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**The international and interregional law of succession in the Kingdom of the Netherlands since October 1, 1996.**

**1. Introduction.**

On 1 October 1996 the Dutch international law of succession was radically amended. The simple, but vague general rules of conflict applicable to the law of succession were replaced on that date by extensive rules from the Act on the Choice of Law Rules Applicable to Succession<sup>1</sup> and the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons.<sup>2</sup> To date, the convention has only been ratified by the Netherlands. The convention has not yet entered into effect. Ratification by three countries is necessary (Article 28) for this. In anticipation of the future entry into force of the convention, the Dutch legislator has already incorporated the rules of the convention into Dutch legislation.<sup>3</sup> The Act on the Choice of Law Rules Applicable to Succession and the rules of the 1989 Hague Convention on the Law Applicable to Succession apply, in principle, solely to estates which have been distributed after 1 October 1996. Estates which were distributed before that specific date are governed by the old general rules.<sup>4</sup>

The Act on the Choice of Law Rules Applicable to Succession solely apply to the European territory of the Kingdom of the Netherlands. The other two constituent parts of the Kingdom, the Netherlands Antilles and Aruba, have not yet incorporated the rules of the convention in their own legislation. The old general rules on international succession still apply in both countries. These rules deviate strongly from the choice of law rules in the Netherlands.

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<sup>1</sup> Act of 4 September 1996 to regulate the choice of law rules concerning succession, distribution and division of an estate as well as the ratification and coming into effect of the Convention on the law application to succession to the Estates of Deceased Persons (Trb. 1994,49) Stb. 1996, 457, in August 1989 in 's-Gravenhage. See Ten Wolde, *Internationaal en Interregionaal Erfrecht in het Koninkrijk der Nederlanden*, 1996, p. 229.

<sup>2</sup> Kingdom Act of 4 September 1996 to ratify the Convention on the Law Applicable to Succession (Trb. 1994,49) Stb. 1996, 456, which entered into effect on 1 August 1989 in 's-Gravenhage. See, amongst others, *Twee Haagse Verdragen*, preadvies Koninklijke Notariële Broederschap, 1990, p. 85, Henriquez, WPNR 5972 (1990), Joppe, *Kleijnbundel, Quod Licet*, 1992, p. 179, Ten Wolde, *Internationaal en Interregionaal Erfrecht in het Koninkrijk der Nederlanden* 1996, p. 229, *Stille FJR* 1996, p. 216 and *Rutten Erven naar Marokkaans recht*, 1997.

<sup>3</sup> Article 1 of the Act on the Choice of Law Rules Applicable to Succession.

<sup>4</sup> The distribution of an estate before 1 October 1996 is in principle, governed by the national law of the deceased at the time of his death (HR 16.3.1990 NJ 1991.575). The settlement and division of an estate is governed by the law of the house of mourning of the deceased. This is the law of the place in which the deceased had his residence as meant in article 1:10 Dutch Civil Code at the time of his death.

The Convention on the Law Applicable to the Law of Succession is not applicable to interregional estates. Consequently, the provisions of the convention are not directly applicable to estates which are connected to one of the other countries in the Kingdom of the Netherlands. Article 21 of the convention, however, does not exclude possible application of the convention.

In section 2, I will present a global view of the international law of succession in the Netherlands, the Netherlands Antilles and Aruba. In section 3 I examine in detail the current interregional law of succession. This will also address the question as to whether it is advisable to apply the rules of the 1989 Hague Convention on the Law Applicable to Succession in interregional situations.

## **2. Private international law of succession in the Netherlands, Netherlands Antilles and Aruba.**

### *Private international law of succession in the Netherlands*

Under the rules of Dutch private international law the inheritance of deceased's estates which were distributed on or after 1 October 1996 is governed by the rules of the 1989 Hague Convention on the Law Applicable to Succession.<sup>5</sup> Settlement of the estates is not covered by the convention, but regulated by the Act on the Choice of Law Rules Applicable to Succession.

