance of information provided by the parties etc.

## **12. When is it considered that foreign law has been sufficiently proved?**

It is up to the judge to decide when foreign law has been sufficiently proved. The judge remains responsible for the ascertainment and interpretation of foreign law.

Below<sup>81</sup>, the possibilities to review a judgment will be discussed. It will appear there that it is important what parties have argued about the content of foreign law and how the court has included those statements in its decision; the more the parties argue about the foreign rules, the greater the burden for the judge, especially when his opinion differs from that of the parties.

## **13. What is the significance of foreign law once it has been proved by the parties?**

As explained above<sup>82</sup>, courts are not bound by the opinion or interpretation of parties regarding the content of foreign law. The judge is always free to evaluate

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<sup>81</sup> Infra under III.

<sup>82</sup> See supra under 1.2. and footnote 71.

the information on foreign law provided to him by parties or by expert witnesses: the judge is actually required to approach this information in a critical way.

As also already explained above, in *practice*, however, the situation seems to be the following: when the parties agree on the substance of foreign law, the judge will usually take their presentation of foreign law for granted; when the parties agree on the substance of foreign law, the judge very often does not even engage in the ascertainment of foreign law and accepts the investigation of parties.

Remark: see also E. GUBBELS in answering question 4 of the “Short Questionnaire”, whereas he analyses the practice of the Dutch registrar and mentions that “Foreign law, unless contrary to public policy, is equivalent to the Dutch law. However, when the outcome appears to be undesirable, it happens that a solution is sought which favors the “better” Dutch law, without violating the foreign legal system.”

#### **14. What are the consequences of the lack of proof of foreign law in your country?**

##### **14.1. Before judicial authorities.**

##### **14.2. Before non-judicial authorities.**

- Preliminary remark: the final task of ascertaining foreign law remains the responsibility of the judge. Following from this, if the parties fail to comply with a request of the judge to provide information, the judge cannot reject the claim for their failure.<sup>83</sup>
- When the content of the foreign law cannot be or is not sufficiently determined, there is no uniform Dutch court practice.<sup>84</sup> Failure to establish foreign law may lead to:
  - o Application of law that seems “similar”
  - o Application of another foreign law that is also related to the claim, the request or the legal relations between the parties
  - o Application of principles of law that are accepted internationally
  - o Application of the *lex fori*.

As already mentioned<sup>85</sup>, refusal of the claim or request in case of failure to establish foreign law is condemned in doctrine.

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<sup>83</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 100-101 and H.U. JESSURUN D'OLIVEIRA, *De antiekiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 109.

<sup>84</sup> L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2008, p. 35-38. See also the Explanatory notes of the 2002 Draft of the General Provisions of the Statute on Private International Law, reporting the Dutch current practice in nr. 34 and 35 cfr. *infra* footnote 122.

In the few reported cases where the problem of failure of establishment of foreign law arose, the Dutch judge seemed to prefer the application of the law of the forum as subsidiary law.<sup>86</sup> A recent judgment of the Supreme Court is interpreted by DE BOER as enforcing the possibilities to apply the “lex fori”.<sup>87</sup>

- Remark: Dutch judges are also required to interpret the foreign law in the way the foreign court would interpret it: they have to take into account the foreign case-law or academic writings where this appears necessary.<sup>88</sup> Where the foreign law holds several different interpretations on a certain issue, the Dutch judge will have to look for a solution according to the foreign interpretation rules.

### 15. How does your previous answer relate to the imperative/non-imperative character given to conflict rules in your country?

Under present Dutch law, the courts are not only bound to apply the foreign law *ex officio*, but also the *choice of law rules*.<sup>89</sup> The doctrine of facultative choice of law is considered to be inconsistent with *article 25* of the Dutch Code of Civil

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<sup>85</sup> Supra, footnote 83, and supra, footnote 32. GEEROMS (S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 200) mentions that the Supreme Court has not yet issued a judgment on the question whether the dismissal of the claim or defense is an appropriate response for failure to prove foreign law. GEEROMS (referring to K. BOELE-WOELKI, “De toepassing van een surrogaatrecht” in G.E. SCHMIDT, M. SUMAMPOUW e.a. (ed.), *Het NIPR Geannoteerd. Annotaties opgedragen aan Dr. Mathilde Sumampouw*, Den Haag: TMC Asser Instituut 1996) indicates that the Dutch Review on Private International Law reported two decisions rendered by the same judge, in which the claims were rejected because of failure to determine the substance of the applicable foreign law.

