Dissolution of Registered Partnerships: Excursion in Conversion

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Since 2001, The Netherlands has allowed for a method of converting a marriage into a registered partnership and vice versa (arts 77a and 80g, Book 1, Dutch Civil Code). The procedure has instigated substantial discussion and is increasingly being utilised by parties wishing to end their marriage quickly. Recent figures indicate that the number of 'lightning divorces' in The Netherlands has increased to 4073 in 2002. This legal conversion causes numerous problems at substantive as well as private international law level, forming the basis of this author's adamant objection to the entire procedure (for criticism of this backdoor form of administrative divorce see, Ian Sumner, 'Transformers: Marriages in Disguise?' [2003] IFL 15). It is not intended here to delve in-depth into the problems raised at substantive law level, apart than to merely highlight some of the most interesting traits of this unique (and arguably ill-conceived) procedure.

The conversion procedure itself has raised numerous problems in practice. In a number of cases, problems have arisen with respect to instruments of conversion having been prepared without the parties actually being aware of the related consequences. In a case before the District Court in Alkmaar, a woman requested a divorce on 27 February 2002. She requested that the judge make supplementary orders on the basis of art 827 of the Dutch Code of Civil Procedure (ancillary provisions in relation to maintenance, property division, parental authority, contact, care and upbringing of children, etc). Her husband also submitted a request for the court to make judgment with respect to art 827. An oral hearing was scheduled for 30 September 2002. During the oral hearing, it appeared that the parties had converted their marriage into a registered partnership before the Registrar of Births, Deaths, Marriages and Registered Partnerships (the Registrar) on 20 August 2002. This conversion thus prevented the district court from making ancillary orders under art 827, since their marriage had been dissolved. This case illustrates the inadequacy of the two-track divorce system currently in operation in The Netherlands. There are two 'competent authorities' involved in this process; on the one hand, the Registry of Births, Deaths, Marriages and Registered Partnerships and, on the other, the district court. In the above-mentioned case, while the judicial procedure was already underway, the parties' marriage was converted into a registered partnership without the knowledge of the district court, since the Registrar is not obliged to inform the court of such a procedure. The parties were, therefore, unaware of the consequences of undertaking such a move, possibly believing that they were in fact making their divorce 'easier'.

Once a marriage has been converted into a registered partnership, the parties are for all intents and purposes involved in a registered partnership. This means that all rights, duties, responsibilities and obligations attached to the institution of registered partnership are applicable to their relationship. One of the most significant differences between the institutions of marriage and registered partnership in The Netherlands lies in the available termination procedures. Marriages must be terminated in court, (art 149, Book 1, Dutch Civil Code), while registered partnerships can be terminated before the Registrar, as well as before a judge (art 80c(c) and (d), Book 1, Dutch Civil Code). It is important to note that the non-judicial procedure can only take place should the parties be in agreement.

The combination of the conversion of a marriage into a registered partnership, coupled with the subsequent non-judicial termination of the registered partnership by means of mutual consent, gives rise in effect to a possible administrative divorce procedure in The Netherlands. This author does not oppose the introduction of administrative divorce in itself. However, if the effect of such a procedure is to remove the protection offered to the weaker party by virtue of a 'backdoor method', then objections can be raised. Article 80d provides the necessary framework and explanation to accompany the non-judicial separation procedure for terminating registered partnerships. The article stipulates that both partners must have agreed that the relationship has irretrievably broken down and that they wish to terminate their relationship. The second sentence of art 80d provides for a number of matters that must be discussed prior to the dissolution. However, this sentence of art 80d has attracted considerable attention in Dutch literature, with opinions being divided as to the compulsory character of the Article. Regardless of whether this sentence is of a compulsory nature or not (it appears that it is now generally accepted that the second sentence of Art 80d is compulsory in nature – the sentence requires that the parties have at least discussed the therein-mentioned issues; an agreement on such issues is nonetheless not compulsory), problems arise due to the absence of an explicit reference to a number of provisions. The position of children in a registered partnership does not need to have been deliberated upon ending the registered partnership. This position could (although this is not the opinion of this author) have been justified when registered partnership was first introduced due to the fact that registered partnerships had no effect on the parties' relationship with any children. However, this situation has since been altered and registered partners are now granted joint parental authority over any children born inside the registered