Article 5 of the convention allows for designation<sup>6</sup> of a choice of law where there is a conflict of law for:

- a. the law of the State of which the deceased is a national<sup>7</sup> at the time the choice of law is made,
- b. the law of the State of which the deceased is a national at the time of death,
- c. the law of the State in which the deceased has his habitual place of residence at the time the choice of law is made,
- d. the law of the State in which the deceased has his habitual place of residence at the time of death.

The underlying idea behind granting freedom to choose applicable law is that in situations with an international element the testator, should in principle, have the greatest possible freedom to exercise influence on the manner in which the estate is inherited.<sup>8</sup>

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<sup>5</sup> See Article 1 Act on the choice of Law Rules Applicable to Succession.

<sup>6</sup> Article 6 regulates the so-called material choice of law.

<sup>7</sup> In the event of multiple nationality, any of the nationalities can be chosen according to the Explanatory Memorandum to the Act Ratifying the Convention on the Law Applicable to Succession to the estate of deceased persons (23 863), p. 9.

<sup>8</sup> Explanatory Memorandum to the Act Ratifying the Convention on the Law Applicable to Succession (23 863), p. 8.

If the deceased has not made a choice of law then the applicable succession law will be determined on the basis of article 3:

1. Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was than a national<sup>9</sup> of that State.
2. Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident<sup>10</sup> there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances,<sup>11</sup> if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
3. In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

The most important advantage of the new regulation when compared to the old Dutch general choice of law rules of the international law of succession is that after the testator has resided in a particular country for five years, the law applicable to succession continues to be certain. In practice, this means that Dutch civil law notaries will apply Dutch succession law more frequently than was the case under the old general private international law rules. However, it also means that the distribution of the estates of Dutch citizens who have left the Netherlands for tax, health or other reasons will be subject to foreign law in a great many more cases. In such cases it is the duty of the lawyer or civil-law notary concerned to indicate the possible choices of law to the testator.<sup>12 13</sup>

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<sup>9</sup> In the event of multiply nationality no effectiveness test (a test in order to determine the nationality with which the testator had the closest connection) is applied according to the Explanatory Memorandum to the Act Ratifying the Convention on the law applicable to succession (23 863), p. 6.

<sup>10</sup> The concept of "place of residence" (ordinary residence) is used here to distinguish from the concept of "habitual residence". A place of residence is the place in which a person, lived for a period of time which is not temporary without it being said that this person is more closely connected with this particular place than with any other place. The concept of habitual residence on the other hand, indicates a closer connection with a particular country. This connection usually is evident from the actual circumstances.

<sup>11</sup> Westbrook, WPNR 5926 (1989), explains the concept of exceptional circumstances so that the situation concerned has to be unique and therefore surprising.

<sup>12</sup> If a similar choice of law is to have full effect it will ultimately depend on the location of the assets and the foreign private international law concerned.

<sup>13</sup> Article 17 of the Convention explicitly excludes the possibility of renvoi. An exception to this rule, however, is provided for in Article 4: "If the law applicable according to Article 3 is that of a non-Contracting State, and if the choice of law rules of that State designate, with respect to the whole or part of the succession, the law of another non-Contracting State which would apply its own law, the law of the latter State applies." This exception only applies when no choice of law has been made.

Settlement of deceased's estates which were distributed after 1 October 1996 is regulated in Article 4 of the Act on the Choice of Law Rules Applicable to Succession. This provides that the settlement and division of an estate distributed in the Netherlands<sup>14 15</sup> is governed by Dutch law. Heirs to the estate are still free to declare another law applicable to the division.<sup>16 17</sup>

*The private international law of succession in the Netherlands Antilles and Aruba*

The private international law of succession in the Netherlands Antilles and Aruba differs substantially from the private international law of succession in the Netherlands. Netherlands Antillean and Aruban private international law are almost identical. The international law of succession of both countries will be referred to jointly hereinafter as the Antillean international law of succession.