<sup>86</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 207. See also, about non-judicial authorities, E. GUBBELS in answering question 5 of the Short Questionnaire about the practice of the registrar: the registrar is allowed to apply Dutch law when the content of the foreign law cannot be or is not sufficiently determined, provided that he informs the public ministry.

<sup>87</sup> HR 9 November 2001, NJ 2002, 2031, noot Th. M. DE BOER, about Moroccan divorce law. The appellate court had rejected the appellant’s divorce claim on the ground that Moroccan law, in casu “talaq”, was considered to be irreconcilable with Dutch public order. The Supreme Court, agreeing with the appellate court in this regard, granted a divorce to the respondent under Dutch law, and accordingly brought the litigation to an end. See on the interpretation of DE BOER also L.Th.L.G. PELLIS, “Ambtshalve toepassing van recht. Daag de wetgever uit nu het nog kan!”, *WPNR* 2003 (6537), p. 449-454.

<sup>88</sup> E.N. FROHN, “Toepassing van buitenlands recht door de Nederlandse jurist”, in P. VLAS, *Globalisering van het IPR in de 21<sup>e</sup> eeuw*, Deventer: Kluwer 1999, p. 78-79, S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 186 and L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2008. See also the explanatory notes of the 2002 Draft of the General Provisions of the Statute on Private International Law, reporting the Dutch practice – see *infra*, under IV., footnote 122.

<sup>89</sup> Cfr. supra, under 1.1. As also already explained there (footnote 18), the principle is also valid for summary proceedings.

Procedure, which prescribes that the courts must apply the law of their own motion.<sup>90</sup>

However,

- *in practice* Dutch courts frequently don't discuss the issue of choice of law rules when parties themselves didn't do so.<sup>91</sup>
- As already explained above<sup>92</sup>, parties have their say about the introduction of foreign law through the presentation of the *facts* of their case.
- Moreover, the Dutch judge is not obliged in all circumstances to apply foreign law to the facts of the case, even if transnational elements invite him to do so. As also already explained above<sup>93</sup>, there are certain exceptions available under Dutch law to the general duty of applying foreign law *ex officio*: as JESSURUN D'OLIVEIRA showed in his doctoral thesis "De Antikiesregel" ("non-choice rule")<sup>94</sup>, when a Dutch judge finds that the relevant foreign rules are similar to the Dutch rules and would achieve the same results, he is released from choosing explicitly which law he prefers to apply.<sup>95</sup>
- Above<sup>96</sup>, I already identified some "curiosities" in Dutch practice, which could be linked to the discussion of "facultative" application of choice of law rules *and* the application of rules of recognition.<sup>97</sup>

## **16. What are the costs involved in pleading and proving foreign law in your country?**

### **16.1. Is it included in free legal aid?**

### **16.2. If the answer to the previous question is no; does this affect the rights of the parties to effective legal assistance?**

- Where judicial knowledge is used or parties are ordered to provide information regarding the content of the foreign law, the court incurs the costs of ascertaining the foreign law.

<sup>90</sup> See e.g. P.M.M. MOSTERMANS, "Optional (facultative) choice of law? Reflections from a Dutch perspective", *NILR* 2004, p. 397.

<sup>91</sup> P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 45-46 and 175. See also L. Th.L.G. PELLIS, "P.M.M. Mostermans, Het processuele conflictenrecht", *RM Themis* 1998, p. 274-277. See also *supra*, footnote 19 about practices in summary proceedings.

<sup>92</sup> *Supra* footnote 40.

<sup>93</sup> *Supra* footnote 39.

<sup>94</sup> H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlandse recht in het burgerlijk proces*, Deventer: Kluwer 1971.

<sup>95</sup> See e.g. HR 19 May 1967, *NJ* 1968, 102, 104-5; Hof 's-Hertogenbosch, 8 March 1993, *NIPR* 1993, 274.

<sup>96</sup> *Supra*, the preliminary remarks and question 2.

<sup>97</sup> On the *ex officio* application of Dutch rules of *international competence*, see M.V. POLAK, Commentaar op de art. 1-14, 67-68 en 985-994 in M.V. POLAK, A.I.M. VAN MIERLO en C.J.J.C. VAN NISPEEN, *Burgerlijke rechtsvordering: Tekst en Commentaar. Wetboek van Burgerlijke Rechtsvordering voorzien van commentaar*, Deventer: Kluwer 2008.