partnership. This amendment to the legislation therefore negates such arguments. Provisions with respect to maintenance also need not be agreed upon in order to effectively terminate the registered partnership. One could argue that the absence of such provisions is equivalent to marriage, where these factors also need not be agreed upon before a divorce is decreed (art 819, Dutch Code of Civil Procedure provides the judge with an opportunity to make such orders, but there need be no agreement on these issues before a judge is able to issue a divorce decree).

However, an essential difference arises in the nature of the procedure: the divorce procedure is in court and therefore both parties will have received legal advice, whereas the termination of a registered partnership with mutual consent occurs before the Registrar. Although art 80c(c), Book 1, Dutch Civil Code stipulates that the agreement to terminate must be signed by at least one notary or lawyer, reference is not made to the duties of such a lawyer or notary. The practical implication of such a provision is that the lawyer or notary will be involved in the conclusion of such an agreement. If the lawyer has not been involved in the preparation of the agreement, then he must first verify the compliance of the agreement with the law before he will be able to sign the document.

Leaving the substantive law issues to one side, imagine the following situation:

> In 1990, X and Y celebrate their marriage in Liverpool, England. X receives news that his office is relocating to Utrecht, The Netherlands and in 1991 X and Y move to The Netherlands. They decide to stay in The Netherlands and settle there permanently. In 1996 their first child is born, quickly followed in 1998 by another baby. However, in 2002 their marriage begins to deteriorate and X suggests that they should convert their marriage into a registered partnership in order to attempt to relieve some of the internal pressure. They go to the Registrar of Births, Deaths, Marriages and Registered Partnerships in Utrecht (their residency) and convert their marriage into a registered partnership. Two months later, things are no better and so the parties decide to dissolve their registered partnership.

If this case were to come before a Dutch judge, then questions relating to his jurisdiction could arise. One might also conceivably have to deal with questions relating to the applicable law to the conversion. Judges outside The Netherlands will also be confronted with questions relating to the recognition and enforcement of such conversions. These three separate issues are dealt with in the following sections.

Jurisdiction

Article 77a(1) allows for a marriage to be converted into a registered partnership by notifying the Registrar of the residency of either one of the parties. The definition of residency is described in detail in Title 3, Book 1, Dutch Civil Code and boils down to the factual place where the party lives or has his actual abode (see also the decision of the Dutch Supreme Court, 21 December 2001, (2002) *Nederlandse Jurisprudentie* 282). This in turn means that at least one of the parties, regardless of their nationality or the place where they celebrated their marriage, must be resident in The Netherlands in order to request a conversion. If the parties do not possess a residency in The Netherlands, then they will still nonetheless be entitled to convert their marriage in The Netherlands should one of them possess Dutch nationality. In this scenario, the conversion should be made at the Registrar in The Hague.

Choice of law rules

A Dutch Registrar is thus competent to convert a foreign marriage into a Dutch registered partnership, so long as the conditions set out above are met. Upon notification, the Registrar is required to draw up an instrument of conversion. However, although the parties' possess a Dutch residency, art 77a(1) does not state which law is applicable to the conversion itself. Nonetheless, at the moment of conversion one is able to talk of two decisive moments: the ending of the marriage (art 149(e), Book 1, Dutch Civil Code states that the conversion of a marriage into a registered partnership is one of the grounds for the termination of a marriage), and the simultaneous celebration of a registered partnership. Should one, therefore, apply the choice of law rule for the termination of marriage, the choice of law rule with respect to the celebration of a registered partnership or, more plausibly, a combination of the two?

