Chapter 15
Family Law Contractualisation in the Netherlands – Changes and Trends

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Abstract This chapter aims to highlight the significant changes Dutch family law has undergone with regard to private ordering of family relationships. Whereas most family law rules are still mandatory, choices increasingly are available: partners, irrespective of their gender, may enter into a marriage or into a registered partnership or may conclude a cohabitation agreement; out-court (administrative) divorce will soon be available for spouses without minor children and divorce agreements anyhow are encouraged and even compulsory with regard to the consequences of divorce with regard to minor children ('parenting plan'). Alternative dispute resolution, including arbitration in areas where parties have the freedom to conclude binding contracts, is increasingly used. Future legislative evolutions might include forms of multi-parenthood; this remains to be seen in 2016.

Regulating Family Relations

The rights and obligations of family members are, to a large extent, regulated by law. However, this does not apply to all parts of life, and the question of whether the legal framework is still adequate in light of a number of important developments in European society, such as the increase in divorce and non-marital cohabitation (with children), has been the subject of recent research. Within the legal framework, family members can define their relationship by making agreements with one another. How broad should this freedom be with regard to international, European and national values, particularly the principle of equality? Who has, and takes, responsibility for people who have a need for protection and care? Where is the line between the public and the private domain? In the discussion on legislating family relations more questions arise: When and how should the state take regulatory action? Which areas (e.g. the entering and leaving of relationships, descent) must be (mandatorily) regulated? Which conceptions regarding 'the family' and the

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protection of the 'vulnerable' lie at the heart of this, and are these in accordance with the views of society? National family law has been influenced by international (CRC, CEDAW) and European (EU, ECHR, ESH) norms and values, but the question arises as to what extent. These are governmental concerns. The other side of the coin is self-regulation. Which agreements can family members make between themselves. It concerns agreements between children and parents about care, between partners over their property relationship and the distribution of care, between couples and third parties over the lineage and care of children, between separated parents over their children, between parents and third parties with regard to the medical care of their children, or between family members concerning organ or tissue donation, or acting as a donor. In making an agreement, it is not only the content which is important, but also, in particular, the fulfilment of obligations and the impact of changes in circumstances. How far does party autonomy extend in family relations? Do the principles of contract law apply unlimitedly, in particular the rule of *pacta sunt servanda*, and how should the courts decide where fundamental values are involved? Under what circumstances can an appeal to reasonableness and fairness be made?

In the following sections an attempt will be made to provide an analysis of how the contractualisation of Dutch family law has evolved. Two main parts are to be distinguished: the freedom of family members to contract on substantive family law issues (1) and their freedom to make legal arrangements as regards the procedure, more precisely the resolution of family disputes (2).

Substantive Contractualisation

Boundaries of Contractual Freedom

Private Law

The general boundaries of private autonomy are provided by Article 3:40 DCC. A juridical act is revocable (*vernietigbaar*) or void (*nietig*) if it violates the law, public order and good morals. In principle, a juridical act that violates a mandatory statutory provision is void. However, if the provision is "intended solely for the protection of one of the parties of a multilateral juridical act, the act may only be annulled".[1] A contract that violates public order or good morals is generally void. For instance, a commercial surrogacy agreement in which the parties agree that the commissioning parents will pay the surrogate mother much more than merely compensation is void because it violates good morals.

[1]Art. 3:40 section 2 DCC; Hartkamp AS (2006) Law of Obligations. In: Chorus MJ, Gerver PHM and Hondius E Introduction to Dutch Law. Kluwer Law International, Alphen aan den Rijn, pp 157–158.

Family Law

Generally, Dutch family law rules have a mandatory character. As a result party autonomy in family matters is limited. For instance, the rights and duties of spouses and registered partners are laid down in mandatory statutory provisions.[2] Parties are not allowed to deviate from these rules by agreement, unless otherwise stated. Article 1:84 section 3 DCC, for example, provides for the possibility to deviate from the mutual duty to bear the costs of the household.[3] Furthermore, parents are not able to enter into agreements concerning the establishment of affiliation or the relinquishment of parental responsibility. However, it is possible to agree on other family-related issues, for example (matrimonial) property relationships, maintenance and contact agreements. Although agreements on child maintenance are allowed, parents have to operate within the confines of the law. For instance, a child maintenance agreement cannot waive the obligation to pay child maintenance.[4]

Horizontal Family Law

Marriage and Registered Partnership

The law recognizes two types of partnerships: a civil marriage and a registered partnership. Both partnerships are open to heterosexual as well as homosexual couples. In 2006, the Act opening civil marriage to same-sex couples (Wet openstelling huwelijk) and the Act introducing registered partnership (Wet geregistreerd partnerschap) were evaluated.[5] The researchers concluded, among other things, that although the legal consequences are almost identical for married couples and registered partners, there was a "societal demand" for a marital alternative.[6] The statistics support this conclusion. In 2012, the total number of marriages was 70,315 (69,030 between a man and a woman, 544 between men and 741 between women). In 2013, the total number of marriages decreased significantly to 64,549 (63,327 between a man and a woman, 522 between men and 700 between women). In 2012, the total number of registered partnerships was 9,225 (8,789 between a man and a woman, 217 between men and 218 between women) whereas in 2013 the total number slightly increased to 9,445 (9,038 between a man and a woman, 208

[2]Title 6 of Book 1 DCC.

[3]Art.1:84 section 1 en 2 DCC.