- When it is the court that consult the International Legal Institute of the Hague, the Dutch Council for the Judiciary (“Raad voor de Rechtspraak”) bears the costs.<sup>98</sup>
- Regarding the London Convention, the costs involved with the answering of requests for information, are borne by the states where they are made. This may be different if the host institution has agreed with the sending institution that a private institution or a qualified lawyer will be searched for the answer. In this case, the requesting state should bear the costs, if no derogation has been made in a bilateral or multilateral context.<sup>99</sup>

### III. Application controls

#### (17 and 18)

17. **Is it possible to appeal a judicial or non-judicial decision based on the insufficient or incorrect application of foreign law?**
  - 17.1. Judicial
  - 17.2. Non-judicial
18. **If the answer to the previous question is yes:**
  - 18.1. Judicial
    - 18.1.1. How?
    - 18.1.2. What are the available ‘routes’?
    - 18.1.3. To whom should the appeal be made?
  - 18.2. Non-judicial
    - 18.2.1. How?
    - 18.2.2. What are the available ‘routes’?
    - 18.2.3. To whom should the appeal be made?

#### *Basic ideas:*

\* In the Netherlands, errors in the *application of foreign law* by the courts of first instance and appellate courts are, in principle, excluded from a review by the Supreme Court.<sup>100</sup>

Clear legislation prohibits direct review of application of foreign law: article 79 (previously 99) of the Judicial Organization Act of 1963 (Wet RO) sums up the grounds for cassation, and states “The Supreme Court quashes acts, appeal judgments, judgments and orders (1) (...) (2) because of breach of the law, *with the exception of the law of foreign states.*” Each time a petition challenges a

<sup>98</sup> See also H.U. JESSURUN D’OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, p. 104.

<sup>99</sup> See article 15 of the London Convention. See also H.U. JESSURUN D’OLIVEIRA, ‘Het Verdrag van Londen (1968): Een halfdode letter’, in G.E. SCHMIDT, M. SUMAMPOUW e.a. (ed.) *Het NIPR geannoteerd. Annotaties opgedragen aan Dr. Mathilda Sumampouw*, Den Haag: TMC Asser Instituut 1996, p. 13-19.

<sup>100</sup> On the review by appellate courts, see already *supra*, footnote 16.

foreign law ruling and alleges indirectly a breach of foreign law, the Court repeats the legislative provision that foreign law is not within its jurisdiction.<sup>101</sup>

Several scholars have deplored this legislative situation, and have pleaded for an extension of the possibilities to review the application of foreign law.<sup>102</sup>

\* Review of application of *conflict of laws rules* is possible: the Dutch Supreme Court may review the application of the Dutch conflict of laws rules.<sup>103</sup>

Remarks:

- In 1963<sup>104</sup> the old article 99 Wet RO was amended in the sense that the former ground for cassation “breach of the act” (“wet”) was replaced by “breach of the law” (“recht”), thus extending the possibilities to review. Before 1963, the Supreme Court could only quash a judgment because of breach of “written” conflict of law rules; starting from 1963, control of *unwritten* conflict of law rules was allowed. It was a deliberate decision of the legislator to open up this way the possibility to review choice of law rules.<sup>105</sup>
- When the lower judge hasn’t indicated if foreign law or Dutch law is applicable – e.g. because the two legal systems are similar on the point in dispute –, the decision should in any case be correct according to Dutch law.<sup>106</sup>

<sup>101</sup> See e.g. HR 9 November 2001, *NJ* 2002, 2031; HR 23 February 2001, *NJ* 2001, 3229; HR 27 January 1995, *NJ* 1995, 3296; HR 17 December 1993, *NJ* 1994, 1379; HR 9 November 1990, *NJ* 1992, 777; HR 17 March 1989, *NJ* 1990, 1638; HR 13 March 1987, *NJ* 1987, 2332; HR 9 August 1985, *NJ* 1985, 2677; HR 3 December 1982, *NJ* 1983, 1110; HR 28 March 1980, *NJ* 1981, 130. See also, more recently, on the interpretation of Belgian law, HR 17 June 2005, *NIPR* 2005, nr. 208 (on the mis-interpretation of Belgian law by the Dutch lower judge, see V. VAN DEN EECKHOUT, “Onder het zwaard van Damocles. De status in Nederland van in het buitenland voltrokken huwelijken die naar normaal toepasselijk recht vernietigbaar zijn”, *FJR* 2005, p. 9-18).

<sup>102</sup> See e.g. E.N. FROHN, “Toepassing van buitenlands recht door de Nederlandse jurist”, in P. VLAS, *Globalisering van het IPR in de 21<sup>e</sup> eeuw*, Deventer: Kluwer 1999, p. 77. See also the references made by GEEROMS (S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 102-103, footnote 353). For a discussion of the issue seen from the perspective of the (need of) codification of PIL-rules, see M.V. POLAK, *Internationaal privaatrecht voor het forum van de Hoge Raad*, Deventer: Kluwer 1990, and L. STRIKWERDA, “Recensie Maurice V. Polak, *Internationaal privaatrecht voor het forum van de Hoge Raad*”, *RM Themis* 1991, p. 521-522.