Choice of law according to the rules relating to marriage

According to art 1(1) of the Private International Law (Divorces) Act, whether a dissolution of a marriage or judicial separation may be petitioned or demanded, and if so on what grounds, is determined:

(a) when the parties have a common national law, by that law;
(b) when there is no common national law, by the law of the country in which the parties have their habitual residence;
(c) when the parties have no common national law, and no habitual residence in the same country, by Dutch law.

Article 1(4) of the same Act also provides that Dutch law shall be applied should 'the parties jointly chose such a law or such a choice by one of the parties remains uncontested'. Although this provision is the fourth paragraph of the article, it acts as the main rule. Since the notification to convert must be a consensual notification, it would appear that the notification in itself would be enough to satisfy the conditions of art 1(4) and thus Dutch law would be applied to the termination of the marriage by virtue of

the conversion. This choice of law rule is applied at the moment the termination of the marriage is requested. In this case, the choice of law rule applies at the moment the Registrar is notified of the parties desire to convert their marriage into a registered partnership.

Choice of law according to the rules relating to registered partnerships

According to art 1(1) of the proposed Private International Law (Registered Partnership) Act currently before the Parliamentary Second Chamber, Dutch law will govern a registered partnership entered into in The Netherlands. Article 1(2) goes on to state that Dutch law will also govern the essential validity of partnerships registered in The Netherlands. This means that as long as the parties satisfy the conditions laid down in art 80a, Book 1, Dutch Civil Code, then the parties will be allowed to enter into a registered partnership in The Netherlands. However, according to art 80a(2), the parties to a future registered partnership are not allowed to enter into a registered partnership should they already be married. This restriction causes a methodological paradox. A Registrar asked to perform a conversion will have to assess the question as to whether the parties are allowed to convert their marriage prior to the conversion actually taking place. Therefore, at that time, the parties would already be married, since no dissolution has taken place and therefore would not satisfy the conditions laid down in art 80a(2), and thus not be able to enter into a registered partnership. This may seem like a hair-splitting exercise, but according to the manner in which a marriage is terminated and a registered partnership simultaneously created, it is argued that this is the only logical way in which the current law can be interpreted. The requirement that the parties are not married certainly begs questions as to the drafting of this legislation. It should not be necessary that such a requirement be satisfied, yet a strict reading of the law leads one unavoidably to such a conclusion.

Since the private international law adopted in relation to the validity of registered partnership are in fact carbon copies of the respective rules for marriage (*Parliamentary Proceedings, Second Chamber*, 2002–2003, No 28924, No 3, at p 10) and due to the fact that the bill lacks reference to the time at which these private international law rules deem to be applied, it can be argued that one should by analogy refer to the respective rules in relation to marriage in order to obtain such an answer. As has already been mentioned, a distinction is drawn in relation to marriage between questions of essential validity (governed by art 2 of the Private International Law (Marriages) Act) and formal validity (governed by art 4 of the same Act). In determining questions of the essential validity of a future marriage, the choice of law is applied at the time the request has been made to celebrate a marriage. Therefore, if one of the parties has not attained the age of majority at the time of requesting the marriage, then they will not be allowed to marry despite the fact that they would have attained such an age at the time the marriage would have celebrated. The same rule is also applied with respect to questions of formal validity.

By analogy, the time at which the proposed choice of law rules for registered partnership should be applied should therefore be identical to the rules for marriage. In other words, in determining questions of formal and essential validity, the choice of law rules will be applied at the time the request to register the partnership is made. In relation to a conversion, such a time refers to the time at which the conversion is requested, since the registration of the partnership occurs at the same time as the termination of the marriage.

Possible solutions

Solution I – private international law: the government could propose and enact legislation specifically providing for a one-step choice of law rule for determining questions surrounding the applicable law with respect to conversions. Such an approach would therefore avoid the necessity to resort to two individual choice of law rules and thus avoid the ensuing problems examined above in relation to art 80(2), Dutch Civil Code.

