

Crossing Borders: Proving Your Personal Status

CROSSING BORDERS: PROVING YOUR PERSONAL STATUS

*INTERACTIONS BETWEEN PRIVATE INTERNATIONAL LAW
AND HUMAN RIGHTS LAW*

SARAH DEN HAESE

eløven

Published, sold and distributed by Eleven

P.O. Box 85576

2508 CG The Hague

The Netherlands

Tel.: +31 70 33 070 33

Fax: +31 70 33 070 30

e-mail: sales@elevenpub.nl

www.elevenpub.com

Sold and distributed in USA and Canada

Independent Publishers Group

814 N. Franklin Street

Chicago, IL 60610, USA

Order Placement: +1 800 888 4741

Fax: +1 312 337 5985

orders@ipgbook.com

www.ipgbook.com

Boom juridisch Antwerpen

ISBN 978-94-6451-110-9

ISBN 978-94-6451-210-6 (e-book)

NUR 822

D/2023/15251/12



Eleven is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-733-3

ISBN 978-94-0011-289-6 (e-book)

© 2023 Sarah Den Haese | Eleven

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

TABLE OF CONTENTS

Abbreviations	ix
Terminology: translations	1
Introduction	3
1 Background	3
2 Research questions	8
3 Delineation	9
3.1 Material scope	9
3.2 Territorial scope	12
4 Research approach and methodology	13
5 Scientific relevance	14
6 Structure	15
1 Private international law framework in Belgium and the Netherlands	17
1 Introduction	17
2 Belgium: Belgian Code of Private International Law	19
2.1 Recognition of foreign judgments	19
2.2 Recognition of foreign authentic instruments	23
2.3 Role of the public prosecutor's office and the Central Civil Status Authority	26
2.4 Recognition of decisions on the provision of care by <i>kafala</i>	27
3 The Netherlands: Book 10 of the Dutch Civil Code	35
3.1 Recognition of foreign marriage certificates	36
3.2 Recognition of filiation established abroad	39
3.3 Role of the Advisory Committee for personal status and nationality cases	42
3.4 Recognition of decisions on the provision of care by <i>kafala</i>	42
4 The 1996 Hague Child Protection Convention	46
4.1 Introduction to the 1996 Hague Child Protection Conven- tion	46
4.2 Recognition under the 1996 Hague Child Protection Convention	47
5 Interim conclusion: comparing Belgian and Dutch private international law rules	49

TABLE OF CONTENTS

5.1	Foreign marriage certificates	49
5.2	Legal parenthood established abroad	50
5.3	Foreign <i>kafala</i> agreements	51
2	Human rights framework	53
1	Introduction	53
2	Council of Europe: European Convention on Human Rights	54
2.1	Competence of the Council of Europe and the ECtHR	54
2.2	Methodology	57
2.3	Territorial scope of the ECHR	59
2.4	Articles 6 and 8 ECHR: the right to a fair trial and the right to respect for private and family life	64
2.5	Article 6 ECHR: the right to a fair trial	71
2.6	Article 8 ECHR: the right to respect for private and family life	78
2.7	Interim conclusion	146
3	European Union: Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union	150
3.1	Competence of the EU and the CJEU	150
3.2	Methodology	158
3.3	The principle of non-discrimination based on nationality	161
3.4	The right of free movement	164
3.5	Case study: family reunification	180
3.6	Right to respect for private and family life	187
3.7	Best interests of the child	190
3.8	Interim conclusion	192
3	Private international law at the level of Belgian and Dutch administrative authorities	195
1	Introduction	195
2	Methodology	196
2.1	Research question and design of the online survey	196
2.2	Distribution of the survey	196
2.3	Number of participants	199
2.4	Composition of the participants	199
3	From the law in the books to how the law is applied by public servants	201
3.1	How often are public servants confronted with foreign documents?	201

3.2	Distinction between judgments and authentic instruments?	201
3.3	Country of origin	202
3.4	Procedure when dealing with foreign documents	202
3.5	Grounds for refusal	205
3.6	Legitimate expectations	207
3.7	Case law of the ECtHR	208
3.8	General remarks	209
4	Interim conclusion	209
4	Private international law in Belgian and Dutch civil courts	211
1	Introduction	211
2	Methodology	211
2.1	General	211
2.2	Collection of case law in Belgium	214
2.3	Collection of case law in the Netherlands	225
2.4	Overview of the collected case law	229
2.5	Coding of case law	231
2.6	Limits	231
3	From law in the books to law in court practice	232
3.1	Marriage	232
3.2	Filiation	334
3.3	Kafala	399
5	Conclusion and a look at the future	419
1	Conclusion	419
2	A look at the future	432
2.1	Human rights to the rescue? Maybe in theory, not so much in practice	432
2.2	Need for more transparency at the level of the judiciary	433
2.3	Public servants in need of better training and support	434
2.4	Need to rethink the distinction in Belgium between foreign judgments and authentic instruments and the abolition of the conflict of laws-test: the Netherlands as an example	435
2.5	Marriages of convenience	436
2.6	Prevalence and legal status of <i>kafala</i> in Belgium and the Netherlands	437

TABLE OF CONTENTS

2.7	Toward a family law status for surrogacy in Belgium and the Netherlands	438
2.8	National authorities bear a responsibility when granting a personal status that runs the risk of not being recognised	439
Bibliography		441
1	Legislation	441
1.1	International legislation	441
1.2	Council of Europe legislation	441
1.3	European Union legislation	442
1.4	Belgian legislation	443
1.5	Dutch legislation	446
2	Case law	448
2.1	International and European case law	448
2.2	National case law	451
3	Literature	462
Index		475

ABBREVIATIONS

BRP	Municipal Personal Records Database (Basisregistratie Personen/BRP)
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child (1989)
DVZ / OE	Belgian Immigration Office (Dienst Vreemdelingen- zaken/Office des Etrangers)
ECHR	European Convention on Human Rights (1950)
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HCCH	the Hague Conference on Private International Law
ICCPR	International Covenant on Civil and Political Rights (1966)
IJI	The Hague Institute of Private International Law and Foreign Law (Internationaal Juridisch Instituut)
IND	Dutch Immigration and Naturalisation Service (Immigratie en Naturalisatiedienst)
PIL	Private international law
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
the Charter	Charter of Fundamental Rights of the European Union (2000)
UDHR	Universal Declaration of Human Rights (1948)
Vlavabbs	Flemish Association of Registrars (Vlaamse Verenig- ing voor Ambtenaren en Beambten van de Burgerlijke Stand)