<sup>103</sup> See also HR 19 January 1968, *NJ* 1968, 112; HR 4 April 1986, *NJ* 1987, 678 and HR 28 January 2005, *RvdW* 2005, 20. On “errors” committed by *parties/their lawyers* in this context, see V. VAN DEN EECKHOUT, “Iedereen wordt geacht de wet te kennen. Maar wie wordt anno 2009 geacht alle ipr-regels te kennen? Mogelijkheden tot invoeren van “dwaling” in het ipr”, to be published.

<sup>104</sup> Act of 20 June 1963, *Stbl.* 272.

<sup>105</sup> See the parliamentary preparation, e.g. MvT II (Bijl. Hand. II, 1950-1951, 2079, no. 3, p. 4); VV II (Bijl. Hand II, 1956-1957, 2079, no. 4, p. 5); MvA II (Bijl. Hand. II, 1962-1963, 2079, no. 5, p. 2 en 5); Hand. II, 1962-1963, p. 2287; Bijl. Hand. II, 1962-1963, 2079, no. 11, p. 2; Hand. II, 1962-1963, p. 2489.

<sup>106</sup> See L.Th. L. G. PELLIS, “Door selectie behoud van kwaliteit”, *WPNR* 1998, 6325, p. 537-542, footnote 38 and L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2008, nr. 35. See also HR 4 April 1986, *NJ* 1987, 678.

*Some remarks about the prohibition to review – directly - the application of foreign law*

- Long before the statutory prohibition came into force, the Dutch Supreme Court denied itself the power to review foreign law.<sup>107</sup>
- As already mentioned<sup>108</sup>, in 1963 the old article 99 Wet RO was amended regarding the possibility to review choice of law rules. Another important amendment was made at that time: the text of Article 99 was amended to include *explicit exclusion of foreign law from the Supreme Court's review power*.
- During the Parliamentary Preparation, there had been plenty of discussion about this issue – ending up, thus, in the explicit exclusion of foreign law from the Supreme Court's review power.<sup>109</sup> Due to this explicit prohibition, no room was left to develop direct exceptions to the rule. However, the concern was expressed that a manifest breach of foreign law, such as an application of foreign law against a clear statutory provision, should always be open to challenge in cassation *under the duty to give reasons*.<sup>110</sup>
- In the subsequent jurisprudence of the Supreme Court, this remark appeared to be very important: in the subsequent case-law, the Supreme Court has weakened the prohibition to some extent by indirectly reviewing foreign law through a plea of incorrect reasoning and violation of the principle of respect for the rights of defense.<sup>111</sup>
- Thus, in sum: although clear legislation prohibits direct review of application of foreign law, the Supreme Court may review decisions where an inadequate motivation for the application of foreign law is given. Hence, when it seems that the judge did not make sufficient effort to ascertain the

<sup>107</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 349. According to JESSURUN D'OLIVEIRA, during the 1920s the Court somehow rendered some judgments in which the Supreme Court argued that it could review foreign law - arguing that the Dutch choice-of-law rule was infringed (H.U. JESSURUN D'OLIVEIRA, *De antikiesregel: een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, Deventer: Kluwer 1971, at 58-59, also discussed in GEEROMS p. 350). According to D'Oliveira, only since 1933 has the Supreme Court consistently refused to review the erroneous application of foreign law.

<sup>108</sup> Supra footnote 103.

<sup>109</sup> See e.g. S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, 351; E. KORTHALS ALTES, *De Hoge Raad en het ongeschreven IPR: tien jaren*, Deventer: Kluwer 1976; M.V. POLAK, *Internationaal privaatrecht voor het forum van de Hoge Raad*, Deventer: Kluwer 1990.

<sup>110</sup> See Bijl. Hand. II, 1962-1963, 2079, no. 11, p. 2.

