Chapter 3
The Dutch Choice of Law Rules on the Termination of Registered Partnerships

3.1 Introduction

On 1 January 1998 the Act introducing Registered Partnership entered into force in the Netherlands.[1] The parliamentary proceedings on this Act show that the institution of registered partnership has been introduced in order to pursue two objectives.[2] It was primarily created to guarantee equal treatment for same-sex couples wishing to have their relationship publicly recognised: registered partnership consequently provides for a status that is equal to marriage. Therefore, the rights and duties attached to registered partnership are practically the same as those attached to marriage.[3] The second objective of the Act introducing Registered Partnership was to provide an alternative for marriage to different-sex couples.

As well as a marriage, a registered partnership can break down. According to Dutch law a registered partnership shall end on the ground of 'irretrievable breakdown of the relationship' by reason of mutual consent of the partners, by dissolution at the request of one of the partners, or by conversion of a registered partnership into a marriage.[4]

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[1] Act of 5 July 1997, *Stb.* 1997, No. 324 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering in verband met opneming daarin van bepalingen voor het geregistreerd partnerschap. Shortly: Act introducing registered partnership.

[2] Memorandum in reply to the parliamentary report (NV), *Kamerstukken II* 1995–1996, 23 761, No. 7, p. 11. See also Boele-Woelki et al. 2007, p. 5 ff.

[3] One of the few differences is that no court-intervention is required in case of termination of a registered partnership by mutual consent.

[4] See Article 1:80c(1) BW, which determines that a registered partnership will also end due to death or a missing partner. This chapter only focuses on the termination of a registered partnership by mutual consent or by dissolution. See Sumner 2004b, pp. 231–237 and Mostermans 2006, pp. 64–65 on the choice of law rules on the termination of a registered partnership by conversion into a marriage.

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Not all countries, however, know exactly this same ground for the termination of a registered partnership. In fact, the grounds for the termination of a registered partnership differ greatly.[5]

The breakdown of a registered partnership can very well involve an international element; e.g. on the basis of one or more of the following circumstances: the persons involved in a registered partnership are of different nationalities, or live in different countries, or live in a country other than the one in which their partnership has been registered, or live in a country of which they are not nationals.[6]

In such international cases the question can arise as to which legal system the Dutch court, notary or lawyer[7] has to apply to the termination of a registered partnership: Dutch law or foreign law? Therefore, choice of law rules is necessary in order to determine the law applicable to the termination of a registered partnership.

To date there is no international instrument in the field of registered partnerships.[8] Due to the fact that there are no international treaties, conventions or bilateral agreements applicable with regard to (the termination of) registered partnerships, each country can autonomously provide for choice of law rules in this field.

This chapter deals with the Dutch choice of law rules on the termination of registered partnerships. Firstly, the absence of a private international law treaty in the field of (the termination of) registered partnerships will be addressed (Section 3.2). After a brief overview of the realisation of the Dutch Choice of Law Act on Registered Partnerships and its foundation (Section 3.3), the choice of law rules on the termination of registered partnerships will be discussed (Section 3.4). Section 3.5 elaborates on the public policy exception. Finally, the question whether the Dutch Proposal on Private International Law will bring any changes as regards the law applicable to the termination of registered partnerships will be examined (Section 3.6).

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[5] Cf., Sumner 2004a, p. 46, who concludes, after an overview of the various termination procedures available in five European countries, that '[…] *not only are the current registered partnerships in these five countries extremely divergent with respect to their entry requirements, but that the associated termination procedures provide yet another layer of complexity.*'

[6] Actually the same circumstances that give a divorce an international character determine whether the termination of a registered partnership bears such a character. Cf., *supra* Sect. 2.1.

[7] In accordance with Article 1:80c BW a registered partnership can be terminated either judicially or administratively. In case of an administrative termination the partners need to be assisted by one or more notaries or lawyers. See further *infra* Sect. 3.4.2.

[8] The International Commission for Civil Status has drawn up a Convention on the Recognition of Registered Partnerships (No. 32), opened for signature on 5 September 2007. See: http://www.ciec1.org/ListeConventions.htm. This Convention has not entered into force yet. The Convention focuses solely on the recognition of registered partnerships and does not establish any choice of law rules. Moreover, this Convention concentrates on the effects on civil status and is neutral as regards the effects concerning property or social effects, etc.

3.2 The Absence of a Treaty in the Field of Registered Partnerships

Save the Convention on the recognition of registered partnerships drawn up by the International Commission for Civil Status,[9] there is no international instrument in the field of registered partnerships.

The law applicable in respect of 'unmarried couples', a subject broader than registered partnerships, is on the Agenda of the Hague Conference on Private International Law. However, no priority has been given to the establishment of an instrument in this field of law.[10] The number of states that recognise the possibility of cohabitation outside marriage or of a registered partnership is too small.[11] Furthermore, a comparison of internal legal systems has shown that a wide range of solutions have evolved. Some systems regulate all the relationships arising from cohabitation, while others focus on certain aspects only, and still other systems leave the whole subject outside the law.[12]

Duncan has distinguished two difficulties that arise in achieving a uniform approach on this issue.[13] First, in those States which have introduced the institution of registered partnership, there will be a tendency, when developing private international law rules, to give preference to their own laws and procedures, or to

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[9] Ibid.

[10] In April 2009 it was lastly confirmed that The Hague Conference leaves the issue without priority on the Agenda, see Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference of 31 March–2 April 2009. The Hague Conference does, however, recognise the need for a convention in this field; see Preliminary Document No. 9 of May 2000 for the attention of the Special Commission of May 2000 on General Affairs and Policy of the Conference, p. 5: '*The absence of clear private international law rules may inhibit free movement across borders by cohabitees where, for example, a status or legal right established in one jurisdiction is not recognised in another, or it may facilitate a partner who is intent on evading established obligations. On the other hand, there is an underlying issue of public policy and a perception in certain states that the recognition of legal consequences for cohabitation may undermine a policy of preference of marriage.*' See also Note on developments in internal law and private international law concerning cohabitation outside marriage, including registered partnership, Preliminary Document No. 11 of March 2008.

[11] See for a list of countries that recognise the concept of registered partnership Boele-Woelki et al. 2007, p. 103, footnote no. 1. Within the European Union currently fourteen Member States know some form of registered partnership, i.e. Austria, Belgium, Czech Republic, Denmark, France, Finland, Germany, Hungary, Luxembourg, the Netherlands, Portugal, Slovenia, Sweden and the United Kingdom. Cf., Curry-Sumner 2008, pp. 102–103.