[4]Art. 1:400 section 2 DCC.

[5]Boele-Woelki KRSD et al (2007) Huwelijk of geregistreerd partnerschap. Kluwer: WODC Ministerie van Justitie, Deventer.

[6]Boele-Woelki KRSD et al (2007) Huwelijk of geregistreerd partnerschap. Kluwer: WODC Ministerie van Justitie, Deventer, p 254.

between men and 199 between women).[7] These figures show that the institution of registered partnership has acquired a solid standing among heterosexual couples.

Formation Requirements

Several legal conditions have to be fulfilled to enter into a marriage or registered partnership (the same conditions apply). Since polygamy is not allowed in the Netherlands, a person may only marry or register a relationship if he or she is not married to or registered with another person (Art. 1:33 DCC). Persons are not allowed to enter into a formal relationship with persons who are within the prohibited degrees of consanguinity. Both partners should have a minimum age of eighteen, unless the partners have reached the age of sixteen and can prove that the woman is pregnant or has already given birth to a child. In addition, the Minister of Justice may provide for a dispensation in case of other important circumstances (Art. 1:31 DCC). However, in practice this is hardly granted. A minor can only marry with the consent of his or her parents. In the event that parents do not consent, the minor can request substitute consent from the courts. At this moment in time, a Bill is pending in the Second Chamber concerning forced marriages.[8] In order to reduce this kind of marriage it is proposed that the exceptions made for minors will be abolished. This means that a person has to be eighteen years of age in order to be able to marry. In addition, neither a marriage between an uncle or an aunt with a niece or nephew will be allowed, nor a marriage between first cousins. An exception applies if both parties declare under oath that their wish to marry is based on their free consent. If the Bill will be approved, the Public Prosecutor will be obliged to prevent a marriage if it concerns a forced marriage. Furthermore, the Public Prosecutor will have the competence to declare a forced marriage void. A marriage or registered partnership is not possible if one of the partners is mentally disabled and is not able to determine his or her own will. Although the legal conditions for entering into a marriage or a registered partnership are the same, differences exist with regard to the legal conditions for a dissolution.

Dissolution

A marriage is dissolved by death, divorce or a decree of legal separation (*scheiding van tafel en bed*). Spouses can jointly or unilaterally request the court for a divorce. Since 2003 the number of divorces is approximately 33,000–35,000 per year. The percentages of divorces granted upon a joint request increased from 48.4 % in 1999

[7] Statistics Netherlands. http://statline.cbs.nl

[8] *Kamerstukken II* 2012/13, 33 488, nr. 3. The Second Chamber approved the amended Bill of 25 March 2014. It has been submitted to the First Chamber.

to 64.8 % in 2009, while in 2011 it decreased to 58.7 %.[9] The only ground for divorce is irretrievable breakdown, even if the partners file a unilateral request; divorce by consent does not form an autonomous ground for divorce. While spouses are obliged to request the court for a divorce, registered partners without children can dissolve their relationship without the intervention of the court. This requires that partners have entered into an agreement, including a statement that they want to end their relationship because it has irretrievably broken down. In December 2013, a Bill was proposed which introduces a so-called administrative divorce. Once this Bill will enter into force the courts will lose their monopoly to dissolve marriages. The courts will share this competence with civil registrars. Three conditions are to be fulfilled: (1) the spouses do not have minor children at the moment of their request; (2) the divorce is based upon a joint request; and (3) the spouses declare that their marriage has irretrievably broken down. The Bill has been modelled on the administrative dissolution of registered partnerships which was introduced in 1998. Currently, if registered partners choose to dissolve their partnership at the office of the civil registrar they are obliged to submit a dissolution agreement on maintenance, the continued use of the house/apartment, the division of property and pension rights. In contrast, when they request the court to dissolve their partnership such an agreement is not necessary. In order to make the administrative divorce 'attractive' the Bill proposes not to require a divorce agreement. In turn it will be abandoned for the dissolution of registered partnerships as well in order to have similar rules for both institutions. In about 14,000 divorce cases per year the spouses have no minor children at the moment of filing the divorce request. A huge decrease in the courts' workload is expected to take place.[10]

Cohabitation

Book 1 of the DCC which contains family law does not regulate cohabitation. However, in tax law, for example, cohabitants can have tax advantages if they fulfill certain requirements, and in social security law cohabitants are considered to be equal to married couples. The only provision in Book 1 of the DCC that refers to cohabitants concerns spousal maintenance. The right of a partner to receive spousal maintenance will end if he or she starts living together with someone "as if they are married".[11] In legal literature, it has been argued that certain marital property rights should be applicable to cohabitants. In 2010, research was conducted, commissioned by the Ministry of Security and Justice, on the "necessity

[9]Chin-A-Fat BES (2013) (Echt)scheiding. In: Brenninkmeijer AFM et al (ed.) Handboek mediation. Sdu Uitgevers, The Hague, pp. 404–405; Statistics Netherlands http://statline.cbs.nl/

[10]http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/12/08/wet-scheiden-zonder-rechter-memorie-van-toelichting.html

[11]Living together with someone who is still married does not fall under this definition, Hoge Raad 20 December 2013, ECLI:NL:HR:2013:2058.

to provide an additional legal regulation of the total separation of property" to partners in a formalized relationship as well as to partners living in an informal relationship.[12] The researchers concluded that "there are sufficient grounds to consider a regulation providing for the mitigation of financial problems and unfair effects of the termination of informal relationships". They, amongst others, suggest that a number of provisions for married couples in Book 1 of the Civil Code could be equally applied to partners in an informal relationship.[13] The Ministry of Security and Justice, however, did not see any need to legislate at this moment in time.[14] As a result, partners can only obtain legal recognition of their relationship to a certain extent by entering into a cohabitation agreement. The legal consequences are limited to the issues laid down by the partners. If the agreement is drawn up by a notary, it can be executed.