Previous Antillean decisions have shown that the distribution of an estate is governed by the country where the testator had his habitual residence at the time of death.<sup>18</sup> No distinction is made here between inheriting movable and immovable property. If no habitual place of residence can be established, the estate will be subject to the law which is most closely connected with the estate, taking into account all the circumstances of the case.<sup>19</sup> The question of whether the testator is free to make a choice of law has not come under discussion in Antillean decisions. In my opinion a testator may make a choice of law in any event when there is an equilibrium in terms of the conflicts of law. Such situation arises when more closely connected systems of law qualify as applicable. If for example a testator moves from country A to country B he may not necessarily be given habitual residence immediately in country B. To move the habitual residence would require that the testator had lived in country B for a specific period of time. To prevent long term uncertainty as to which law governs the settlement of the estate of the testator, the testator is free to make a choice for the law of either country A or country B.

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<sup>14</sup> That is when the testator is habitually resident in the Netherlands at the time of his death.

<sup>15</sup> This law also governs the duty and powers of the administrator (Art. 5 Act on the Choice of Law Rules Applicable to Succession).

<sup>16</sup> The law applicable to the distribution of the estate of a testator with habitual residence abroad is not regulated. This rule has already led to problems in notarial practice.

<sup>17</sup> Article 2 of the Act on the Choice of Law Rules Applicable to Succession also contains a compensation rule which can be applied when one of the heirs to the estate is prejudiced by the application of foreign private international law rules.

<sup>18</sup> See, amongst others, *Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba* 20.5.1986 *Tijdschrift voor Antilliaans Recht-Justicia*, 1988, p. 76.

<sup>19</sup> See Ten Wolde, *Internationaal en Interregionaal Erfrecht in het Koninkrijk der Nederlanden*, 1996, p. 163.

Under Antillean international succession law settlement of an estate is subject to the law of the country in which the deceased had his residence at the time of death. This is the place of residence where the testator can be reached for legal matters (Article 66 Netherlands Antilles/Aruban Civil Code). The duty and authority of the (foreign) administrator is also governed by this law. Antillean private international law, therefore, treats multilateral rules of conflict for succession differently from Dutch private international law. Separation and division of the estate is also governed by the law of the last place of residence of the deceased. It should be noted here that the question whether special procedural requirements must be followed when incapable persons are involved in the division is governed by the law of the country where those concerned are habitually resident.

### **3. Private interregional law of succession in the Kingdom of the Netherlands**

#### *General*

The object of private interregional law is to regulate legal transactions as efficiently and justifiably as possible within the territories of the Kingdom of the Netherlands. This objective restricts the function of the private interregional law rules.

Although private interregional law greatly resembles private international law, other principles apply for the former. A common basis exists in private interregional law which does not in the private international law of the different countries in the world. This basis is formed by the constitutional relationship in which the Netherlands, the Netherlands Antilles and Aruba are united together: the Kingdom of the Netherlands as prescribed in the Charter for the Kingdom of the Netherlands. The effect of this common basis is that a number of principles are laid down in private interregional law which are expressed less strong or not at all manifest in private international law. Moreover, this means that there is one system of private interregional law and not three different systems of private interregional law in each part of the Kingdom. Furthermore, this basis means that a number of general doctrines, which according to the prevailing doctrine have the common objective of bringing all the principles of private interregional law into line with each other, as does not extend to "renvoi", adjustment (afstemming) and "Näherberechtigung".