[12] See Preliminary Document No. 5 of April 1992 for the attention of the Special Commission of June 1992 on General Affairs and Policy of the Conference. This point of view has been confirmed anew by the Special Commission in June 2000; see Preliminary Document No. 10 of June 2000 for the attention of the Nineteenth Session. See also Note on developments in internal law and private international law concerning cohabitation outside marriage, including registered partnership, Preliminary Document No. 11 of March 2008. See also Hausmann 2000, pp. 241–248; and Boele-Woelki et al. 2007, p. 267.

[13] Duncan 1999, pp. 3–4.

the laws and procedures of other States in which the institution exists. This is a natural tendency deriving from the practical need to avoid the vacuum that might otherwise arise.[14] Secondly the attitudes towards recognition of registered partnerships, in those States which do not provide for the registered partnership in their national laws, will vary.[15]

Doctrine is divided on the question whether the Hague Conference should give higher priority to the establishment of a convention in the field of-at least-registered partnerships.[16]

According to Duncan there are two reasons to develop a uniform approach to (some) private international law aspects of registered partnerships. In the first place, the legal vacuum that currently exists in many national legal systems needs to be filled: the status (if any) to be accorded to registered partners who move from one jurisdiction to another needs to be clarified. A solution might be found by establishing some generally accepted principles. Secondly, it would be desirable, at least in respect to those states which are willing to afford some level of recognition to foreign registered partnerships, to develop some uniformity in the approach to recognition in order to provide some continuity in the status of registered partners.[17]

Šarčević recognises the challenge for the Hague Conference on Private International Law of adopting uniform conflicts solutions for non-marital cohabitation.[18] The most difficult task would be to agree on a definition of the non-marital union to be regulated or to specify its main characteristics. By now one should be able to detect a minimum of common denominators, thus making it possible to identify the major characteristics of non-marital cohabitation most likely to be accepted by all States, including those where the institution is not (yet) regulated by substantive law. In his opinion, if these states had the option, it is more likely that they would join an international instrument with uniform choice of law rules rather than regulate the subject matter by national legislation.[19]

However, although Šarčević states that there is no doubt that it would be useful to unify the private international law aspects of registered partnerships in an international convention, he does not consider the time ripe yet to attempting to unify the choice of law rules for registered partnerships at the international level. New institutions require some 'digesting time' before acceptable uniform solutions can be found or before a large number of countries are even willing to discuss the subject matter at an international conference such as the Hague Conference.[20]

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[14] As will be discussed below, the Dutch private international law rules are a good example of this approach. See further *infra* Sect. 3.3.3.

[15] See Duncan 1999, p. 4.

[16] See, in general, Goldstein 2006, p. 369 ff.

[17] See Duncan 1999, p. 3.

[18] Šarčević 1981, pp. 337–338; and Šarčević 1999, pp. 45–48.

[19] Šarčević 1999, p. 46.

[20] Ibid., pp. 47–48.

Joppe holds this same view on the unification of private international law issues of registered partnership. She argues that the large diversity of national regulations in this field makes it very hard to reach consensus on the international level. Moreover, a country will probably change its point of view with regard to the recognition of registered partnerships entered into abroad from the moment it introduces the institution of registered partnership in its own national legislation. Therefore, the establishment of an international convention should be postponed until the national developments in this field have more or less stabilised.[21]

Šarčević and Joppe rightly argue that, although the number of countries introducing the institution of registered partnership increases, it seems premature to try to reach an international consensus on the issue. This is very well reflected by the resistance that the Hague Conference experiences when it tries to give more priority to the establishment of an instrument on the issue of unmarried couples.[22]

3.3 The Dutch Choice of Law Act on Registered Partnerships

In the absence of an international convention that could be ratified, the Dutch legislator has introduced private international law provisions in respect to registered partnerships. As of 1 January 2005 the Dutch Choice of Law Act on Registered Partnerships is in force.[23] This Act does not only provide for rules concerning the termination of a registered partnership. The Act also includes choice of law rules on the entry into a registered partnership in the Netherlands and on the recognition of a registered partnership entered into abroad, on the legal personal ties between the partners, on the partnership property regime, and on maintenance obligations during the registered partnership as well as after termination of the registered partnership.

After some general remark (Section 3.3.1), Section 3.3.2 will elaborate on the characteristics of the CLARP. Subsequently, its substantive and temporal scope of application (Sections 3.3.3 and 3.3.4) will be discussed.

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[21] Joppe (Groene Serie Personen- en familierecht), General remarks, n. 4.

[22] See Report of the Special Commission on General Affairs and Policy of the Conference of 31 March to 1 April 2005, Preliminary Document No. 32A of May 2005, pp. 28–29. The United States is one of the strongest opponents of any activity of the Hague Conference in this field.

[23] Act of 6 July 2004, *Stb.* 2004, Nos. 334 and 621, containing a regulation of the choice of law with regard to the registered partnership, *Wet conflictenrecht geregistreerd partnerschap*. Hereinafter abbreviated to 'CLARP'.

3.3.1 General

As mentioned above, the institution of registered partnership has been provided for in Dutch substantive law since 1 January 1998. Although the Dutch Standing Committee on Private International Law had already drawn up an advice concerning the choice of law on registered partnerships in May 1998, the legislator did not regulate this field of law until 1 January 2005.[24]

Why did the Choice of Law Act on Registered Partnerships only enter into force in January 2005? The legislator puts forward two reasons for this lapse of time:

> In verband met de ontwikkelingen rond het geregistreerd partnerschap en de openstelling van het huwelijk van personen van hetzelfde geslacht, die zich in de afgelopen drie jaar hebben voorgedaan, is enige tijd gewacht met de omzetting van het advies van de Staatscommissie in wetgeving. De openstelling van het huwelijk voor personen van hetzelfde geslacht heeft niet geleid tot afschaffing van het geregistreerd partnerschap. Hoewel het instituut van het geregistreerd partnerschap elders geleidelijk ingang vindt, is het niet waarschijnlijk dat binnen afzienbare tijd een verdragsregeling over internationaal privaatrechtelijke aspecten ter zake tot stand zal komen.[25]

Firstly, it was expected that the opening up of civil marriage to same-sex couples would lead to the abolition of the institution of registered partnership.[26] This has, however, not happened. When it became clear that the opening up of civil marriage would not lead to the abolition of the institution of registered partnership, the Minister of Justice declared that the private international law aspects of same-sex marriage should be regulated jointly with those of registered partnership.[27] But, as seen above in Section 2.2.2, the private international law aspects of same-sex marriage have been regulated separately from those of registered partnership.[28]

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[24] Staatscommissie 1998; the advice dates from 8 May 1998 and has been published in *FJR* 1998, pp. 146–159.