Contracting on Horizontal Relationships

Contracting on Formal or Substantive Conditions

Under Dutch family law it is not possible to bind oneself through an agreement in respect of the formation requirements. The rules on entering into a marriage or a registered partnership are mandatory. This also applies as regards the substantive and formal conditions to dissolve a marriage or registered partnership. They are not at the disposal of spouses/partners. This will not change once the Bill on divorce without the involvement of a judge will enter into force.

Contracting on Divorce

The consequences of a divorce can be arranged in a divorce agreement (*echtscheidingsconvenant*) in which the division of property, spousal maintenance, pension rights and child arrangements are laid down. There are no formal requirements for such agreements,[15] except for the child arrangements; they have to be in writing. This also means that persons without any legal education can be consulted by the spouses in drawing up their divorce agreement or that spouses can download a

[12] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague.

[13] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague, p 296.

[14] Letter to the Second Chamber 28 February 2012, *Kamerstukken II* 2011/12, 28 867 nr. 29.

[15] Hoge Raad 26 January 1979, *NJ* 1980, 19.

standard agreement from the internet. Over the past few years, an increase in the number of (online) "divorce agents" has been observed.[16]

Contracting on Spousal Maintenance

Spouses can enter into an agreement concerning spousal maintenance before or after the divorce decree (Art. 1:158 DCC). Spouses have the freedom to agree that no maintenance has to be paid; however, they can only agree on this during the marriage with the prospect of a divorce.[17] Furthermore, spouses can deviate from the duration of the maintenance. It is important to note that spouses may agree that the contract cannot be amended by the courts due to 'a change of circumstances'. If spouses have laid down such a provision, the courts may only interfere in case a change of circumstances results in an extremely unreasonable and unfair situation. Contracts between spouses who have not laid down that their contracts cannot be changed, can be altered by the courts if a 'change of circumstances' has taken place. Another reason for the courts to change the agreement is if the spouses have clearly disregarded the legal standard. However, the court will interpret these provisions strictly, in order to respect the autonomy of the spouses. It has also been argued that changing a maintenance agreement may have consequences for the agreement regarding the division of property.[18]

Vertical Family Law

The Parent-Child Family Relation(s)

Legal Parenthood

While legal parenthood is still primarily based on biology, a trend is developing towards social parenthood as a basis for legal parenthood. In 2009 the requirements for adoption by lesbian couples were eased. In the same year approximately 25,000 lesbian couples lived together of whom 20 % had children under 18 years of age in their household.[19] Based on sociological research, it is expected that these numbers

[16]Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18.

[17]Hoge Raad 7 March 1980, *NJ* 1980, 363. For a dissenting opinion see Schonewille F (2012) Partijautonomie in het relatievermogensrecht. Maklu-Uitgevers, Apeldoorn/Antwerp, pp 127–130.

[18]Wortmann SFM and Van Duijvendijk-Brand J (2012) Personen- en familierecht. Kluwer, Deventer, p 170.

[19]Vonk MJ and Bos H (2012) Duo-moederschap in Nederland vanuit juridisch en ontwikkelingspsychologisch perspectief. Familie & Recht 2012, juli-September. doi: 10.5553/FenR/.000005

will increase in the coming years.[20] On 1st April 2014, the Act concerning the establishment of legal parenthood of the female partner of the mother other than through adoption entered into force.[21] The fundamental changes in affiliation law encompass the following. The mother of a child is not only the woman who has given birth to the child (*mater semper certa est*)[22] or who has adopted the child, but also the woman who is married to the birthmother, who has recognized the child or whose parenthood is established in court. In order to become a co-mother by law, the partners have to be married or registered and must have used medically assisted procreation with the sperm of an unknown donor. If they are not married or they used a known donor, the co-mother can recognize the child or her motherhood can be established in court proceedings.

The father is the man who is married to the mother, who has recognized the child, whose paternity has been established in court proceedings or who has adopted the child. The recognition of maternity or paternity is null and void if the birthmother has not given her consent to the recognition. However, co-mothers, begetters and donors with family life may request the court to substitute its authorization for the mother's consent. Male couples can only become legal parents by adoption. Until recently, married fathers received legal parenthood by law, while registered partners had to recognize their child. On the 1st April 2014, the situation of married and registered couples with regard to affiliation finally were equalized.[23]

Parental Responsibility

A person who has parental responsibility over a child is obliged to care for the child. This means that such persons are responsible for the mental and physical well-being of the child, its safety and the development of its personality.[24] Furthermore, parents with parental responsibility are obliged to encourage contact with the other parent. Legal parents who are married or who are registered partners have joint parental responsibility over their children by law. If the legal parents are not married or registered, only the mother has parental responsibility. In order to exercise joint parental responsibility, the father and the mother have to be recorded in the parental responsibility register as exercising joint parental responsibility (Art. 1:252 DCC). This joint request will generally be granted. If the mother does not cooperate the father can request the court to assign joint parental responsibility to both parents or sole parental responsibility to him. The court can replace the mother's consent to

[20] Vonk MJ and Bos H (2012) Duo-moederschap in Nederland vanuit juridisch en ontwikkelingspsychologisch perspectief. Familie & Recht 2012, juli-September. doi: 10.5553/FenR/.000005

[21] *Staatsblad* 2013, 480; 2014, 132.