On what principles is private interregional law founded? Firstly the important principle of private interregional law laid down in Article 40 of the Charter for the Kingdom of the Netherlands, whereby on the basis of this provision judicial decisions and first authenticated copies of deeds executed in one part of the Kingdom have full legal effect in the other constituent parts of the Kingdom. Such decisions and first authenticated copies may not only be enforced in the other parts of the Kingdom they also have the same binding force and evidentiary value as in the territory in which judgment was rendered.<sup>20</sup>

Similar confidence in the jurisdiction of the other parts of the Kingdom is characteristic of Dutch private interregional law. The above interpretation of Article 40 of the Charter has far reaching implications for interregional choice of law rules. Thus the principle of harmonizing judgments must be accepted without question. According to this principle, the court must always apply the same law in proceedings initiated in any of the territories. The observance of different choice of law rules in the three territories of the Kingdom could easily lead to forum shopping.

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<sup>20</sup> HR 14.1.1994 NJ 1994,403.

Once a final judgment or decision is pronounced it is fully enforceable in the other constituent parts. Apart from this practical basis, in my opinion due to the structure of the Kingdom and its underlying common basis, interregional choice of law rules should be uniform.<sup>21</sup>

In addition, the principle of equality applies, which also ensues from the political relationship within the Kingdom. The relationship within the Kingdom and the Dutch connection assume equality of the three territories with respect for each others culture and legal systems being central, the law of the other territories must be treated in the same way as its own law.

As in the international choice of law rules, a choice must be made in interregional choice of law rules between two or possibly all three of the legal systems concerned (the Dutch, Netherlands Antillean or the Aruban). If a Dutch citizen having retired to the Netherlands Antilles dies there it will have to be determined with which of the territories the deceased had the closest connections. If the deceased has only lived in the Netherlands Antilles for a short time he will be deemed to have the closest connections with the Netherlands.

This brings us to the question of how interregional law applicable to choice of law rules should be constructed. In my view, private international law and private interregional law do not completely concur. In private international law rules of conflict are constructed from the social values and norms of each country. This construction theoretically takes into account the interests of other legal systems, it aims to find solutions which are acceptable according to international standards. Therefore, the norms and values of other legal systems are only theoretically taken into consideration. The reverse is true in private interregional law. Here it is known which three legal systems may be deemed applicable. The construction of the rules of conflict therefore definitely take the values and norms of all three States of the Kingdom into account. For example, under Antillean divorce law the grounds for divorce are more restricted than under Dutch divorce law. In my opinion this implies that the rules of conflict may not be constructed so that an Antillean can easily choose to have Dutch divorce law apply. Such an interpretation would prejudice the values and norms which prevail in the Antilles.

I would like to address another important difference between private international law and private interregional law. As already pointed out, in international choice of law rules any random system of law which could be applicable is taken into consideration in advance, which is a "Spring ins Dunkle" (a "shot in the dark"). This information often has influence on the interpretation of international rules of conflict and also lead to the doctrine of public policy. Private interregional law, however, makes perfectly clear which legal systems may be deemed applicable. Corrections on the grounds of public policy cannot be prevented on an interregional basis.

Based on the above points of departure and principles, interpretation of the individual rules of reference may take place. This interpretation is dependant, as in private international law on the function fulfilled by rules of reference concerned. In my view this function depends on the nature of the events concerned (for example, the death of the testator) or the nature of the act concerned (for example, the settlement of the estate) to which the rule of reference refers. In the case of distribution the function will aim to show the law most closely connected with the estate. If it regards settlement then the function of the rule of conflict will aim to serve the interests of creditors and fulfil legal requirements, etc.

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<sup>21</sup> See, amongst others, Lemaire, *De Conflictu Legum*, 1962, p. 306 and Ten Wolde, *WPNR* 6072 (1992).

Therefore, rules of conflict have been constructed in the same way in private interregional law as in private international law. The nature of the underlying event or act determines the function and thus the construction of the rule of conflict. Of course the individual international choice of law rules discussed above in the Netherlands, the Netherlands Antilles and Aruba are a source of inspiration for such construction.

*Private interregional law of succession: general*

The national law of succession in each of the three territories of the Kingdom only differ slightly at present with regard to the rules for division of an estate. However, in the near future the Netherlands will introduce a new succession law. The Netherlands Antilles and Aruba do not plan to undertake similar legislative activities. Once the new Dutch law has been codified there will be an increasing need for better interregional succession legislation.