[25] Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 2.

[26] See *NJB* 1999, p. 148 and 1295. As seen above, the institution of registered partnership was primarily created to ensure equal treatment for same-sex couples wishing to formalise their relationship. However, the abolition of the institution of registered partnership on the sole ground that the opening up of marriage to same-sex couples has led to fulfilment of the first objective of the Act introducing registered partnership would do no justice to the second objective of the latter Act, i.e. providing different-sex couples with an alternative for marriage.

[27] Letter of the Minister of Justice of mid 1999, to which is referred by Joppe 2000, p. 373 and by Jessurun d'Oliveira 2000, p. 300.

[28] Dutch substantive law recognises only one type of marriage, i.e. the marriage open to couples regardless of sex. Therefore, the same-sex marriage has been included in the already existing private international law rules on marriage.

Secondly, initially preference was given to the establishment of a multilateral convention on registered partnerships.[29] The Hague Conference on Private International Law would be the most obvious body to draw up such a convention.[30] However, despite the fact that this subject has been set on the Agenda of the Hague Conference, no priority has been given to the establishment of a convention in the field of the law applicable to unmarried couples.[31]

Also in the European context there is some development in the field of registered partnerships. Even though the European Commission has presented a Green Paper on Matrimonial Property of both marriage and extra-marital unions, this project is still in a preparatory stage. Moreover, the scope of application of this prospective Regulation will definitely be limited to the matrimonial property regime.

As it was unlikely that choice of law rules on registered partnerships would be drawn up in either European or international context within the foreseeable future, the Dutch legislature had to take action.[32]

Even though the advice of the Standing Committee of 1998 has been taken as a guideline in practice, legal certainty with regard to the law applicable to several questions of private international law regarding registered partnerships was at stake.[33] It must be stressed that the Standing Committee did not advocate this approach, as it urged the legislator to enact legal provisions on this issue.[34]

Jessurun d'Oliviera reproached the legislator with extreme carelessness in respect of all those registered partners who want to know, preferably in advance, under which circumstances the Dutch court has jurisdiction in international cases and which law will be applied to their partnership property regime, maintenance, and equalisation of pension rights, etc. Even if the institution of registered partnership would be abolished, there would still be a need for rules on private international law for the registered partnerships that have already been entered into and certainly for the recognition of the registered partnerships that have been entered into or terminated abroad.[35]

Ten Wolde has equally urged the legislator to quickly regulate the private international law issues on registered partnerships. His main concern was that legal

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[29] A conference discussing the possible establishment of a convention in this field has been organised by the Council of Europe in March 1999 in The Hague. See further Schrama 1999, p. 131 ff.

[30] See equally Boele-Woelki 1999, p. 13.

[31] See *supra* Sect. 3.2.

[32] See Boele-Woelki 2003, p. 4848.

[33] Certainly given the fact that the Choice of Law Act on Registered Partnerships solely applies to registered partnerships that have been concluded after the entry of this Act. See further *infra* Sect. 3.3.4.

[34] See Staatscommissie 1998, para 2.

[35] Jessurun d'Oliveira 1999, pp. 305–306. See also Joppe 2000, pp. 394–395.

practice was more or less adrift in this field, as certainty with regard to the choice of law is needed for legal practitioners so as to know how to advice their clients.[36] Although the Standing Committee has noticed in its advice that some anticipatory effect emanates from it,[37] this does not guarantee any certainty.[38] The legislator is namely by no means bound to the advice of the Standing Committee and is fully free to draw up different rules on the private international law aspects of registered partnerships. The absence of private international law rules in this field therefore led to legal uncertainty and thereby to legal inequality for registered partners.[39]

3.3.2 Characteristics of the CLARP

The Choice of Law Act on Registered Partnerships has a number of characteristics.[40] With regard to the termination of a registered partnership the following four characteristics are of particular importance.

In the first place, the underlying principle of the Act is that the equal treatment of marriage and registered partnership in substantive law should equally influence the choice of law rules on registered partnership. However, the relative rarity of the institution could necessitate deviations from the equal footing with marriage.

Secondly, the CLARP contains mostly unilateral choice of law rules. As opposed to multilateral choice of law rules that refer to foreign law as well as to national law, unilateral choice of law rules only indicate when the *lex fori* -Dutch law- applies.[41] The choice for unilateral choice of law rules in the CLARP is motivated by the fact that there are currently only a few countries that have incorporated the registered partnership, or a similar institution, in their legislation. Consequently, a multilateral choice of law rule might imply that the law of a foreign legal system that does not recognise the institution of registered partnership is designated as the applicable law. Such reference might lead to practical problems; the Dutch Standing Committee on Private International Law referred to this effect as the reference to a 'legal vacuum'[42]:

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[36] Ten Wolde 2001, p. 141.

[37] See Staatscommissie 1998, para 2.

[38] Cf., Jessurun d'Oliveira 2000, p. 300 stating that '*the formal status of the Standing Committee's proposal is for the time being floating in limbo*'.

[39] See Ten Wolde 2001, p. 141.

[40] Boele-Woelki 2003 distinguishes six remarkable characteristics of the CLARP. Only four of the characteristics Boele-Woelki mentions are of importance with regard to the termination of a registered partnership. See also Joppe 2000, p. 374; Joppe (Groene Serie Personen- en familierecht), CLARP, n. 8; and Ten Wolde 2001, pp. 141–143.

[41] Cf., Strikwerda 2008, pp. 26–27; and Ten Wolde 2009, pp. 48–49.

[42] See Staatscommissie 1998, para 4: '*een juridisch luchtledig*'. See also Joppe 2000, p. 374; Ten Wolde 2001, p. 142; Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 3; and Frohn 2004, p. 290.