[22] While the birthmother is not necessarily the genetic parent, the legislator has decided to maintain this principle also in case of egg donation or surrogacy.

[23] *Staatsblad* 2013, 486; 2014, 134.

[24] Art. 1:247 DCC.

exercise joint parental responsibility with the father if this is in the best interest of the child. One of the legal parents may also have joint parental responsibility with a non-legal parent, if the child is born 'within' a marriage or registered partnership and only has one legal parent. In addition, the court may assign parental responsibility to a non-legal parent who, together with the legal parent, takes care for the child. As long as same-sex couples do not both become legal parents by law, the latter rules in particular will be of importance for them. In principle, parents maintain joint parental responsibility after a divorce or separation. Only upon the request of one of the parents and if the child would become "torn or lost between the parents" in the case of joint parental responsibility, or sole parental responsibility is otherwise necessary in the best interests of the child, the court may determine that one of the parents has parental responsibility. However, this is the exception rather than the rule.[25]

Child Maintenance

Parents are obliged to maintain their children. Not only legal parents have this obligation, but also others might have to financially support a child. The biological father has to pay child maintenance if the child does not have two legal parents. The same is true for the partner of the mother who has agreed to the procreation of the child. This might be a male partner as well as a female partner. Besides the biological parent and the parent who intended to care for the child, a social parent may be financially responsible; both a step-parent and a non-legal parent with parental responsibility have an obligation to support their (step)child (Art. 1:395 DCC and 1:253w DCC). While a step-parent only has this responsibility as long as he is in a formalized relationship with the mother and lives together with the child, these requirements are not applicable to the parent with parental responsibility.

Contracting on Legal Parenthood

Dutch law concerning affiliation and parental responsibility is mandatory and cannot be set aside by contract.[26] These kinds of contracts are considered void, since they violate the law (Art. 3:40 DCC). However, this does not mean that parents do not make agreements concerning the role that a third person should play in the child's life. Lesbian couples may, for example, enter into a contract with

[25] Schrama WM (2009) Family Function over Family Form in the Law of Parentage, The legal position of children born in informal relationships. In: Boele-Woelki KRSD (ed.) Debates in Family Law at the Dawn of the 21st Century. European Family Law series no. 23. Intersentia, Antwerp, pp 117–138.

[26] De Boer J (2010) 1* Personen- en familierecht, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Kluwer, Deventer, p 695.

a known donor agreeing on the roles of all parties, or commissioning parents may enter into an agreement with a surrogate mother. However, these agreements are not recognized as valid agreements and cannot be enforced.[27] It is generally acknowledged that a surrogate mother cannot be obliged to give away the child. Less clarity exists with regard to the obligation of commissioning parents to accept a child. While some authors state that commissioning parents cannot be obliged to do this, others argue that they can.[28] Although surrogacy agreements on the establishment or exclusion of parenthood are invalid, these kinds of agreements may be of importance in court proceedings concerning the assignment of parenthood. If all parties agree that the commissioning parents will take care of the child and adhere to this decision after the birth of the child, the court might more easily transfer legal parenthood and parental responsibilities from the surrogate mother to the commissioning parents.[29] Also agreements between lesbian couples with known donors in which they agree that the known donor will have parental responsibility or will play a specific role in the child's life are not enforceable. They are however used in court proceedings in order to prove the initial parties' intentions.

Contracting on Parental Responsibilities

Parenting Plan

As mentioned in section "The parent-child family relation(s)" parents maintain joint parental responsibility after a divorce or separation and they cannot obtain or lose parental responsibility by contract. Only the courts can decide on this matter. Since 2009, parents with parental responsibility, who want to divorce or separate, are obliged to enter into a 'parenting plan' (*ouderschapsplan*). They have to make agreements concerning (1) the division of care and upbringing duties (main residence and contact); (2) the way they will inform each other about child-related issues; and (3) child maintenance. The parenting plan is to be submitted to the courts which marginally scrutinize whether the agreement is in the best interests of the child.[30] Upon approval it will be attached to or incorporated into the divorce decision. The question arises as to what other issues parents can agree upon and what legal status is given to the parenting plan. Although it is argued

[27] Boele-Woelki KRSD (2013) (Cross-border) Surrogate Motherhood: We Need to Take Action Now! In: The Permanent Bureau of the Hague Conference on Private International Law (ed) A Commitment to Private International Law, Essays in honour of Hans van Loon. Intersentia, Cambrigde/Antwerp/Portland, pp 47–58.

[28] Boele-Woelki KRSD et al. (2012) Draagmoederschap en illegale opneming van kinderen. Boom Juridische Uitgevers, The Hague, p 47.

[29] See for example Rechtbank Noord Nederland 11 September 2013, ECLI:NL:RBNNE:2013:5503, *NJF* 2013/143.