Similar to the division in the international law of succession, interregional law also comprises two parts: distribution and settlement and division.

*Private interregional law of succession: distribution*

As already discussed above, the law with the closest connections to the deceased must be determined. The function of the interregional rules of conflict and in its extension the connecting factor must be brought into line with this. As in the international law of succession, in the interregional law of succession it must also be determined which law actually has closest connections with the deceased. It is self-evident that the nationality of the deceased does not form a useable criterium as the connecting factor in an interregional context. The place of residence is certainly a usable connecting factor. This place of residence must establish the connection between the deceased and the law most closely connected with him. According to the prevailing doctrine,<sup>22</sup> the connection with the place of residence must also be sought according to private international law: the habitual residence. The interregional rule of conflict with regard to succession reads as follows: distribution will be governed by the law of the habitual residence of the deceased at the time of his death.

The habitual residence is not a strictly defined concept. Situations could arise in which it is unclear whether someone still has its habitual place of residence in the Netherlands, for example, or in Aruba. In such cases where there is an equilibrium in terms of private international law the testator should be given the opportunity to ensure certainty, like under private international law, by means of designating one of these laws.<sup>23</sup> The testator may choose his “old” or “new” habitual residence. The choice is only valid, however, when the testator chooses either the law of the State in which he had his habitual place of residence at the time he designated the law of his choice or at the time of his death.

*Private interregional law of succession: settlement and division*

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<sup>22</sup> See, amongst others, Kollewijn, *Interregionaal en Internationaal Privaatrecht*, 1938, p. 15; Lemaire, *De Conflictu Legum*, 1962, p. 306; Joppe, *WPNR* 6005 (1991); Ten Wolde, *WPNR* 6045 (1992). See also the overview given by Henriquez, in: *Grensoverschrijdend Privaatrecht*, 1993, p. 61.

<sup>23</sup> With respect to the form of the choice of law, a connection may be sought with the *locus regit actum* rule as this is observed in private international law of all three countries.



In the case of interregional settlement and division much inspiration can be found in the Netherlands Antillean and Aruban private international law which also accepts the concept of residence. However here too, the principles of private interregional law need to be considered. As discussed the interregional rules of conflict should be constructed on a common basis.

Here, the interests of creditors and requirements of law have priority. The deceased could be contacted by his creditors or for other legal matters until the time of his death in his place of residence. In view of these interests and requirements the conflict rule with regard to distribution should, in my view, be connected to the last place of residence. The settlement of an interregional estate is also subject to the law of the internal legal place of residence of the deceased at the time of death (house of mourning).<sup>24</sup> It is likely that the duty and power of the administrator of the estate will as well as in private international law be subject to the law of the house of mourning. The special connection between the three parts of the Kingdom implies that the duty and the powers of an administrator<sup>25</sup> from one part of the Kingdom be recognised in the other constituent parts.

On the basis of the connection with the distribution, in my opinion, the same rule of conflict applies to division of the estate. If persons are identified amongst the heirs who do not possess free control over their own goods, then the division must take place by way of notarial instrument and will require court approval. This formal provisions purport to protect the incapable partner.<sup>26</sup> In view of this function, the protective provisions of the State in which the partner is habitually resident are exclusively applicable.<sup>27</sup>

*Designation of the private international law of the different constituent parts of the Kingdom by private interregional law rules*

### **General**

Is the function of the interregional choice of law rules limited to regulating questions relating to the applicability of the national law of the three territories of the Kingdom, or does this function also extend to regulating questions concerning the applicability of laws regarding conflicts of laws in the three territories? I will only discuss this question in relation to the law of succession.

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<sup>24</sup> This is the residence within the meaning of Article 10 Book 1, Dutch Civil Code, Article 66 Netherlands Antilles Civil Code and Article 66 Aruban Civil Code.