> Ten aanzien van een aantal onderwerpen bevat het voorstel geen alzijdige conflictregels, maar beperkt het zich tot het ontwikkelen van eenzijdige regels die aangeven in welke gevallen Nederlands intern recht toepasselijk is op geregistreerde partnerschappen die in Nederland zijn aangegaan. De keuze voor deze aanpak is uiteraard een gevolg van de overweging dat alzijdige verwijzingsregels op het terrein van het geregistreerd partnerschap in een *juridisch luchtledig* terecht zouden komen in al die gevallen dat zo'n conflictregel zou verwijzen naar een rechtsstelsel dat het geregistreerd partnerschap of verwante rechtsfiguren niet kent.[43]

The unilateral character of the choice of law rules of the CLARP has provoked some critique.[44] In order to prevent the situation in which the law of a country that does not recognise the institution of registered partnership is designated as the applicable law, the Dutch choice of law rules should be provided with connecting factors that lead to the applicability of a legal system that does recognise the registered partnership. Besides, a choice of law rule should designate the law to which the legal relationship is most closely connected.[45] From this point of view it is not entirely clear why the legislator chose for unilateral choice of law rules. The establishment of multilateral choice of law rules that are provided with connecting factors that designate the law of a country that recognises the institution of registered partnership would have been perfectly possible. The *locus celebrationis* could serve as an alternative connecting factor, instead of connecting to the nationality or the habitual residence of (one of) the partners. The use of the *locus celebrationis* as a connecting factor implies that only the law of a country that recognises the legal concept of registered partnership can be designated as the applicable law. The legislator has been aware of this connecting factor, since the *locus celebrationis* has been frequently used throughout the whole Act. However, one should be aware that the *locus celebrationis* does not *per se* reflect a close connection and is, therefore, not always a suitable connecting factor.[46]

The legislator has clearly indicated that, should in the future the number of countries that have introduced the institution of registered partnership in their legislation extend, it could be desirable to change the unilateral rules of the CLARP to multilateral choice of law rules.[47]

Although the use of multilateral choice of law rules as regards registered partnership should be stimulated, the current provisions seem to suffice at the moment. The unilateral choice of law rules of the CLARP do not only apply to

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[43] Staatscommissie 1998, para 4 (emphasis added).

[44] See *inter alia* Ten Wolde 2001, p. 142; and Reinhartz 2004, p. 491.

[45] Cf., Strikwerda 2008, pp. 36–37.

[46] The connection that the *locus celebrationis* reflects depends on the criteria the *lex loci celebrationis* attaches to the entry into a registered partnership. E.g. in the Netherlands, a registered partnership can only be concluded if at least one of the persons involved has his/her residence in the Netherlands or possesses Dutch nationality (Article 80a(4) BW).

[47] Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 3:.'Ik [the Dutch Minister of Justice; NAB] ben mij overigens ten volle ervan bewust dat het te zijner tijd wenselijk kan blijken de regeling op dit punt bij te stellen.' The Standing Committee has equally advocated this point of view, see Staatscommissie 1998, para 4.

registered partnerships entered into in the Netherlands, but also to those entered into abroad. Consequently, there is no gap in the law as regards the law applicable to the termination of registered partnerships.[48]

The third characteristic of the CLARP is that if the choice of law rules refer to the law of the place of registration, it concerns a referral to this law in its entirety, i.e. the law including the private international law rules of that country (*Gesamtverweisung*). The Explanatory Memorandum to the CLARP explains this characteristic:

> Voor in het buitenland aangegane geregistreerde partnerschappen is gekozen voor aanknoping bij de «lex loci celebrationis», het recht van de staat waar de verbintenis is aangegaan, met inbegrip van het daar ontwikkelde internationaal privaatrecht. […] In het algemeen worden de belangen van de partners in een elders geregistreerd partnerschap het beste gediend door bij het stelsel van de lex loci celebrationis aan te sluiten, onder meer omdat hun verwachtingen geacht mogen worden bij dat rechtsstelsel aan te sluiten.[49]

The legislator justifies the use of the *Gesamtverweisung* by stating that it is in the parties' interests to connect to the law of the state where the registered partnership has been concluded: generally their expectations can be considered to join this legal system. Ten Wolde has objected to this characteristic, notably from a practical point of view.[50] For it is too large a call on Dutch legal practice having to determine the content of the foreign private international law rules, in the event that such rules would already exist. In particular the legal certainty and the ease of use of the choice of law highly oppose a system in which the applicable law is to be determined according to non-existent or indefinite foreign private international law rules. Furthermore, this choice of law system is contrary to the general approach adopted with respect to *renvoi* in the Dutch choice of law.[51]

Finally, the CLARP makes a clear and systematic distinction between registered partnerships entered into in the Netherlands and those entered into abroad.[52] These two categories have found a separate regulation throughout the whole Act. Ten Wolde has opposed this distinction because it would violate the general principles of private international law as regards legal certainty and the ease of use of the choice of law. He argues that the same-multilateral-choice of law rules should apply to registered partnerships, regardless of the place they have been

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[48] In contrast to for example the Dutch - unilateral - choice of law rule on the winding up and distribution of estates, which only covers the situation in which the deceased had his habitual residence in the Netherlands. Dutch law does not provide any rule on the law applicable to the administration of estates when the deceased's last habitual residence had not been located in the Netherlands. See further on this issue Ten Wolde 1996, p. 298; and Knot 2008, p. 72 ff.

[49] Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 3. The Standing Committee advocated the same point of view, see Staatscommissie 1998, para 4.

[50] Ten Wolde 2001, p. 143.

[51] See Article 5 of the Dutch Proposal on Private International Law, which determines that the choice of law rules refer solely to the substantive rules of the applicable law (*Sachnormverweisung*).

[52] See Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 3.

entered into.[53] Although the application of the same choice of law rules to registered partnerships, irrespective of the *locus celebrationis*, is to be welcomed, the mentioned distinction in the CLARP does not seem to harm the general principles of private international law in question, as the distinction has been carried out systematically throughout the whole Act.