[30] Ackermans-Wijn JCE (2012) De nieuwe aanbevelingen van het LOVF met betrekking tot het ouderschapsplan. EB Tijdschrift voor Scheidingsrecht 74: 7–8.

in literature that parents are free in exercising their parental responsibilities and that they cannot be bound by contract,[31] the minister has stated that a parenting plan does not limit parents in exercising parental responsibilities but that it enables parents to consider how they want to exercise their responsibilities after a divorce or separation. Furthermore, it is unclear whether a parenting plan is a substantive or procedural requirement for obtaining a divorce. If a parenting plan is not submitted, the divorce will not be pronounced. As a result the requirements for obtaining a divorce in the Netherlands have become more severe. The spouses are bound to come to an agreement as regards the divorce consequences for children. This obligatory character of the parenting plan is irreconcilable with the notion of party autonomy. Freedom of contract does not exist as regards the above-mentioned issues which are prescribed by law and must be contained in the agreement. Only as regards the precise content of the arrangements are the spouses free to decide, although they may not violate the best interests of the child. Only in exceptional cases, where it has been proven that the parents cannot communicate, will the court decide on issues which are to be included in a parenting plan and will subsequently dissolve the marriage. However, this path is not easily taken. First, the parents have to do their 'homework'. Mediation might help in this regard, but not in all cases does mediation turn out to be successful. In cases of so-called divorces involving a bitter conflict between the separating spouses (*vechtscheidingen*) the obligation to draw up a parenting plan might be more of an obstacle than a relief. In the evaluation study of parenting plans which was published in December 2013, it has been concluded that:

1. agreements concerning the children after divorce are being increasingly entered into;
2. the parenting plan is imbedded in the daily work of family lawyers, mediators and judges;
3. the parenting plan obliges the parents to think about the consequences of their separation for their children which is considered to be an advantage since otherwise the divorce procedure cannot start;
4. less judicial procedures concerning child matters are taking place, which can be explained by the fact that parents must agree on several child issues at the time of their divorce.

Finally, it has been concluded that there is no evidence that parenting plans have led to more contact between the child and both parents, that fewer conflicts between the parents have arisen and that children have less problems.[32] These aims, however, constituted the initial objectives of the legislator. With regard to the enforcement of parenting plans see section "Execution".

[31] De Boer J (2010) 1* Personen- en familierecht, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Kluwer, Deventer, p 818.

[32] Ter Voet MJ and Geurts T (2013) Evaluatie ouderschapsplan: een eerste verkenning. WODC, The Hague, pp 7–11.

Contracting on (Religious) Education

With reference to a decision of the *Hoge Raad* in 1938 it has been argued that the person with parental responsibility is free to decide on the choice of education and cannot be bound by contract.[33] However, it is not unusual that parents add a provision in their parenting plan that they will jointly decide on educational matters and that they will try mediation if they are not able to agree. If parents do not reach an agreement, they can request the court to decide on the matter.[34] It can be reported that disputes have been decided about all sorts of issues linked to the exercise of parental responsibilities, such as religious education and medical treatment. Choosing or changing schools and other problems connected with the child's education have also been a source of disputes.[35] However, since the introduction of the parenting plan in 2009, agreements on specific educational choices laid down in a parenting plan have not been contested before the courts (or at least not been published).

Contracting on the Child's Residence

In principle, the parents are free to decide with whom the child should live. The determination of the (main) residence of the child is one of the mandatory requirements of the parenting plan that the parents are obliged to draw up upon their separation. The parents can agree on residence with one of them or on shared residence. If they cannot reach an agreement as to with whom the child should live or whether it should live with both parents on an alternating basis, they can ask the court to decide.[36]

The *Hof 's-Gravenhage* held in 2011 that, in principle, a settlement agreement (see section "Arbitration") concerning the residence of a child is generally binding.[37] However, in this particular case the court decided that due to a change of circumstance the agreement was no longer in the best interests of the child. Therefore, the agreement was no longer binding.

[33] Hoge Raad 20 May 1938, *NJ* 1939, 94.

[34] See for example Gerechtshof 's-Gravenhage 9 June 2010, ECLI:NL:GHSGR:2010:BM8379; Gerechtshof 's-Hertogenbosch 20 December 2012, ECLI:NL:GHSHE:2012:BY6982; Gerechtshof Arnhem-Leeuwarden 10 January 2013, ECLI:NL:GHARL:2013:BZ1919.

[35] See for example Gerechtshof 's Gravenhage, 23 June 2010, LJN BN3877, Rechtbank Zwolle, 19 August 2004, LJN AQ7125 and Rechtbank 's Hertogenbosch 9 June 2005, LJN AT7299.

[36] Art. 1:253a DCC.

[37] Gerechtshof 's Gravenhage 2 March 2011, *RFR* 2011/73.

Contracting on the Dissolution of the Parent-Child Relationship

According to Dutch law parents with parental responsibilities cannot dissolve their legal relationship with the child by agreement. The rule 'once a parent, always a parent' applies. Only the court can dissolve the parent-child relationship in the case of adoption or when it discharges the holder(s) from their parental responsibilities when his/her/their behaviour results in a serious risk to the person or the property of the child.