<sup>111</sup> See e.g. HR 2 April 1976, *NJ* 1977, 124, confirmed in e.g. HR 31 May 1985, *NJ* 1985, 717; HR 13 March 1987, *NJ* 1987, 679 (JCS); HR 13 July 2001, *NJ* 2002, 215 (on the judgment of HR 13 July 2001, analyzed from the perspective of claims of social security rights of foreigners, see V. VAN DEN EECKHOUT, "De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw", *Migrantenrecht* 2002, p. 144-158). About the complications that could come forward if the Supreme Court quashes a judgment without referring the case to a lower (handling the case itself), see already supra, footnote 60.

foreign law, or the parties were not sufficiently involved in the process of ascertaining the substance of foreign law, or the court ignored relevant elements, the Dutch Supreme Court can intervene to assure a minimum standard of quality in the administration of justice and in some cases correct the error.<sup>112</sup>

- The extensive advisory opinion (“conclusie”) of advocate-general Strikwerda with HR 17 March 1989<sup>113</sup> clarifies the answer on the question to what extent exactly this review is possible, and to what extent the position of the parties is important: as already explained above<sup>114</sup> and as Strikwerda makes clear, what parties have argued about the content of foreign law and how the court has included those statements in its decision, is very important when reviewing a judgment. The lower Judge is not allowed to “surprise” parties.<sup>115</sup>

Remark about non-judicial authorities: the normal routes are available. If, e.g., the Dutch officer refuses to conclude a marriage, the future spouses can seize the court and ask the court for a judgment obliging to celebrate the marriage. In this case, it is up to the judge to decide - see also e.g. E. GUBBELS in answering question 3 of the “Short Questionnaire”.

Three additional remarks about the “control” of the application *abroad* of foreign law and foreign rules of PIL by judicial and non-judicial authorities, as related to the possibilities of “recognition” in the Netherlands:

- About faults made by *foreign* authorities, and the implications thereof for the recognition in the Netherlands, E. GUBBELS mentions, in answering question 1 of the “Short Questionnaire”, that “Legal facts established abroad are generally recognized in general, even if in determining the legal fact, foreign law might have been applied incorrectly.”
- Cfr. on the correct application of foreign rules of PIL by *foreign* authorities, the discussion on the Dutch rule of recognition as embedded in Article 5a paragraph 1 of the Dutch “Wet Conflictenrecht Namen”, including the words “with respect to foreign rules of PIL”: according to the Standing Committee for Private International Law (opinion of 23 August 2006, to be consulted on [www.justitie.nl](http://www.justitie.nl) ) these words don’t mean that the Dutch registrar should verify on his own motion if the foreign rules of PIL have been applied in a correct way by the foreign registrar, in order to be able to recognize the act: according to the Standing Committee, the Dutch registrar shouldn’t apply the exception of public order if the foreign registrar has applied foreign rules in an incorrect way.

<sup>112</sup> S. GEEROMS, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004, p. 359.

<sup>113</sup> HR 17 March 1987, NJ 1990, 427. See also on this judgment M.V. POLAK, *Internationaal privaatrecht voor het forum van de Hoge Raad*, Deventer: Kluwer 1990, p. 36, arguing that the Supreme Court goes a step further than before in this case, allowing to quash a judgment not only because of a breach of foreign law, but also because of a violation of foreign *jurisprudence*.

<sup>114</sup> Supra, footnote 41.

<sup>115</sup> Cfr. supra, footnote 38 and footnote 5 in the preliminary remarks.

- Dutch rules of PIL generally – except a rare exception - don't include neither a “contrôle de la loi convenable”, nor “renvoi”.

**(19 and 20)**

- 19. Can foreign law be rejected on the grounds of being unconstitutional in your legal system?**
  - 19.1. In the judicial arena.**
  - 19.2. In the non-judicial arena.**
- 20. If the answer to the previous question is yes, how does this happen?**
  - 20.1 In the judicial arena.**
  - 20.2. In the non-judicial arena.**

The doctrine of “public order” allows rejecting the application of foreign law.<sup>116</sup>

*Remarks:* above, I already mentioned

- the judgment of the Supreme Court of 9 November 2001, especially interesting regarding to the “positive effect of the exception of public order”:<sup>117</sup> in this case, the appellate court had rejected the appellant's divorce claim on the ground that Moroccan law, in casu “talaq”, was considered to be irreconcilable with Dutch public order. The Supreme Court, agreeing with the appellate court in this regard, *granted a divorce to the respondent under Dutch law*, and accordingly brought the litigation to and end. The judgment is interpreted by DE BOER as enforcing the possibilities to apply the “lex fori”.
- the judgment of the Supreme Court of 15 September 2006,<sup>118</sup> especially interesting regarding the plea that application of foreign law conflicted with the Dutch public policy *when that decision would not be recognized abroad*.

See also the “three additional remarks” I already made in answering question 19.

#### **IV. Proposals for reform**

**(21, 22, 23 and 24)**

- 21. What is your opinion of the operation of your legal system with regard to pleading and proving foreign law, to both judicial and non-judicial authorities?**
- 22. Are there any plans to reform the current model?**
- 23. Which aspects of the model adopted by your legal system do you consider to be in need of reform and why?**

<sup>116</sup> See for the basic principles of the “exception of Dutch international public order”, L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2008, nr. 35 and nr. 63.

