European Private International Law

2015/2017

European Private International Law

2015/2017

Katharina Boele-Woelki
&
Roderic ter Rele

Ars Aequi Libri
Nijmegen 2015

ISBN 978-90-6916-599-8
NUR 822

Coverdesign: Janine van Winden.

Preface

Private International Law is private law and thereby its rules primarily derive from national law. However, this description emanates from days of old. Since the Treaty of Amsterdam, which entered into force in 1999, it requires modification as far as the Member States of the European Union are concerned. In addition to multilateral Conventions in the field of Private International Law, European Regulations which address cross-border relationships have obtained a significant position. In the years to come, Private International Law within the European Union will, first and foremost, have its origins in European law. This is why this book is entitled European Private International Law. It collects international and European instruments which primarily contain Private International Law rules for jurisdiction, the applicable law and the recognition and enforcement of foreign decisions. The instruments were adopted by various organisations such as the Hague Conference on Private International Law, the United Nations, the International Commission on Civil Status, the Council of Europe, the International Civil Aviation Organization, the International Bank for Reconstruction and Development, the Comité Maritime International and the European Union. Hence, Private International Law rules of national origin are not contained in this collection. This second edition contains an update of all instruments.

The compilation may well be useful for legal education and practice alike.

Utrecht, March 2015

Katharina Boele-Woelki

Roderic ter Rele

Some Guidance as to Private International Law

Private law relationships with foreign elements

Generally, private law relationships with foreign elements, such as the differing nationalities of the parties or their habitual residence/place of business in different countries, are subject to national substantive law. The 'conflict' as to which possible substantive law of the legal systems involved is to be applied must be decided by the respective rules of Private International Law determining the law which is applicable. These rules use a connecting factor such as the common nationality or the place of habitual residence of the person who, for example, is performing the most characteristic contractual obligation in order to 'connect' the private relationship with a specific set of legal rules under the relevant national law. The choice of the connecting factor is based on the consideration that, on the one hand, the factor must be relevant to the specific relationship and, on the other, that a national system is to be applied which is found to have, conceptually, the closest connection with that relationship. A 'conflict' between legal systems is to be decided in which several legal systems, or at least two, are involved of which the respective national laws could be applied.

Under specific circumstances national legal policy may require the application of rules of national law. This is the case when overriding mandatory rules are to be taken into account. In most cases, however, national legal policy will offer rules of national law to be applied and may not care, for instance, whether the nationals of the country concerned have obtained their divorce in another country where probably a different, and less restrictive, divorce law has been applied or whether a contract is governed by a law with which none of the parties has a connection and which has only been chosen as the most neutral law.

However, not all legal systems and the societies which they serve are prepared to accept everything. When the recognition of a specific status which has been obtained abroad (divorce, marriage, adoption), or the enforcement of a foreign judgment, is sought the legal system where this is to take place applies its recognition and enforcement rules. At this stage certain safety mechanisms come into play, the most important of which is the prevention of any violation of national public policy. This falls within the area of recognition and enforcement. It is generally characterised as international procedural law together with the rules on the international jurisdictional competence of courts and tribunals, whereas the issue of the applicable law is commonly indicated as the 'conflict of law'. Hence the overall term 'Private International Law' can be applied to the rules which address jurisdiction, the applicable law and recognition and enforcement.

Different legal sources

Regarding the legal sources of Private International Law rules a distinction is to be made between three levels: the international level, the European level and the national level which consists of statutory rules and/or case law. The Private International Law rules adopted and enacted at these different levels are to be applied in accordance with a generally accepted hierarchy. If a country is bound by an international Convention it will not apply its national conflict of law rules unless the legal issue does not fall within the Convention's scope of application. The same holds true for the relationship between European Regulations on the one side, and national rules, on the other, as far as the European Union is concerned. If the European Regulation applies – that is if the relevant legal question falls within its scope of application – national conflict of law rules cannot be consulted. The expectation that the hierarchy of precedence as between international Conventions and European Regulations might be similar in the sense that the higher level (international) takes priority over the lower level (regional) is, however, not justified. In this respect a 'one size fits all' answer cannot be provided since each spe-

cific European Regulation itself determines whether or not, in relation to the contracting states of an international Convention, preference is to be given to either European or (existing) Convention rules. In respect of the three different questions it depends on the nature of the cross-border relationship (*e.g.* contract, delict and tort or family relationship) which instrument is to be consulted by the competent forum. Only the legal sources which address the specific Private International Law issue are to be consulted. Obviously, the answer to the question whether a court has jurisdictional competence cannot be found in a Convention which contains only rules of applicable law. It is therefore essential to know exactly what question is posed and the kind of rules which the legal source (a Regulation or a Convention) contains. In particular, those who are not familiar with the methods and techniques of Private International Law often find it difficult to find their way through the jungle of Private International Law rules. The schematic overview below might be of assistance in this endeavour.

Cross-border relationship	Which court decides?	Which law applies?	Can the foreign decision/ the status obtained abroad be recognised and enforced?
Legal sources	International procedural law	Conflict of laws	International procedural law
EU Regulations			
Conventions (in general subordinated to EU law)			
National statutes and case law			

Contents

Protection of Children and Adults

Adoption

Maintenance Obligations

Succession

Law of Obligations

Contracts

Transport

Delict/Tort

Legal persons

Trust/Property

Procedural Law

Immunity

Jurisdiction, Recognition and Enforcement

Access to Justice

Legalisation

Arrest