<sup>25</sup> Established on the basis of the law designated by interregional rules for settlement.

<sup>26</sup> The question of whether a partner is incapable is determined by the law of the country in which he is habitually resident.

<sup>27</sup> The question how the incapable partner should be represented is governed by the law of his habitual residence.

As a rule legal scholars distinguish the following four situations:

- (a) a foreigner has his place of domicile in one of the territories of the Kingdom;
- (b) a Dutch national has his domicile abroad , but continues to have close connections with one of the territories of the Kingdom;
- (c) a Dutch national is domiciled abroad and has no close connections with any of the territories of the Kingdom;
- (d) a foreigner is domiciled abroad.

It must be determined which territories' private international law applies. I advocate that the answer to this question can be found in the function attributed to the international choice of law rules.

*Object and function of the choice of law rules: the concept of the limited function of the conflict of laws*

On an internationally accepted basis, the function of choice of law rules is to regulate international legal transactions as efficiently and justifiably as possible. Such choice of law rules should be applied to events and acts which are carried out or performed anywhere in the world. On a national basis, on the other hand, the scope of the function of choice of law rules is restricted. My view in accordance with this is that the function of Dutch choice of law rules is limited to regulating international legal transactions as efficiently and justifiably as possible to the extent that such transactions take place within the Dutch legal system. The natural limits of Dutch choice of law rules are therefore set where events and acts arise outside the Dutch legal system. Therefore Dutch choice of law rules should only determine which law applies to an event or an act which falls beyond the scope of Dutch law or society. No one would argue that the law applicable to an inheritance entirely located and distributed in Florida left by a Brazilian testator falls within the scope of the Dutch legal system or within the scope of the Dutch choice of law rules; Dutch choice of law rules have no function to fulfil in this situation. This is no different when a creditor makes an attachment on assets located in the Netherlands belonging to a foreign registered heir of the testator or when a creditor holds a Dutch registered heir of the same testator liable for debts of the testator. In the proceedings which follow the Dutch court must consider which law is applicable to the distribution of the estate and, in particular, which law determines whether the debts of the testator pass by operation of law to the heirs. Assuming that the testator lived in Florida for less than five years prior to his death, according to Dutch private international law the estate will be governed by Brazilian law, which implies that the heir will be liable for the debts of the estate in proportion to his share of the inheritance. This, however, raised the question of whether the applicability of Dutch choice of law rules is justifiable here. After all, the Dutch legal system is not (materially) involved in the distribution of the estate as the Brazilian testator resided in Florida and, in addition, the entire estate is situated there. Does the location of the private assets of the heir or his residence in the Netherlands in this case justify the application of Dutch choice of law rules? My view is that this should not be the case as no relevant involvement exists between the Dutch legal system and the distribution of the estate, Dutch choice of law rules do not have any function to fulfil here. Foreign choice of law rules do not in, all fairness, make it mandatory but the fact that the Dutch legal community is not materially affected means that there is no necessity for applying Dutch choice of law rules.

The fact the Dutch choice of law rules are national law means that these conflict of law rules are interpreted in accordance with the norms and values prevailing in Dutch society.

The object and function of the Dutch choice of law rules, achieving efficient and justifiable regulation of international legal transactions to the extent that such transactions take place in the Dutch legal system, however, implies that this interpretation can only take place with due observation of foreign law. This is a requirement of international legal transactions. A rule of conflict must be constructed in such a way that the result is acceptable not only in the Netherlands but also abroad, only in this manner can efficient regulation be achieved. A referral to a law deemed unacceptable abroad will as a rule lead to non-recognition there too of the outcome of the referral, which is inefficient. Finding internationally acceptable solutions is the only means of ensuring the smooth progress of international legal transactions. The principle of international acceptability also entails that Dutch law and foreign law receive equal treatment as far as possible. In determining the law applicable to an event or act the Dutch courts must, in principle, therefore be impartial to the law to be applied.<sup>28</sup> Foreign and Dutch law may be equally applicable.