3.3.3 Scope of Application

Worldwide, the institution of registered partnership is still a relatively rare phenomenon. Besides, the countries that have regulated the institution of registered partnership have attached divergent legal consequences thereto.[54] The differences lie not only in the legal consequences attached to the registration of a partnership: in some countries the regulations merely create a simple contractual relationship, while in other legal systems the regulations determine personal status. The scope of the national regulations also differs: registered partnerships can be allowed for same-sex couples only (e.g., Scandinavian countries), or for both same-sex and different-sex couples (e.g., Belgium, the Netherlands), or even to asexual couples, such as brother-sister, or mother-daughter relationships (e.g., France, Spain).[55]

It is clear from the Dutch parliamentary proceedings that not all foreign forms of registered partnership can be recognised as such in the Netherlands.[56] Although the basic principle of the CLARP is that a registered partnership lawfully concluded abroad will be recognised as such in the Netherlands, the foreign institution does have to meet a set of criteria:

> Het wetsvoorstel beoogt regels te geven voor die samenlevingsvormen waaraan staatgevolg ('Standesfolge') is verbonden. Een typisch kenmerk is daarbij de registratie. Een ander kenmerk dat in deze van belang is, is dat het gaat om een rechtsinstituut dat exclusief is, dat wil zeggen een verbintenis die een huwelijk of ander partnerschap van een van de partners met een derde uitsluit en bestemd is voor de juridische bevestiging en bescherming van affectieve relaties. Van belang is verder dat het gaat om partnerschappen waarbij de partners, al dan niet van hetzelfde geslacht, op grond van de wet rechten en plichten hebben die gelijk zijn aan of in sterke mate georiënteerd zijn op die van het huwelijk. Te denken valt in het bijzonder aan de verplichting elkaar ter zijde te staan en elkaar het nodige te verschaffen. Voorts valt te denken aan de verplichting tot een

[53] Ten Wolde 2001, p. 143.

[54] Cf., Boele-Woelki 2000, p. 1054, concluding in 2000 that not one single national regulation was completely in conformity with another national regulation.

[55] See Joppe 2000, p. 372.

[56] The regulation of the CLARP differs in this respect from the advice of the Dutch Standing Committee on Private International Law, which proposed a more open-ended provision as regards characterisation by not posing the requirements mentioned in Article 2(5) CLARP. See Staatscommissie 1998, para 7 at Article 18.

> evenredige bijdrage in de lasten van de samenleving, hoofdelijke aansprakelijkheid voor de schulden ten behoeve van de samenleving en dergelijke.[57]

These requirements have found a regulation in Article 2(5) CLARP, determining that:

> […] a registered partnership entered into outside the Netherlands will only be recognised as such, if it forms a legally regulated form of cohabitation between two persons who maintain a close personal relationship, and the cohabitation, at least:
>
> a. was registered by an authority competent to do so in the place where it was entered into;
> b. excludes the existence of a marriage or other form of cohabitation with a third person regulated by law; and
> c. creates obligations between the partners which, in essence, correspond with those in connection with marriage.[58]

If a registered partnership concluded outside the Netherlands does not meet these criteria, it will not be recognised as such. Such partnership falls outside the scope of application of the choice of law rules of the CLARP.

The Standing Committee on Private International Law has suggested that the choice of law rules of the CLARP may be applied by analogy to other regulated forms of partnership.[59] Ten Wolde has strongly opposed this point of view: such analogical application would bring about an unnecessary complication, as it creates uncertainty. If it is deemed desirable that the choice of law rules apply to all regulated forms of partnership, then this should be stated expressly in the CLARP.[60] However, the Explanatory Memorandum to the CLARP remains silent on this question. Therefore, it should be assumed that the choice of law rules of the CLARP cannot be applied *per analogiam* to regulated forms of partnership that are not recognised as a registered partnership according to the criteria of Article 2(5) CLARP.[61]

3.3.4 Transitional Provision

Article 29 of the CLARP contains a transitional provision:

> 1. This Act shall not apply to registered partnerships concluded prior to the date of its entry into force.

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[57] Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, pp. 2–3.

[58] Translation by Sumner and Warendorf 2003, p. 245.

[59] Staatscommissie 1998, para 3.

[60] Ten Wolde 2001, pp. 141–142.

[61] It is highly uncertain which rules do determine the applicable law to those foreign partnerships that fall outside the scope of application of the CLARP. Arguably these partnerships can be considered as contracts. However, this is a matter of characterisation. See further on the characterisation of non-marital registered relationships, Jessurun d'Oliviera 2003, pp. 1–37. See also briefly Hausmann 2000, pp. 248–249.

2. Notwithstanding the provisions of paragraph (1), Article 21 of this Act applies to the equalisation of pension rights in case the registered partnership has been terminated or dissolved after the time of the entry into force of this Act.

According to this provision the rules provided for by the CLARP do not apply to registered partnerships concluded prior to the date of its entry into force. This means that the termination of registered partnerships is only governed by the CLARP if the partnership has been entered into on or after 1 January 2005. The law applicable to a registered partnership entered into before the CLARP took effect is determined on the basis of the general rules of private international law concerning registered partnerships, i.e. the proposal of the Dutch Standing Committee on Private International Law.[62] With regard to the law applicable to the termination of a registered partnership the proposal of the Standing Committee and the regulation of Articles 22 and 23 CLARP correspond.[63]

The provision of Article 29 CLARP is comprehensible, since the CLARP includes choice of law rules for all matters relating to registered partnerships. Although this is merely a theoretical question — the CLARP corresponds to the Standing Committee's proposal as regards the termination of registered partnerships — the provision of Article 29 CLARP is fairly strange with regard to the termination of a registered partnership. It is not logical that the time of the entry into a registered partnership is decisive for the applicable law to its termination. This date of reference does no justice to the principle of the closest connection. Quite some years can easily pass between the entry into the registered partnership and its termination. The date of reference in case of termination of a registered partnership could therefore have better been either the moment that the partners request at least one expert, be it a lawyer or a notary, to assist them in terminating their partnership, or the moment of filing the petition for dissolution of the registered partnership.[64] This date is a better reflection of the closest connection between the registered partnership and the law to be applied to its termination. Moreover, this date of reference is also used in international divorce cases, to which the choice of law rules on the termination of registered partnerships should conform as much as possible.[65]

The legislator should therefore have made an exception to the principal rule of Article 29(1) CLARP for the termination of a registered partnership similar to the exception of Article 29(2) with regard to the equalisation of pension rights.

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[62] See for a case in which this situation was at issue Rb.'s-Gravenhage 22 September 2006, *NIPR* 2007, 109.

[63] See Staatscommissie 1998, para 7 at Articles 16 and 31.

[64] In case of termination sought on grounds of mutual consent and in case of dissolution sought on grounds of a sole petition, respectively.

[65] See *supra* Sect. 2.4.5.

3.4 The Law Applicable to the Termination of Registered Partnerships

The law applicable to the termination of registered partnerships is determined on the basis of Articles 22 and 23 of the CLARP.