Solution II – legal fiction: one could opt for a so-called 'legal fiction' or 'split moment' scenario (another example of a split moment scenario in Dutch law is the so-called '*dubbele levering bij voorbaat*' (double delivery in advance)). Although A has not received the house he has bought from B, A obtains a mortgage and usufruct over the house. When the house is actually delivered (this is done by virtue of the keys being handed over), a 'split moment' is created so that the mortgage has priority over the usufruct). The choice of law rule concerning the dissolution of the marriage being applied first, resulting in the eventual dissolution of the marriage. At that moment in time, the parties would then no longer be married but nonetheless at the same time would not yet have celebrated a registered partnership. Only once this first stage has been completed would the choice of law rule with respect to the celebration of a registered partnership be applied. This somewhat vague 'no man's land' would thus present the Registrar with the opportunity to apply art 80a(2) positively and thus enable the parties to enter into a registered partnership, thus completing the conversion procedure. A technical, linguistic point made possible by the wording of art 77a could also possibly support such an argument. Article 77a(3) mentions the ending (*eindigen*) of the marriage and the beginning (*aanvangen*) of the registered partnership. However art 80a(2) talks of the celebration (*aangaan*) of a registered partnership. Therefore, one could state that the choice of law applied to the celebration of the registered partnership actually occurs after the marriage has been ended, once the partnership has begun, but before the partnership has been celebrated. This position is difficult to defend since the government certainly did not intend such a reading of the text.

Solution III – amendment: if art 80a(2), Book 1, Dutch Civil Code was amended to specifically exclude the application of this provision should the parties be converting their marriage into a registered partnership, then such problems would also be avoided.
Solution IV – abolition: instead of creating legal fictions or awkward statutory amendments allowing for a back-door administrative divorce and removing the protection of weaker parties, it is argued that the whole conversion procedure should instead be abolished. The reason for its inception has now past and the procedure has served its purpose. Should people argue that for its retention due to the non-judicial form of divorce it inherently permits, then it is submitted that the legislator should be frank about such aims and instead introduce a form of administrative divorce. Inspiration can be taken from the Danish, Norwegian or Portuguese models: for further information see K. Boele-Woelki, B. Braat, I. Sumner (eds), *European Family Law in Action: Volume I: Grounds for Divorce* (Intersentia, 2003).

Conclusions

It is submitted that despite the four options open to the government, it would be best advised to avoid substantive law solutions II and III. Both solutions provide 'quick-fix' solutions to a problem that has been created by a lack of foresight at the time of legislative enactment. If one's bicycle tyre is punctured in numerous places, it can make more sense to replace the tyre altogether than attempt to patch and repair the existing tyre. A short while after repair, the tyre will be so weak that replacement is still required. In a similar fashion, solutions II and III attempt to solve the current situation by means of a patch and repair. Instead, the legislator must re-examine the aims and function of the conversion scheme. On this basis, it is submitted that solutions I and IV provide for and promote legal certainty and avoid the clumsy use of legal amendments and legal fictions. It is, however, argued that should one also take the substantive law difficulties into account in combination with the complications created at private international law level, the government is strongly advised to proceed along the lines outlined in solution IV.

Recognition and enforcement of Dutch conversions abroad

Will Dutch conversions be recognised abroad and, in relation to this article, will a Dutch conversion be recognised in either England and Wales or Scotland? Imagine that a British judge is confronted with such a conversion, how would this be dealt with?

Recognition according to the rules of Brussels II

On 1 March 2001, Regulation (EC) No 1347/2000 of 29 May 200 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (2000) OJ L 160/19 came into force in 14 of the 15 EU Member States (Denmark being the only country not to ratify the regulation), unifying the rules on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. The effect of the Council Regulation in England and Wales and Scotland is clarified by UK-delegated legislation (European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001 (SI 2001/310), European Communities (Matrimonial Jurisdictions and Judgments) (Scotland) Regulations 2001 SI 2001/36), also applicable since 30 March 2001 in Northern Ireland: European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001 (SI 2001/660). Despite the fact that this Regulation will be repealed by Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (2003) OJ L 338/1, the so-called Brussels IIa or IIbis Regulation, this new Regulation does not enter into force until 1 March 2005 (Art 72). Even once Regulation (EC) No 2201/2003 has repealed Regulation (EC) No 1347/2000, the provisions applicable to matrimonial matters will remain more-or-less unaltered.