The principle of equality is in my view not limited to foreign substantive law but also extends to foreign choice of law rules. Both Dutch and foreign choice of law rules may, in principle, be equally applicable. Where the Dutch legal system is not materially involved and the Dutch choice of law rules therefore have no function, I feel that the foreign choice of law rules which are materially concerned should be consulted. The foreign choice of law rules may under the circumstances have more right to be applicable than Dutch choice of law rules. As will be demonstrated below there are a number of possible situations in which an event or an act is performed abroad where foreign choice of law rules are just as much or even more applicable than Dutch choice of law rules.

Applying the above view of the limited function of choice of law rules will lead to the following outcomes.

*(a) A foreigner is domiciled in one of the territories*

Take, for example, an American testator residing in Aruba who dies there. The contents of the estate include real estate located in the Netherlands. Which international choice of law should the civil-law notary apply to the distribution? Kollwijn<sup>29</sup> and Lemaire<sup>30 31</sup> argue that in this case the interregional choice of law rules should designate the applicable international choice of law rules.<sup>32</sup>

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<sup>28</sup> In the theory of Von Savigny achievement of international harmony in judgement is the highest goal. In a model in which it is assumed that the choice of law rules of all countries are founded on a common basis, this is logical. If all the choice of law rules were identical in every country, the law designated as applicable would also be the same. Under current national choice of law rules the principle of harmony of judgements, however has been reduced to a ideal only achievable by means of treaties. In the choice of law rules of each country all the choice of law rules of all the countries in the world can not theoretically been taken into consideration. Therefore, in my opinion harmony of judgements is then not a principle of the Dutch, the Netherlands Antillean or Aruban choice of law rules.

<sup>29</sup> NTIR 1953/1954, p. 288.

<sup>30</sup> De Conflictu Legum, 1962, p. 301.

<sup>31</sup> In the same sense Ten Wolde, WPNR 6045 (1992).

<sup>32</sup> See for criticism if this rule Henriquez, in: Grensoverschrijdend privaatrecht, 1993, p. 64 and Haak, Interregionaal privaatrecht, 1994, p. 23.

For that matter it should be kept in mind that these authors treat the habitual residence as the only connecting factor, in their interregional scenario the connecting factors of choice of law and *lex fori* were not known at that time. According to the doctrine of Kollewijn and Lemaire the principle of harmonizing interregional judgments also arises with regard to the applicable international choice of law rules. In that case the Dutch<sup>33</sup> or Aruban civil law notary will apply the Aruban law of succession.

In the system of choice of law rules which I support, in the case in question there is no question of requiring that a conflict be regulated by private interregional law. The private interregional law has in my opinion no function to fulfil but should limit itself to strictly "internal" cases. In the case mentioned above, and more particularly in the example given, the core question is whether Dutch international choice of law has a function since the deceased was resident in Aruba. As I have demonstrated, this is not the case. Since the Aruban legal system is materially involved, the Aruban choice of law rules applicable to succession should be applied by the Dutch court. I believe that applying the international choice of law of the last place of residence is correct on the ground of the limited function of the international choice of law and not so much on the grounds of interregional considerations.

*(b) A Dutch national is domiciled abroad, he has strong connections with one of the territories*

Kollewijn<sup>34</sup> and Lemaire<sup>35</sup> advocate that in this case the international choice of law of the territory with which the person concerned has the closest connections should be applied.<sup>36</sup>

In my opinion in this case, as well as in situation (a), private interregional law has no function. This is a question of private international law. It must be determined on the basis of the actual circumstances whether the choice of law rules of the forum are applicable. If it concerns a Dutch national who lived in Cuba at the time of his death (who had very close connections within the Kingdom with the Netherlands Antilles) and has a bank account in Amsterdam, Cuban international choice of law rules must indicate the applicable succession law. If this is Dutch law, it must then be established on the basis of Cuban law how to determine the law of which territory is applicable.