Procedural Contractualisation

ADR Techniques

There are three main ADR techniques available in the Netherlands: arbitration, binding advice and mediation. Arbitration and binding advice can be characterised as mechanisms in which a third independent person stands above the parties while in mediation a third person stands "between" the parties.[38] Until recently, in particular arbitration has not been used in family disputes (see section "Arbitration"). The Netherlands is not familiar with in-court ADR, yet courts have the possibility to refer parties to mediation and all courts have a so- called mediation office.[39] In 8 out of 1,000 cases the courts refer to mediation,[40] most of them being family cases.[41]

Arbitration and Binding Advice

Arbitration and binding advice have a statutory basis in both national and transnational law.[42] Parties can enter into an arbitration agreement in which they agree to submit a dispute to arbitration. The dispute is settled by one of more arbitrators, mostly one or three (at least an uneven number). On the 1st January 2015 the new Dutch arbitration law entered into force.[43] It contains new rules on the exchange

[38] Brenninkmeijer AFM (2013) Mediation. In: Brenninkmeijer AFM et al (ed.) Handboek mediation. Sdu Uitgevers, The Hague, p 35.

[39] Chin-A-Fat BES (2011) Scheiden anno 2011, Over depolarisering, mediation en overlegscheiding. In: Justitiële verkenningen, Scheiding en ouderschap 37 (6). Boom Juridische Uitgevers-WODC, The Hague, p 37.

[40] De Rechtspraak. Kengetallen 2011. http://www.rechtspraak.nl

[41] Chin-A-Fat BES (2011) Scheiden anno 2011, Over depolarisering, mediation en overlegscheiding. In: Justitiële verkenningen, Scheiding en ouderschap 37 (6). Boom Juridische Uitgevers-WODC, The Hague, p 38.

[42] Art. 1020–1073 of the Code of Civil Procedure (CCP) and Art. 900–906 of Book 7 DCC.

[43] *Staatsblad* 2014, 200; 2014, 254.

of procedural documents by e-mail, and the procedure has become cheaper for the parties involved. Binding advice concerns "the performance of a contract which calls for a third party to decide as to how a conflict should be solved".[44] The Netherlands has many specific dispute committees (*geschillencommissies*), e.g. committees for consumer cases, disputes between employers and employees and disputes between landlords and tenants.

Since these ADR techniques are private arrangements without any state interference, no formal registration exists. This means that the exact number of arbitration and binding advice cases cannot be obtained. Approximately 1,500 arbitration cases are registered at the courts each year whereas the number of cases of binding advice is estimated at nearly 5,000 per year.[45]

Mediation

Mediation is only regulated for transnational situations, due to the implementation of the EU directive on certain aspects of mediation in civil and commercial matters.[46] While the Second Chamber approved the initial proposal to apply the directive also in national situations,[47] it was withdrawn, because it would not have received the necessary majority in the First Chamber.[48] This means that mediation is not regulated as such, but the legal basis is found in settlement agreements (*vaststellingsovereenkomsten*).[49] The provisions regarding this kind of agreement cover the result of a successful mediation, but not other issues such as access to the courts, limitation periods, liability, confidentiality and the costs of mediators. These rules have been developed in the case law.[50] Only in the Code of Civil Procedure is any explicit reference made to mediation. Courts have the possibility to refer to mediation if divorcing parents were not able to agree upon a 'parenting plan'.[51] However, mediation is not obligatory. In September 2013, a new proposal to regulate mediation in national situations was introduced in the Second Chamber.[52]

[44] Hondius E (2006) Specific contracts. In: Chorus MJ et al Introduction to Dutch Law. Kluwer Law International, Alphen aan den Rijn, p 240.

[45] Brenninkmeijer AFM (2013) Mediation. In: Brenninkmeijer AFM et al (ed.) Handboek mediation. Sdu Uitgevers, The Hague, pp 43–44.

[46] Implementation of EU Directive 2008/52/EG: *Staatsblad* 2012, 570.

[47] *Kamerstukken II* 2011/2012, 33 122, nr. 2.

[48] *Kamerstukken I* 2012/2013, 32 555 H.

[49] Articles 900–906 Book 7 DCC. This is the same basis as for binding advice.

[50] Van Hoek AAH and Kocken CLB (2013) The Netherlands. In: Esplugues C et al Civil and Commercial Mediation in Europe. Intersentia, Cambridge/Antwerp/Portland, p 497.

[51] Articles 815 and 818 CCP.

[52] *Kamerstukken II* 2012/2013, 33 722.

According to official documents the Netherlands considers itself as a leading country with regard to mediation.[53] Nevertheless, in 2010, the number of mediations was approximately only 51,960, which is relatively small in comparison with the 1,187,560 civil court cases in the same year.[54] Research indicates that in 70 % of all mediation cases the parties do reach an agreement and in 16 % of cases a partial agreement is reached.[55]

Application in Family Matters

Arbitration

Since March 2012, a new ADR technique has been promoted in family disputes: arbitration.[56] Although arbitration was theoretically possible in family matters, in practice it was rarely used. It has been argued that arbitration does not suit family-related issues since family matters are matters of public order.[57] Article 1020 section 3 of the Code of Civil Procedure determines as regards the arbitrability of a case that "the arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose." In the *travaux préparatoires* of this Code it is stated that most family matters have a mandatory character in Dutch law, which means that this kind of dispute would not be suitable for arbitration. Exceptions are made for the division of matrimonial property and for maintenance agreements.[58] It has been argued that even though many areas of family law are mandatory and do not provide any possibility for the parties to deviate, modify or change certain rules such as the establishment and exclusion of affiliation and parental responsibility, other family-related matters are at the discretion of the parties, such as property relations between the spouses, the division of property after divorce, spousal and child maintenance *and* the residence of the child andcontact agreements.[59] In 2010, the

[53] *Kamerstukken II* 2012/2013, 33 722, nr. 2, p 1.