Article 22

> Dutch law determines whether a registered partnership entered into in the Netherlands may be terminated by mutual consent or by dissolution and on which grounds.

Article 23

1. Dutch law determines whether a registered partnership entered into outside the Netherlands may be terminated by mutual consent or by dissolution and on which grounds.
2. In derogation from the provisions of paragraph (1), the law of the State where the registered partnership has been entered into will apply if the partners have jointly made a choice for that law in the contract made between them in respect of the termination by mutual consent of the registered partnership.
3. As regards the termination by dissolution and in derogation from the provisions of paragraph (1), the law of the State where the registered partnership has been entered into will be applied if, in the proceedings:
   a. the partners jointly chose this law or such a choice by one the partners remains uncontested[66]; or
   b. either partner chose such law and both partners have actual ties with the State where their registered partnership was entered into.
4. Dutch law governs the manner in which termination by mutual consent or the dissolution of a registered partnership entered into outside the Netherlands is made.[67]

3.4.1 Foundation of the Choice of Law Rules on the Termination of Registered Partnerships: Favor Dissolutionis

As mentioned above, the basic principle of the CLARP is that its rules should conform as much as possible to the equivalent rules on marriage.[68] But the fact that the registered partnership and similar legal institutions are relatively rare

[66] The translation of Sumner and Warendorf 2003 provides for another translation of this sentence: 'the partners jointly chose this law or such a choice made by one of the partners has not been revoked'. However, this translation is not entirely accurate, as revoking the choice implies that the other partner should act. Yet, an act of the other party is expressly not required, as the condition can also be fulfilled in case of default of appearance. See *infra* Sect. 3.4.5.2.

[67] Translation by Sumner and Warendorf 2003, p. 250.

[68] This is the result of the position taken in Dutch substantive law as described above, see *supra* Sect. 3.1.

concepts on the international level impedes full application *per analogiam* of the choice of law rules on marriage and divorce.[69]

With regard to the termination of a registered partnership, as with the dissolution of marriage, the underlying basic principle of substantive law is the undesirability of artificially upholding partnerships that have in fact broken down. Since the Dutch choice of law rules on divorce are based on the *favor divortii* principle[70] an equal stance has been adopted with respect to the termination of registered partnerships. In this respect reference has been made to the *favor dissolutionis* principle.[71]

The foundation of the CLARP on the principle of *favor dissolutionis* implies that it aims to favour the possibility to terminate a registered partnership in international cases. Although it might not exist, foreign law that does not allow for the termination of registered partnerships is contrary to the Dutch view of the law.

As with regard to divorce, the choice of law rules on the termination of registered partnerships lead in the majority of cases to the designation of Dutch law as the applicable law. In addition, the parties also have a limited opportunity to choose the law applicable to the termination of their registered partnership.

3.4.2 *Structure of the Choice of Law on the Termination of Registered Partnerships*

The choice of law on the termination of registered partnerships has been divided in two categories: the registered partnerships entered into in the Netherlands (Article 22) and those entered into outside the Netherlands (Article 23).

Article 23 CLARP makes a further distinction between termination by mutual consent and dissolution by the court. This structure can be traced back to Dutch procedural law. The Dutch legislator has created a two-track system for the termination of registered partnerships: the administrative procedure on the one hand and the judicial procedure on the other.[72] Registered partners wishing to terminate their partnership jointly ('termination of the registered partnership by mutual consent') are to make use of the administrative procedure. A registered partner wishing to terminate the relationship unilaterally ('dissolution of the registered partnership') is to make use of the judicial procedure.

The termination of a registered partnership by mutual consent is governed by Article 1:80d BW. The partnership is terminated by mutual consent of the partners

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[69] See Staatscommissie 1998, para 4.

[70] See *supra* Sect. 2.2.3.

[71] See e.g. Curry-Sumner 2005, p. 447 ff.

[72] See Explanatory Memorandum (MvT), *Kamerstukken II* 1996–1997, 23 761, No. 3, p. 10. See further Curry-Sumner 2005, p. 149; and Boele-Woelki et al. 2007, p. 35 ff.

and does not require any judicial intervention. The termination is established by a mutual agreement signed by both partners and one or more lawyers or notaries. Article 1:80d(1) BW requires that both partners have agreed that the relationship has irretrievably broken down and that they wish to terminate their relationship.

If the termination is sought on grounds of a sole petition, a judicial procedure is required. It is worth noticing that, as opposed to the dissolution of a marriage, the judicial proceedings for the termination of a registered partnership may only be initiated upon a petition filed by one of the parties, thus excluding the possibility of a joint petition.[73]

This distinction made by Dutch procedural law is also found in Article 23 CLARP. Article 23(2) applies to the termination of a registered partnership by mutual consent, whereas Article 23(3) applies to the termination of a registered partnership on grounds of a sole petition.[74]

3.4.3 The Choice of Law Rules: General Remarks

The legislator has with regard to the choice of law rules on the termination of registered partnerships tried to join as much as possible the choice of law rules on divorce. However, two remarks must be made in this regard.

In the first place, full analogous application of the current choice of law rules on divorce could lead to the situation in which the law of a country that is devoid of provisions on the matter is designated as the applicable law.[75] It is perfectly possible that the common national law of the parties or the law of their common habitual residence do not provide for the possibility to enter into a registered partnership, let alone for rules on the termination of such a relationship. The application of the latter choice of law rules by analogy to the termination of registered partnerships could thus lead to the situation in which the registered partnership cannot be terminated.[76]

Secondly, the question arose as to which choice of law rules the legislator should join with respect to the choice of law on the termination of registered partnerships. For while the choice of law on divorce is currently determined in the Choice of Law Act on Divorce, the Dutch Standing Committee on Private

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[73] Article 1:80c(1d) BW.

[74] See further *infra* Sect. 3.4.5 in which the law applicable to these two categories will be discussed more profoundly.

[75] See Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, pp. 16–17.

[76] For exactly this reason the Dutch Standing Committee chose to draw up unilateral choice of law rules, because otherwise a 'legal vacuum' is designated. See Staatscommissie 1998, para 4. Moreover, as seen above, such a result would be contrary to the *favor dissolutionis* principle. See also Mostermans 2006, p. 66.