<sup>117</sup> HR 9 November 2001, NJ 2002, 279. Supra, footnote 87.

<sup>118</sup> HR 15 September 2005, NJ 2006/505. Supra, preliminary remarks, footnote 5.

**24. What is your opinion on the desirability and feasibility of a community law instrument regarding this issue?**

**24.1. Should the rules be the same for judicial and non-judicial authorities?**

**24.2. Which non-judicial authorities should be included?**

Below, I will identify a number of proposals and points of criticism/controversy as put forward in the Dutch doctrine<sup>119</sup> *in the current context of codification of Dutch private international law* and the discussions about this project.

Indeed, anno 2009, a project of codification of Dutch Private International Law Rules is taking place. A draft of the provisions, to be included in a future Act, and actualized until 2003, can be consulted on [www.justitie.nl](http://www.justitie.nl).<sup>120</sup> The Dutch Parliament has charged the “Staatscommissie voor het Internationaal Privaatrecht” (“Standing Committee for Private International Law”), established as early as 1898, with the task of taking measures to further the codification of the Dutch Private International Law rules. In June 2002 the Dutch Standing Committee on Private International Law published a comprehensive report with a proposal for *general provisions* in a future Dutch General Law concerning conflict of laws.<sup>121</sup>

In this proposal for “General Provisions of the Statute Private International Law”, some interesting issues are discussed:

- About the issue of “subsidiary law”, the 2002 Draft General Provisions of the Statute on Private International Law<sup>122</sup> deliberately declines to regulate the problem. According to the explanatory notes, preference is given to a judicial (case-by-case) approach, continuing this way the current practice.
- About the issue of “facultative” application of choice of law rules and foreign law, the Standing Committee defends the status quo of the

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<sup>119</sup> Sometimes repeating partly what has already been explained supra. On the other hand, I won't repeat all points of criticism as already explained supra, see e.g. the criticism on the London Convention by JESSURUN D'OLIVEIRA - as well as the advantages of this convention - (supra, with question 4); the comments of MOSTERMANS on the “non-choice rule” (“antiekiesregel”, see supra footnote 39), the plea of some authors to extend the possibilities of the Dutch Supreme Court to review the application of foreign law (supra, footnote 102); etc.

<sup>120</sup> See the “Voorontwerp” of 1982 and the “schets” of August 1992, amended and actualized by the “Voorontwerp van Wet houdende Consolidatie van regelgeving internationaal privaatrecht, stand per 1 november 2003”, to be consulted on [www.justitie.nl](http://www.justitie.nl), particularly [http://www.justitie.nl/onderwerpen/wetgeving/over\\_wetgeving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx](http://www.justitie.nl/onderwerpen/wetgeving/over_wetgeving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx)

<sup>121</sup> Staatscommissie voor het Internationaal Privaatrecht, “Advies omtrent een voorstel voor een wettelijke regeling houdende Algemene Bepalingen van de Wet op het internationaal privaatrecht”, The Hague 1 June 2002, to be consulted on [www.justitie.nl](http://www.justitie.nl).

<sup>122</sup> See nr. 34 and 35 of the Draft. Cfr. supra, footnote 84. Moreover the explanatory notes of the 2002 Draft of the General Provision also adhere to the principle that Dutch courts should decide foreign law issues in compliance with the foreign law itself, that is, in conformity with the relevant foreign legislation, case law, and academic writings. See also supra, footnote 88.

procedural status of choice of law and foreign law in the Netherlands. According to Art. 2 of the proposal, the Dutch courts have to apply the choice of law rules, as well as the applicable foreign law, on their own motion.<sup>123</sup> the 2002 Draft of the “General Provisions of the Statute Private International Law” thus foresees in Article 2 an explicit provision on the procedural treatment of choice-of-law-rules and the applicable foreign law. According to its terms, the judge must apply on his own motion the private international rules and the law applicable following these rules. According to the notes explaining the 2002 Draft of the “General Provisions of Statutory Private International Law”, the rules on the ex officio application and ascertainment of foreign law apply likewise in *summary proceedings*, though with the proviso that in summary proceedings, the parties are expected to play a more active role in the ascertainment of the applicable foreign law<sup>124</sup>.