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<sup>33</sup> Assuming that the deceased was resident in Aruba for less than five years, according to Dutch private international law on the basis of Article 3, paragraph 2 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, the estate is governed by the law of the federal state of the A.S.A. with which the deceased was most closely connected (Art. 19, paragraph 3, subparagraph b).

<sup>34</sup> *Interregionaal en internationaal privaatrecht*, 1938, p. 24 and NTIR 1953/54, p. 290.

<sup>35</sup> *De Conflictu Legum*, 1962, p. 301 and p. 312.

<sup>36</sup> See also Henriquez, in: *Grensoverschrijdend privaatrecht*, 1993, p. 65. Henriquez leaves this situation on practical grounds outside private interregional law. In his view the court will then apply its own private international law.

*(c) A Dutch national is domiciled abroad, he has no special connections with any of the territories*

If no special connections can be established between a Dutch national domiciled abroad and one of the territories, according to Kollewijn and Lemaire, the international choice of law of the forum will be applicable.

For my opinion I refer to my comments under (b).

*(d) A foreigner is domiciled abroad*

In these cases a national court has no option other than to apply its own international choice of law. It is true that this disturbs interregional harmony, but the chance of this causing problems in practice is small according to Kollewijn and Lemaire.

In my view this is a strictly international case and private interregional law has no function here.

The above demonstrates that the interregional choice of law rules have no function in any of the four cases discussed, as these choice of law rules are limited to strictly interregional situations. The applicability of the international choice of law of all three territories should be applied in each case on the basis of the extent to which the legal system concerned is involved.

*Application of the rules of the convention by way of analogy in the interregional law of succession?*

Article 21 of the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons reads as follows:

"A Contracting State in which different systems of law or sets of rules of law apply to succession shall not be bound to apply the rules of the Convention to conflicts solely between the laws of different systems or sets of rules of law."

The object of this provision is to distinguish between international and interregional/interpersonal conflicts.<sup>37</sup> Article 21 makes it perfectly clear that interregional and interpersonal questions are excluded from the convention.

The provision does not, however, exclude application of the Convention to interregional situations by way of analogy. However, is this advisable? It has been explained above that the international choice of law rules can not automatically be applied to interregional situations. It is also argued that the inspiration for interregional choice of law rules may be sought in international choice of law rules. An important objection, however, is that the rules of the convention are in force exclusively in the Netherlands and not in the Netherlands Antilles and/or Aruba. Moreover, it is not likely that the convention will come into effect for the Netherlands Antilles.

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<sup>37</sup> According to the Explanatory Report, p. 601.

Analogous application of all<sup>38</sup> the rules of the convention for the interregional law of succession in my opinion is not advisable.

However, of course the provisions of Article 19, paragraph 5, subparagraphs a and b could be a source of inspiration to the extent that it concerns interregional choices of law for succession. In that case the choices must be increased to include situations where there is no equilibrium in terms of the conflict of laws and which could affect the habitual place of residence at any time in any of the territories or the close connections with any of the territories in the Kingdom. For that purpose the basis for the freedom to choose an applicable law in all three territories of the Kingdom must be changed from exclusively preventing a lack of clarity in situations with equilibrium in terms of conflict of law to favour the choice of law made by the testator to the extent possible. This is already the case in the Netherlands but not in the Netherlands Antilles and Aruba. For this reason analogous application of Article 19, paragraph 5, subparagraphs a and b is not advisable.

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<sup>38</sup> This raises the question of whether it would be advisable for the matter since the rules of the convention have been drafted with a view of creating a balance between the connecting factors of nationality and domicile, and nationality in an interregional connection is not a distinguishing criterium. The exceptions of Article 3 paragraphs 2 and 3 are so strongly connected with this balance that direct application of these rules in interregional cases is not advisable.