[54] Including debt collection cases. Van Hoek AAH and Kocken CLB (2013) The Netherlands. In: Esplugues C et al Civil and Commercial Mediation in Europe. Intersentia, Cambridge/Antwerp/Portland, p 494 who refer to *Kamerstukken I* 2012/2013, 32 555 nr. C, pp 3–4.

[55] Vogels RJM (2011) De stand van Mediation in Nederland. Stratus, Zoetermeer, p 14.

[56] Since March 2012 the Netherlands Arbitration Institute has 20 specialized family law arbitrators.

[57] Zonnenberg LHM (2012) Arbitrage in het familierecht. EB Tijdschrift voor Scheidingsrecht 12, who refers to Snijders HJ (2011) Nederlands Arbitragerecht. Kluwer, Deventer, p 84.

[58] Meijer GJ (2012) Commentaar op artikel 1020 Rv. In: Van Mierlo AIM, Van Nispen CJJC, Polak MV (eds.) Tekst & commentaar Burgerlijke Rechtsvordering. Kluwer, Deventer. The new Dutch arbitration law does not change Article 1020 section 3 of the Code of Civil Procedure.

[59] Zonnenberg LHM (2012) Arbitrage in het familierecht. EB Tijdschrift voor Scheidingsrecht 12; Gerechtshof 's- Gravenhage 2 March 2011, ECLI:NL:GHSGR:2011:BP9424 (binding agreement regarding the residence of a child).

Rechtbank Arnhem held that a request by a mother to change the child maintenance agreement was not admissible since she had entered into an arbitration contract with the other parent.[60]

Since court procedures concerning divorce-related issues are time-consuming and costly, arbitration is considered as a possible alternative. No specific exceptions exist for the arbitration procedure in family law matters. This means that partners can agree upon arbitration *ad hoc* or in advance and that the court has to grant leave for enforcement, thereby marginally scrutinizing the settlement, before it can be executed (section "Execution"). It is not known how often arbitration in family law disputes has been used.

Mediation

Mediation has a long history in family law matters. Mediation started in the late 1980s when some family lawyers were trained to become divorce mediators. In 1990 they established an association for divorce mediation lawyers (*Vereniging van Advocaat-Scheidingsbemiddelaars, currently vFAS*). Since then, mediation has gained major importance. Approximately 45 % of the total number of mediation cases concern family issues.[61] Mediation is on a voluntary basis, but courts can refer parents to mediation in order to enter into a 'parenting plan'. The main reasons for partners to make use of mediation is because they want to maintain a good relationship with the other partner or because of the lower costs.[62]

Collaborative Divorce

While, for long time, mediation was the dominant ADR technique used in family law matters, since recently collaborative divorce and family law arbitration have been introduced in the Netherlands. Inspired by American practice, collaborative law was introduced at the beginning of this century. Especially in family law, this has become a popular form of dispute resolution; the so-called collaborative divorce.[63] According to this method, both parties are represented by their lawyer, but aim to settle the dispute without court intervention. They may jointly appoint a coach and include other experts in the process, for example a financial expert or child therapist.

[60] Rechtbank Arnhem 14 June 2010, ECLI:NL:RBARN:2010:BN2002.

[61] Vogels RJM (2011) De stand van mediation in Nederland. Stratus, Zoetermeer, p 11.

[62] Vogels RJM and Van der Zeijden P.Th (2010) De stand van mediation in Nederland. Stratus, Zoetermeer, p 42.

[63] Zonnenberg LHM (2012) Arbitrage in het familierecht. EB Tijdschrift voor Scheidingsrecht 12.

Recognition of Agreements Reached Through ADR

Execution

A decision by an arbitrator can be executed in the same way as a court decision, after the court (*voorzieningenrechter*) has granted leave for enforcement. The court will scrutinize the arbitration agreement only marginally, thereby deciding whether the formal requirements have been fulfilled and whether the agreement does not violate public order or good morals. In principle, binding advice, settlement agreements, mediation agreements and parenting plans are binding, but cannot be executed like a court decision. However, parties can request the court to incorporate the agreement in the (divorce) decision, which means that the agreement can be executed. Only agreements concerning the children will be subject to legal scrutiny; agreements which are not in the best interests of the child will not be accepted. The percentage of agreements concerning the children that were incorporated in the divorce decision increased from 59 % in 2007 to 82 % in 2011.[64]

Judicial Scrutiny

In principle, contracts with regard to family matters are binding. Therefore, a strict standard of scrutiny applies. Declaring a family agreement null and void because of an unequal bargaining position is highly exceptional in Dutch practice. Unequal bargaining positions might be relevant in cases concerning matrimonial property agreements. Spouses may, for example, enter into a contract in which they agree upon the total separation of property (*koude uitsluiting*), which may result in a considerably unfair situation for one of the spouses. In 2010, a report was published concerning the question whether an additional regulation should be provided that could mitigate the unfair effects of the total separation of property. One of the conclusions was that only in exceptional cases should the courts declare a total separation of property agreement to be null or void.[65]

Spouses who would like to have their agreement declared null or void on the grounds of unequal bargaining positions may argue on the basis of an abuse of circumstances (*misbruik van omstandigheden*), mental disorder, being contrary to the standards of reasonableness and fairness (*in strijd met de maatstaven van redelijkheid en billijkheid*) or a fundamental mistake (*dwaling*). An abuse of circumstances is not easily recognized by the courts when it concerns family

[64] Ter Voet MJ and Geurts T (2013) Evaluatie ouderschapsplan: een eerste verkenning. WODC, The Hague, p 81.