Whether a foreign dissolution decision falls within the material scope of Brussels II is to be found in Art 1 and 13(1). It appears from these Articles that Brussels II is applicable with respect to the recognition of judicial divorces, judicial separations and annulments of marriages, as well as with respect to certain parental responsibility issues, but this falls outside the scope of this article. Although the term 'divorce proceedings' is interpreted rather loosely, and Art 1(2) states that non-judicial procedures will be seen as equivalent to judicial procedures should they be officially recognised in a EU Member State, the Dutch conversion procedure does not fall within the scope of these provisions. The conversion procedure is not a divorce, but instead provides a distinct method for dissolving a marriage. Consequently, the conversion procedure does not, according to the Dutch Standing Committee on Private International Law and various commentators, fall within the scope of the Brussels II Regulation. If the conversion procedure does not fall within the scope of the Brussels II Regulation, one must examine the common law rules according to English and Scots law, in order to answer the question of recognition of this procedure.

Recognition according to English and Scottish law

Part II of the Family Law Act 1986 (the 1986 Act) deals with the recognition of divorces, annulments and legal separations. The rules laid down in this Act are exclusive; thus the common law rules relating to the recognition of divorces and legal separations which survived the Recognition of Divorces and Legal

Separations Act 1971 have now been replaced by the statutory scheme provided for in s 45 of the 1986 Act. The first question one must therefore ask oneself is whether the provisions of the 1986 Act are applicable to the Dutch conversion procedure.

Although the current Civil Partnerships Bill before the House of Lords would allow for the recognition of registered partnership in the UK, no reference is made in the Bill to the recognition of this sort of marital dissolution procedure. Therefore, reference to the Civil Partnerships Bill has not been made.

Scope of the 1986 Act

The 1986 Act is concerned with two different types of dissolutions: judicial divorces, annulments and legal separations on the one hand and extra-judicial divorces, annulments and legal separations on the other. As foreign matrimonial proceedings may manifestly differ from English ones, it has been necessary for the English courts to decide whether the foreign proceedings fall within one of the categories of divorce, annulment or legal separation, whether judicial or extra-judicial, within the meaning of the 1986 Act. For example, the termination of a marriage by a husbands' unilateral decision to change his religion and become a Muslim could not be regarded as either a divorce or an annulment according to the 1986 Act (see *Viswalingham v Viswalingham* (1980) 1 FLR 15). It is important to note, however, that the grounds on which the foreign divorce, nullity or legal separation was obtained are irrelevant to the question of recognition. It is immaterial that the divorce, etc was obtained on a ground unknown to English law.

As already stated above, the Dutch conversion procedure provides for the extra-judicial dissolution of a marriage and would therefore fall to be determined according to the rules on extra-judicial divorces, annulments and legal separations. Divorces may be obtained in numerous extra-judicial ways including by mutual consent, administrative divorce or under religious laws. It would thus be for an English or Scottish judge to determine whether the Dutch conversion procedure could be deemed to fall under one of the headings of extra-judicial divorce, annulment or legal separation. It is submitted that a judge confronted with a Dutch conversion would glean inspiration from the writings of Dutch commentators on this matter and would thus hold that the Dutch conversion cannot be considered to be a divorce, annulment or legal separation within the meaning of the 1986 Act since it is also not regarded as a divorce in The Netherlands. Therefore adopting a *leges causae* characterisation; an approach adopted and supported in English case law by the decision in *In re Maldonado; State of Spain v Treasury Solicitor* [1954] P 223. If this were the case, then the conversion would not fall within the material scope of the 1986 Act and thus the dissolution of the marriage would not be recognised and the parties would still be regarded as married according to English law. This could create serious problems further down the line should the parties wish to dissolve their registered partnership (and perhaps subsequently remarry or reregister a partnership). The parties would be regarded as legally single in The Netherlands upon the termination of the registered partnership and thus free to celebrate another marriage or register another partnership, whereas in England and Wales and Scotland the parties would still be regarded as married.