- Although the latest draft codification of general provisions on private international law thus deliberately opposes the doctrine of facultative choice-of-law, among Dutch scholars there is resistance to the (radical) ex officio application of the choice-of-law-rules and foreign law.
  - In a reaction on the publication of the 2002 Draft of the General Provisions of the Statute Private International law, PELLIS<sup>125</sup> has called for a more flexible application, suggesting to replace in article 2 of the General Provisions the words “has to” by “may”.
  - DE BOER suggested a proposal with more possible impact in 1996.<sup>126</sup> In a contribution in 1996 to the “Recueil Des Cours of the Hague Academy of International Law”, DE BOER defended Facultative Choice-of-Law theory, invoking the thesis that the judge should only apply foreign law if the parties desire its application. In a more recent article on the Rome III proposal, DE BOER<sup>127</sup> argued that, if no choice of law has been made, the lex fori should be applicable; if this couldn’t be realized, he suggests, as a “second best solution”, to apply the doctrine of facultative choice of law.

<sup>123</sup> Neither in the “Voorontwerp” of 1982, nor in the “Schets” of 1992, an explicit provision was included on this issue. In the explanatory notes of the 2002 Draft General Provisions (see nr. 30 and following), the Standing Committee argues that facultative application of choice of law rules and foreign law would conflict with article 25 Rv. The Standing committee also sums up several objections against the doctrine of optional choice of law. The issue is discussed whether article 25 Rv. needs further legislative clarification (cfr. supra, answer to question 3); even though according to the Standing Committee article 25 Rv. doesn’t allow any other interpretation, it is wise to include a specific provision about this issue in the PIL-code.

<sup>124</sup> See also supra, footnote 19.

<sup>125</sup> L.Th.L.G. PELLIS, « Ambtshalve toepassing van recht. Daag de wetgever uit nu het nog kan!”, *WPNR* 2003 (6537), p. 449-454.

<sup>126</sup> Th. M. DE BOER, “Facultative Choice of Law. The Procedural Status of Choice-of-law Rules and Foreign Law”, in *Recueil des Cours* 1996, Vol. 257, p. 225-427.

<sup>127</sup> Th. M. DE BOER, “The second revision of the Brussels II Regulation: jurisdiction and applicable law”, in K. BOELE-WOELKI en T. SVERDRUP (red.), *European Challenges in Contemporary Family Law*, Antwerpen: Intersentia 2008 p. 341.

- According to DE BOER<sup>128</sup> the doctrine of optional choice should, in principle, be related only to *judicial* proceedings. According to DE BOER, the merits of facultative choice of law would appear rather limited in extrajudicial proceedings, *but* his opinion is somewhat differently with regard to the application of choice of law rules by *the registrar*.<sup>129</sup>
- The paradox is that even though DE BOER himself - the most enthusiastic proponent of facultative choice of law - excludes from his pleading for facultative choice of law extrajudicial proceedings, in Dutch *practice* examples could be observed of deliberate ignorance of PIL-rules by non-judicial authorities – *without* possibility for the parties to “opt” for the application of PIL-rules.<sup>130</sup> As I explained in the preliminary remarks, in those cases PIL-rules of *recognition* were the issue at stake, but about those PIL-rules DE BOER is very clear in his rejection of facultative PIL, as he argues: “Facultative choice of law does not extend to jurisdiction, nor to the recognition of foreign acts and decisions. The doctrine only applies to situations, in which the choice between lex fori and foreign law determines the creation of a certain legal effect, not to those in which the legal consequences foreign law attaches to a fact or event that occurred abroad are invoked in another state.”

<sup>128</sup> Th. M. DE BOER, Th.M. DE BOER, “Facultative Choice of Law in Extrajudicial Proceedings”, in J.-F. GERKENS a.o., *Mélanges Fritz Sturm, offerts par ses collègues et ses amis à l’occasion de son soixante-dixième anniversaire*, Vol. II, Liège, Editions Juridiques de L’Université de Liège 1999, p. 1409-1424.

<sup>129</sup> DE BOER: “It has no place in notarial practice, I think, because a notary public not only has a duty to provide the notarial documents required by law but, also, to advise his clients on the legal complications that foreign law could cause of their transaction is, or could be, connected with different countries. Fiscal authorities, when addressing private law issues that might present themselves in the course of an assessment, should apply choice-of-law rules and, if need be, foreign law *ex officio*, because taxpayers, even if they are aware of possible choice-of-law complications, have no way of arguing the choice-of-law merits of their case until the initial tax decision can be appealed in court. Finally, most private international law rulings by a registrar are decisions on the recognition of events that occurred or were occurred abroad, subject to rules of recognition rather than choice of law. Facultative choice of law does come in, however, in situations in which the registrar is requested to achieve a change in a person’s status that does not depend on an act or decision by a foreign authority. In such cases, it might be asked whether a registrar is justified in applying his own law as long as the result required can be achieved under that law, or whether he should choose the applicable (foreign) law *ex officio*. In my view, *lex fori* should be the point of departure in all cases in which favor notions pervade the registrar’s choice-of-law rules, particularly the notions of *favor matrimonii* and *favor infantis*. If the result desired can be achieved under forum law, I can see no reason why it should be disallowed under a foreign law the registrar has seen fit to choose on his own motion, against the parties’ implicit wishes. In this respect, the use of facultative choice of law may well be extended to extrajudicial proceedings.”