[65] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague, p 51.

agreements.[66] The law requires causality between the circumstances of the weaker spouse and the conclusion of the agreement. The other spouse must have known of the (psychological) weakness of the spouse and must have abused these circumstances.[67] The *Hof Amsterdam*, for example, recognized an abuse of circumstances in a case in which the man threatened to commit suicide if the woman would not sign the divorce agreement.[68] Based on Art. 3:34 DCC, a weaker spouse can argue that he or she had a mental disorder at the time of the conclusion of the contract. However, just as in the case of an abuse of circumstances the court does not easily acknowledge this. Probably, this argument may only succeed in cases where the weaker party has been treated in a mental hospital before or at the time of the divorce procedure.[69] A strict standard of scrutiny also applies if it concerns cases which are contrary to the standards of reasonableness and fairness.[70] Only in one case has this argument been accepted so far by the *Hoge Raad*. In this case the man knew in advance that the woman would not be able to comply with the agreement.[71] Based on Article 6:228 DCC an agreement is voidable if it has been entered into under the influence of a mistake with regard to the facts or legal rights and would not have been concluded by the mistaken party if he or she would have had a correct view of the situation. Although parties often claim that they have entered into an agreement under the influence of a mistake, because they were not fully informed by the other party, the courts rarely accept this argument.[72]

Modification of Family Agreements

Based on Art. 6:258 DCC the court has the competence to "change the legal effects of an agreement or it may dissolve an agreement in full or in part if there are unforeseen circumstances of such a nature that the opposite party, according to standards of reasonableness and fairness, may not expect an unchanged continuation of the agreement." The court may change or dissolve the agreement with retroactive

[66] Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18; Subelack TM (2012) De vaststellingsovereenkomst. EB Tijdschrift voor scheidingsrecht 6. For example, Gerechtshof 's Hertogenbosch 25 June 2007, LJN BA9017; Gerechtshof 's-Gravenhage 16 December 2009, LJN BL4259; Gerechtshof 's-Hertogenbosch 22 December 2009, ECLI:NL:GHSHE:2009:BL1040.

[67] Art. 3:44 DCC.

[68] Gerechtshof Amsterdam 22 July 1999, *EB* 2001, 27.

[69] Hoge Raad 24 May 1985, *NJ* 1986, 699 and its sequel Hoge Raad 23 December 1988, *NJ* 1989, 278.

[70] Art. 6:248 section 2 DCC.

[71] Hoge Raad 16 January 1981, *NJ* 1982, 31.

[72] Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18.

effect. In family disputes, courts rarely accept "unforeseen circumstances" as a ground to dissolve an agreement.[73]

As mentioned in section "Contracting on horizontal relationships" parties can enter into maintenance agreements. Spouses are allowed to agree that no spousal maintenance has to be paid and they may deviate from the legal duration of the maintenance. The standard of scrutiny will not be different from other cases, even if a certain agreement would result in a shift of financial responsibility from the ex-partner to the State. The court can alter maintenance agreements if a 'change of circumstances' has taken place. However, if parties agree that the contract cannot be changed by the courts due to 'a change of circumstances', the courts may only interfere in extremely unreasonable and unfair situations. In case an agreement concerns children, the court will be less strict. The contract will always be scrutinized by the court by taking the best interests of the child into account. For example, in the case mentioned in section "Contracting on parental responsibilities" concerning the residence of a child, the court decided that the settlement agreement was no longer in the best interests of the child.[74]

Changes and Trends

Dutch family law has undergone significant changes regarding the possibility of the parties to contract about their family relationship. Most family law rules are still mandatory; however, more and more choices are becoming available: partners, irrespective of their gender, may enter into a marriage or into a registered partnership; they may conclude a cohabitation agreement which however only binds the two partners but which is also recognized by the State for the purpose of specific social and tax benefits; spouses (without minor children) may choose for the dissolution of their marriage through a court decision or – de lege ferenda – through registration at the civil registrar's office. Divorce agreements are encouraged, but are not obligatory. This does not apply to the divorce consequences as regards children. Parents must agree on clearly prescribed issues, which concern the residence(s) of the child, child maintenance and the information rights of the other parent. The parenting plan is compulsory. Alternative dispute resolution is often used, which to an increasing extent includes arbitration in areas in which parties have the freedom to conclude binding contracts. In the area of affiliation and parental responsibilities it is not possible to deviate from the legal rules by contract. Recently, research into

[73] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague, p 30; Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18. One of the few examples in which the court recognized unforeseen circumstances was Hoge Raad 12 June 1987, *NJ* 1988, 150.

[74] Rechtbank 's Gravenhage 2 March 2010, ECLI:NL:GHSGR:2011:BP9424.

the possibility of introducing multiple parental responsibilities into Dutch family law based upon a contract between a lesbian couple and a known donor or a step-parent plan has been finalized. The Ministry of Security and Justice commissioned this socio-empirical and comparative research, which was published in 2014.[75] A multidisciplinary composed state commission on 'recalibration parenthood' was appointed in April 2014. Its report is expected in 2016. Whether the legislator will then legislate in this area remains to be seen.

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