Problems of this nature have in fact already arisen with respect to the recognition of the conversion. In a case before the District Court in Maastricht, a married couple converted their marriage into a registered partnership. They intended to subsequently terminate their registered partnership by reason of mutual consent. However, before doing so they moved to Germany, where problems occurred due to non-recognition of their conversion. As a result neither party was able to remarry. The couple subsequently returned to The Netherlands, reconverted their registered partnership into a marriage and subsequently dissolved their marriage by way of a joint divorce application (art 80g, Book 1, Dutch Civil Code (conversion registered partnership into marriage) and art 154, Book 1, Dutch Civil Code (joint divorce application).

Assuming the 1986 Act to be applicable

One could however say that the core principle of the heading 'extra-judicial divorce' is that the parties are no longer deemed to be married. Adopting a *leges causae* characterisation approach, according to Dutch law, the parties are as a result of the conversion procedure no longer considered to be married and thus one could, indeed, speak of an extra-judicial divorce. The fact that the parties simultaneously enter into a registered partnership does not detract from the dissolution of their marriage. If one assumes that an English judge would adopt such a proposition, that is to say deeming the Dutch conversion procedure to fall within the scope of the 1986 Act, how would he proceed further? It is first necessary to examine whether or not the extra-judicial divorce was obtained by 'judicial or other proceedings' (s 54 of the 1986 Act).

The question thus arises: what are proceedings? This is an important distinction since the grounds for jurisdiction are wider for those extra-judicial divorces obtained by proceedings than for those without proceedings. The question arises as to whether the Dutch conversion procedure falls within the ambit of the phrase 'proceedings'? This is important, since the jurisdictional rules are much wider should the divorce be decreed 'with proceedings' as opposed to 'without proceedings'. While there is no definition of 'judicial or other proceedings' in the 1986 Act, s 54(1) of the 1986 Act merely states that proceedings are to be construed as 'judicial and other proceedings', it has been suggested by some commentators that the phrase is limited to those cases involving 'some act external to the parties themselves, such as registration, conciliation or some other form of approval'. The leading case in this field is *Quazi v. Quazi* [1980] AC 744. The parties who married in India were Muslims

born in India and nationals of Pakistan. They moved to Pakistan in 1964 and to Thailand in 1965. In 1968, whilst still living in Thailand they made a *khula*, a recognised form of divorce under Muslim law by which the parties signed a document terminating the marriage. They continued to live together and then moved back to Pakistan were they no longer lived together. The husband then came to live in England, where he bought a house. In 1974, against his wishes, his wife came to live with him. The husband, doubting the validity of the *khula*, flew to Pakistan and there purported to divorce his wife by pronouncing the *talaq* in accordance with the laws of Pakistan. He then returned to England where he petitioned for a declaration that the marriage had been lawfully dissolved either by the *khula* or by the *talaq*.

The court thus had to determine whether the *khula* and the *talaq* were to be regarded as a divorce obtained by means of 'other proceedings' under the Recognition of Divorces and Legal Separations Act 1971 (the 1971 Act). In declaring that the *khula* could not be regarded as falling within the material scope of the 1971 Act, Ormrod LJ stated in the Court of Appeal that 'we agree with the conclusion [of the court of first instance] about the *khula*; it was an act purely *inter partes* and involved no intervention by the state in any form' (at 789). Since the Dutch conversion procedure does involve intervention by the State (by the Registrar on behalf of the State), such a procedure is not equivalent to a *khula*. It must however be noted that Lord Diplock in the House of Lords stated that due to certain inadequacies and conflicting and confusing evidence, any decision of the Court of Appeal or House of Lords in relation to the validity of the *khula* divorce would be valueless as precedent in any subsequent case (at 804).