International Law proposed to amend these rules.[77] The proposed amendment of the choice of law rules on divorce entails that in principle Dutch law applies to an international divorce, unless the spouses choose for the application of their common national law. This *professio iuris* provides the spouses the opportunity to increase the chance that the Dutch decision on their divorce will be recognised in their country of origin. The legislator has settled the mentioned question in favour of the proposed amended choice of law rules on divorce.[78] However, the most important difference is that the possible recognition of the termination of a registered partnership by mutual consent or by dissolution in the country of origin of the partners is considered to be less important, notably if their national law is devoid of provisions on the matter.[79] Consequently, in case of a registered partnership entered into abroad the parties are provided the opportunity to make a *professio iuris* in favour of the law of the country where the partnership has been registered (*lex loci celebrationis*), which may or may not coincide with their common national law.

As already mentioned above, one of the characteristics of the CLARP is that it makes a clear and systematic distinction between registered partnerships entered into in the Netherlands and those entered into abroad.[80] With respect to the applicable law to the termination of a registered partnership this distinction has been equally upheld: Article 22 CLARP designates the law applicable to the former situation, whereas the applicable law to the latter situation is determined by Article 23 CLARP.

The principal rule regarding the applicable law to the termination of a registered partnership can be derived from Articles 22 and 23 CLARP: Dutch law will apply in all cases unless the partners have chosen the application of the *lex loci celebrationis*.[81] As a result, Curry-Sumner distinguished the following three categories:

a. registered partnerships entered into in the Netherlands;
b. registered partnerships entered into outside the Netherlands where termination is sought on grounds of mutual consent; and
c. registered partnerships entered into outside the Netherlands where dissolution is sought on grounds of a sole petition.[82]

Below these three categories will be discussed. The law applicable to the termination of registered partnerships of category a will be discussed in Section 3.4.4.

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[77] In the Dutch Proposal on Private International Law this proposal has been copied; see further *supra* Sect. 2.6.

[78] See Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 17. See also Joppe 2000, p. 393 and Joppe (Groene Serie Personen- en Familierecht), Article 23 CLARP, n. 28.

[79] See Staatscommissie 1998, para 7 at Article 31; Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 17 and Mostermans 2006, p. 67.

[80] See *supra* Sect. 3.3.2.

[81] Curry-Sumner 2005, p. 457, stating that '*despite the apparent complexity of the Dutch choice of law rules* […], *the ultimate scheme is based on a simple distinction*.'

[82] Curry-Sumner 2005, p. 457.

The choice of law on the termination of registered partnerships of categories b and c -those entered into abroad- will be discussed in Section 3.4.5.

3.4.4 Termination of Registered Partnerships Entered into in the Netherlands

Pursuant to Article 22 CLARP the termination of registered partnerships entered into in the Netherlands is governed by Dutch law, which determines whether these partnerships can be terminated by mutual consent or be dissolved and on which grounds.

The partners who have entered into a registered partnership in the Netherlands do not have the opportunity to make a *professio iuris* in favour of a foreign legal system.

Before the entry into force of the Choice of Law Act on Registered Partnerships, Dutch courts already applied this choice of law rule to the termination of registered partnerships entered into in the Netherlands.[83]

3.4.5 Termination of Registered Partnerships Entered into Abroad

In principle also the termination of registered partnerships entered into outside the Netherlands is governed by Dutch law (Article 23(1) CLARP):

1. Dutch law determines whether a registered partnership entered into outside the Netherlands may be terminated by mutual consent or by dissolution and on which grounds.

This provision gives the parties the certainty that their registered partnership can be terminated, even if this would not be possible according to the *lex loci celebrationis*. Article 23(1) CLARP thus favours the application of Dutch law and is based on the *favor dissolutionis* principle.[84]

The partners who have entered into a registered partnership outside the Netherlands do have the opportunity to choose the law applicable to the termination of their registered partnership pursuant to Article 23(2) and (3) CLARP. However, this *professio iuris* is limited to the law of the country where the partnership has been registered (*lex loci celebrationis*). The *professio iuris* according

[83] Dutch law was applied on the basis of the regulation as proposed by the Standing Committee in 1998. See Rb. Roermond 29 March 2001, *NIPR* 2001, 188; Rb.'s-Gravenhage 23 April 2003, *NIPR* 2003, 173; Rb.'s-Gravenhage 27 August 2003, *NIPR* 2003, 253; Rb.'s-Gravenhage 27 October 2003, *NIPR* 2004, 11; and Rb.'s-Gravenhage 10 December 2003, *NIPR* 2004, 119.

[84] See equally Reinhartz 2004, p. 495.

to Article 23(2) or (3) CLARP mostly aims at favouring the recognition of the termination of the registered partnership in the country where it has been concluded.[85]

The *professio iuris* on the termination of registered partnerships is at disposal of the partners both in case of the termination by mutual consent (Article 23(2) CLARP) and in case of the termination by dissolution (Article 23(3) CLARP):

> 2. In derogation from the provisions of paragraph (1), the law of the State where the registered partnership has been entered into will apply if they have jointly made a choice of that law in the contract made between the partners in respect of the termination by mutual consent of the registered partnership.
> 3. As regards the termination by dissolution and in derogation from the provisions of paragraph (1), the law of the State where the registered partnership has been entered into will be applied if, in the proceedings:
> a. the partners jointly chose this law or such a choice by one the partners remains uncontested; or
> b. either partner chose such law and both partners have actual ties with the State where their registered partnership was entered into.

According to these provisions the parties can deviate from the principal rule of Article 23(1) CLARP (i.e. application of Dutch law) by choosing the application of the *lex loci celebrationis*.

3.4.5.1 Limited *Professio Iuris*

The parties have a limited opportunity to choose the law applicable to the termination of their registered partnership: solely the *lex loci celebrationis* can be chosen.

The legislator has put forward the following arguments in support of this choice:

> De verwijzing naar het recht van de gemeenschappelijke nationaliteit of van de gewone verblijfplaats kan bij beëindiging van een geregistreerd partnerschap echter tot praktische problemen leiden, indien dat recht het instituut van het geregistreerd partnerschap niet kent. Voor de beëindiging van het geregistreerd partnerschap lijkt voor de partners veeleer een belang te zijn gelegen in het doen van een keuze voor het recht van het land waar het geregistreerd partnerschap is aangegaan. Voor hen zal met name van belang zijn of een beëindiging met wederzijds goedvinden of een rechterlijke beslissing over ontbinding kan worden erkend in het land waar het geregistreerd partnerschap is aangegaan.[86]

In the first place the legislator indicates that the referral to the law of the common nationality of the partners or to the law of their habitual residence may lead to practical problems in case of termination of a registered partnership, if this

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[85] See Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, pp. 16–17.