<sup>130</sup> Cfr. *supra*, the preliminary remarks.

- As I also already indicated in the preliminary remarks<sup>131</sup>, DE BOER has interpreted the case “Van Schijndel” of the European Court of Justice as allowing facultative choice of law as far as the national system accepts the doctrine of facultative choice of law: DE BOER concludes that the procedural status of choice-of-law conventions is determined by the principles of civil procedure prevailing in the forum State. As explained here, the *status quo* of the procedural status of choice of law and foreign law *in the Netherlands* is that choice of law rules *must* be applied ex officio. And even though authors as PELLIS and DE BOER have asked for more flexibility, it seems that neither article 25 Rv. nor article 2 of the Draft General Provisions will be amended.<sup>132</sup>
- A final proposal to be mentioned, is the suggestion of PELLIS<sup>133</sup> to charge – within certain conditions – the parties themselves with the ascertainment and proof of foreign law *in the specific case that a choice of law has been made*. This proposal is particularly interesting in a context of Europeanization of PIL: in the process of European unification of PIL-rules, “choice of law” is often made possible.<sup>134</sup>

<sup>131</sup> Supra, footnote 6.

<sup>132</sup> MOSTERMANS (P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004), recently argued that it is “clear that optional choice of law is not consistent with the current Article 25 Dutch Code of Civil Procedure.” She adds to this, p. 404 “If optional choice of law is not consistent with the existing Article 25 Dutch Code of Civil Procedure, then it could be argued that this Article should be amended. This does not seem to be the correct method of approach, however. In my opinion, a duty for the courts to raise the choice of law issue of their own motion is more suitable to *the spirit of current Dutch civil procedural law*” and, p. 409-410: “In my opinion, the application of choice of law rules ex officio is *more in tune with the present developments in Dutch law regarding the respective roles of the parties and the judge in civil litigation.*” In her PhD, MOSTERMANS (P.M.M. MOSTERMANS, *De processuele behandeling van het conflictenrecht*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 180) has presented suggestions to avoid the ignorance of choice of law rules and foreign law – in short, by obliging the originator of the proceedings to be explicit about the applicable law starting from the beginning of the proceedings

<sup>133</sup> PELLIS, discussing the procedural status of choice of law rules and foreign rules in summary proceedings: Th. M. PELLIS, Een geding, maar dan kort!” Boekbespreking Kramer, *WPNR* 2002, 6475, p. 132-137.

<sup>134</sup> See also, on the analysis of MOSTERMANS (P.M.M. MOSTERMANS, “Optional (facultative) choice of law? Reflections from a Dutch perspective”, *NILR* 2004, p. 393-410) that facultative choice of law shouldn’t be welcomed, because “In proceedings concerning rights and duties which the parties can freely dispose of, a way to avoid the problematic application of foreign law is an agreement between the parties during the proceedings on a choice for forum law. This is usually granted by Dutch choice of law. The parties can make such an agreement on their own initiative or at the invitation of the court. In case they do not agree on a choice for forum law and the content of the applicable foreign law has to be determined, the Dutch courts should have the possibility to order a party to co-operate in ascertaining that law. Especially when one of the parties appears to have access to the relevant information on this law, such an order can be

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justified. With regard to proceedings concerning status issues one can observe that, according to current Dutch conflicts law, a number of status issues are often to be decided under Dutch law anyway. With respect to proceedings regarding other status issues, a possible solution to the foreign law problem could be found in the choice of the jurisdictional criteria. It would be interesting to investigate whether in questions of status the attribution of jurisdiction to the Dutch courts could be sharpened in such a way that the applicability of Dutch law could more easily be made as the starting-point of the choice of law rule. As a result, in most proceedings concerning status issues Dutch law would apply anyway. In such proceedings optional choice of law would then become meaningless", the comments of V. VAN DEN EECKHOUT, "Europeanisatie van het ipr: aanleiding tot herleving van discussies over facultatief ipr, of finale doodsteek voor facultatief ipr?", *NIPR* 2008, afl. 3, p. 258-262, situating the analysis of MOSTERMANS in a context of Europeanization of PIL – where, e.g., possibilities of "choice of law" in proceedings concerning status issues are frequently created.

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