The House of Lords determined that the *talaq* divorce was indeed eligible for recognition since in this case the wife had been given notice, as had the chairman of the local union council, with a prospect of conciliation proceedings also having been initiated. This is in contrast to the situation in *Chaudhary v. Chaudhary* [1985] Fam 19, where a bare *talaq* (ie where the husband simply orally pronounces three times that he has divorced his wife) was not held to constitute 'proceedings'. Lord Scarman in *Quazi* defined proceedings as (at 824):

> 'any act or acts officially recognised as leading to divorce in the country where the divorce was contained and which itself is recognised by the law of the country as an effective divorce.'

This definition would, however, lead to virtually all proceedings abroad falling under the notion of proceedings and thus the rule would lose any special character that it currently possesses. On this basis, Lord Scarman was prepared to recognise the *khula* divorce even though it merely involved an agreement between the parties themselves. At any rate, if one turns ones attention to the case at hand, the question rises whether one can consider the Dutch conversion procedure to constitute 'proceedings' under the 1986 Act. Although the Registrar is not directly involved in the conversion procedure, to the extent that he is virtually powerless to alter the course of events, the Registrar must record the conversion in the register and draw up the instrument of conversion. In applying the law to the given facts, it seems quite clear that an English or Scottish judge would have little difficulty in determining that the extra-judicial divorce had been obtained by proceedings.

If one assumes that the dissolution has been obtained by proceedings, then the dissolution will be recognised if it satisfies the same conditions as though imposed on judicial dissolutions. The dissolution must have been obtained in a country where one party to the marriage was domiciled (in the English or the foreign sense) or habitually resident or of which one party was a national (s 46(1)(b) of the 1986 Act). This causes no serious problem since in order to obtain access to the conversion procedure in The Netherlands, either one of the parties must be *resident* in The Netherlands. The dissolution must also be effective under the law of the country in which it was obtained (s 46(1)(a). These conditions also need to be satisfied at the date of commencement of the dissolution proceedings (s 46(3)(a). Even if both of the parties to the marriage are now domiciled in England and Wales, the divorce can still be recognised in England and Wales.

If one however assumes that the extra-judicial divorce is not obtained by proceedings, then the recognition grounds are somewhat more restrictive. The divorce must be effective under the law of the place where is was obtained (s 46(2)(a)) and at the relevant date (the date on which the divorce, legal separation or annulment was attained, s 46(3)(b)) each party to the marriage was domiciled in that country; or either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce is recognised as valid (s 46(2)(b). This obviously causes slightly more problems since jurisdiction for the conversion procedure is based solely on jurisdiction, whereas the basis for recognition in England and Wales and Scotland is based on the British notion of domicile (a far narrower notion). Recognition is further restricted through the non-recognition of divorces should either party to the marriage be habitually resident in the UK throughout a period of a year immediately preceding the date mentioned in s 46(3)(b) (s 46(2)(c).

Whether one advances along a course of the extra-judicial divorce being obtained by proceedings or not, one must nonetheless also examine the exclusive list of grounds for non-recognition (s 51). A foreign divorce, annulment or legal separation will not be recognised if:

(a) the jurisdictional grounds listed in the 1986 Act are not satisfied (s 46(1);
(b) the divorce was not effective in the country in which it was obtained (s 46(1)(a));
(c) the decision is *res judicata* (s 51(1)(b), this ground for non-recognition is discretionary;

(d) there was no subsisting marriage between the parties at the time of the divorce (s 51(2)(b), also discretionary);
(e) there are judicial or other proceedings in progress on the grounds of want of notice of or opportunity to take part in the proceedings (s 51(3)(a), also discretionary); or
(f) the recognition would be manifestly contrary to public policy (s 51(3)).

If one proceeds from the aforementioned example, then it is clear that the first five of these grounds would provide no scope for the non-recognition of the Dutch conversion in the UK. One must, however, examine the case-law in the field of public policy to establish whether such a procedure would be contrary to English public policy. Prior to the enactment of the 1986 Act, there existed a discretionary ground for denying recognition at a common law level on public policy grounds. It is usual that the courts seek guidance from the cases decided on the basis of this common law ground in deciding whether recognition would be contrary to public policy according to the 1986 Act. Under the 1986 Act, s 51(3) states that recognition may be denied if 'it would be manifestly contrary to public policy'. Although it has been stated that the use of public policy should be exercised 'sparingly' (see *Qureshi v Qureshi* [1972] Fam 173, at 198–199, *Tahir v Tahir* (1993) SLT 194), it has since been used in circumstances when to allow the foreign divorce to be recognised would be 'offensive to the judicial sense of substantial justice' (see *Middleton v Middleton* [1967] P 62, at 69–70. The principles on which the statutory discretion should be exercised have been summarised as:

> 'In exercising its discretion ... this court should have regard to all the surrounding circumstances which would include a full investigation of the facts relied upon to support a refusal of recognition; the likely consequences if the petitioning spouse had been given the opportunity to take part in the proceedings; an assessment of what the legitimate objectives of the petitioning spouse are, and to what extent those objectives can be achieved if the foreign decree remains valid, and what the likely consequences to the spouses and any children of the family would be if recognition were refused.' (*Newmarch v Newmarch* [1978] Fam 79, at 95)

In relation to extra-judicial proceedings, as is the case with the Dutch conversion procedure, a number of peculiar problems have arisen, leading the courts to decide that the recognition of extra-judicial divorces is, as such, not against public policy (*Quazi*, at 781–782). If one has already assumed that a judge would deem a Dutch conversion to fall within the material scope of the Act, then it is likely that it would thus be recognised, since specific provision has been made in the 1986 Act for the recognition of extra-judicial proceedings. The only limitation is that the jurisdictional basis for such recognition is domicile (s 46(2)(b)). From the case-law in the area of public policy it would seem unlikely that an English or Scottish judge would be able to bring the Dutch conversion within the ambit of this provision. If a bare *talaq* is to be recognised in England there seems little objection to the conversion procedure where both parties are at least involved and in agreement.

Conclusions

This article has attempted to outline some of the substantive as well as private international law problems associated with the Dutch conversion procedure or the *omzetting*. The provisions creating the *omzetting* were conceived in haste and not thoroughly thought through. It is concluded that the Dutch legislator should now proceed along one of two lines. On the one hand, the legislature could readdress the legislation that allows for the *omzetting*. In dealing with each of the main problem areas in turn, solutions could then be proposed attempting to solve or eliminate such loopholes. Problems such as those elucidated above, for example, concerning the absence of a choice of law rule for the conversion procedure. A thorough inventory of the problems has already been conducted. On the other hand, the legislature could abandon the current situation and introduce a form of administrative divorce – a procedure that would provide an avenue for those couples in agreement concerning the irretrievable breakdown of their marriage. In doing so, attention must however given to the position of the weaker party and such an administrative divorce should not leave the weaker party out in the cold. Certain issues, such as those with respect to any children involved and spousal (or if applicable child) maintenance, should be agreed upon beforehand. The time has now come for the legislature to look carefully at the current situation. Whatever the outcome, whether the conversion procedure is maintained with amendment or administrative divorce is introduced, the situation should no longer be allowed to continue in the way it has been allowed to since 2001. However, it is the firm opinion of this author that the legislature would be best advised to introduce administrative divorce than attempt to amend an already corrupt provision. Administrative divorce is already tolerated, let us proceed further and introduce a full-blown procedure that not only protects those involved but also leads to fewer problems at an international level. The time has now come for the legislature to take the bull by the horns and deal with the inadequacies of the current situation. Not only for the national situation but also in terms of the far broader issues created at international level, occurring as soon as the parties cross the border and request recognition in a foreign jurisdiction.

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