[86] Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, pp. 16–17.

law does not know the institution of registered partnership. The legislator rightly stresses that the designation of the law of the common nationality of the partners or the law of their habitual residence may lead to practical problems. However, it is not obvious that such referral necessarily leads to problems. Moreover, in the absence of a *professio iuris*, the reference to a legal vacuum, i.e. a law which does not know the concept of registered partnership, is clearly undesirable. Yet this argument is not very convincing in case of a *professio iuris* by the parties: why protect the parties who deliberately chose the application of a law which does not allow for the termination of a registered partnership? Only considerations of legal economy come into mind.

Secondly, the legislature rightly argues that the partners have an interest in the possibility to choose the *lex loci celebrationis* as the applicable law. This interest is connected to the recognition of the termination of the registered partnership in the country in which it has been concluded.

The question remains why the parties are not granted with the possibility to choose any law allowing for the termination of a registered partnership. This would serve the *favor dissolutionis* principle. However, in comparison with the *professio iuris* in case of divorce, the situation is slightly more complicated in case of the termination of a registered partnership. The fact that a *professio iuris* would only serve the partners if the law chosen would allow for the termination of registered partnerships already limits the possible laws which the partners can choose. Yet is it necessary to ascertain already in advance that the laws out of which can be chosen allow for the termination of a registered partnership? Should a choice for, e.g., the law of the common habitual residence of the partners be excluded just because this law *might* not know the concept of registered partnership? Or is this law a valid option, provided that it allows for the termination of a registered partnership?

The danger of the referral to a 'legal vacuum' is less present in case of a *professio iuris* than in case of application of the choice of law rule of Article 23(1) CLARP. The parties wishing to terminate their registered partnership are, to begin with, not likely to opt for a law that does not provide for this opportunity. Furthermore, in two different ways Dutch law can still become applicable: either parties can revoke their *professio iuris*, or the provision on the *professio iuris* could be complemented with an 'auxiliary' rule which determines that if the law chosen does not provide for the termination of registered partnerships, the choice will not be effective and the law specified in the absence of a *professio iuris* will apply.[87] A third possibility is to allow the parties to make a new *professio iuris* for a law that does provide for the termination of the registered partnership.

[87] Cf., Article 6(2) of the Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 ('Hague Trust Convention') for a similar 'auxiliary' rule. It is worth noticing that in the field of trusts the same problems occurred as in the field of registered partnerships. Just as the registered partnership, trust is a concept that is unknown in many legal systems. See Duncan 1999, p. 2; and Šarčević 1999, p. 46.

In light of the foregoing, the *professio iuris* on the termination of a registered partnership should be extended.[88] The possibility to choose the law applicable should, however, not be unlimited: there should be a connection between (one of) the partners and the law to be applied to the termination of their registered partnership. The extension of the degree of the party autonomy in this field to the law of the nationality of either partner or to the law of their common habitual residence fulfils this condition. The extended *professio iuris* should be complemented with the auxiliary rule that if the law chosen to the termination of the registered partnership does not know the concept of registered partnership, the choice is not effective and the law specified in the absence of a *professio iuris* applies.

3.4.5.2 Formal Requirements of the *Professio Iuris*

The formal requirements of the *professio iuris* on the termination of the registered partnership depend on whether the termination is sought on grounds of mutual consent (Article 23(2) CLARP) or on grounds of a sole petition (Article 23(3) CLARP).

When the registered partnership is terminated by mutual consent, Article 23(2) determines that the choice for the application of the *lex loci celebrationis* has to be made jointly by the partners in the contract terminating their registered partnership.

In case of termination on grounds of a sole petition, it is required that the partners have jointly chosen for the *lex loci celebrationis* or that this choice has been made by one partner and is not contested by the other (Article 23(3)(a) CLARP). This law will also be applied if one party has made a choice of law for the place where the partnership was registered and both parties have actual close ties with that country (Article 23(3)(b) CLARP).[89]

The legislature has emphasised that the *professio iuris* pursuant to Article 23(3) CLARP should in principle be made jointly.[90] However, it must be noted that this requirement is fairly strange, since the dissolution of a registered partnership can only be sought on grounds of a sole petition.[91]

Article 23 CLARP does not contain any provision on the time of choice.

In case of the termination of the registered partnership on grounds of mutual consent (Article 23(2) CLARP), the time of choice is obvious: the time of the conclusion of the contract between the partners on the termination of their registered partnership is decisive.

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[88] Cf., *supra* Sect. 2.3.1 concerning the *professio iuris* on divorce.

[89] See for a detailed description of the authenticity test *supra* Sect. 2.4.2.1. The same test applies to the termination of a registered partnership. This implies that all circumstances of the case are taken into account in order to determine whether both parties have a real societal connection to the country where the partnership has been registered. This test enhances an individual review.

[90] See Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 17.

[91] Cf., *supra* Sect. 3.4.2.

If only one of the parties chooses the *lex loci celebrationis* according to Article 23(3) CLARP, this choice should in principle be made in the initiatory petition. If the requesting party makes a *professio iuris* after filing the petition in case of default of appearance, the respondent is not informed and has, consequently, no opportunity to contest the choice. Therefore, such a choice is not valid. In defended proceedings on the termination of a registered partnership a joint *professio iuris* can be made not only at the beginning of the proceedings, but also at a later time during the proceedings, for example during the court session. Moreover, the *professio iuris* can still be lawfully agreed upon in appeal.[92]

3.4.5.3 Formal Requirements of the Termination of Registered Partnerships Entered into Outside the Netherlands

The application of foreign law pursuant to a *professio iuris* according to Article 23(2) and (3) of the CLARP is restricted to the substantive requirements of the termination of a registered partnership. According to Article 23(4) CLARP Dutch law governs the formal requirements of the termination of the registered partnership entered into abroad, irrespective of the formal requirements posed by the law applicable by choice of the parties pursuant to Article 23(2) and (3) CLARP:

> 4. Dutch law governs the manner in which termination by mutual consent or the dissolution of a registered partnership entered into outside the Netherlands is made.

According to this provision Dutch law applies to the form and manner in which the termination of a registered partnership entered into abroad takes place.

The provision of Article 23(4) CLARP is based on the principle of protection.[93] The formal requirements to which the legislator refers are meant to guarantee the parties the protection provided for by Dutch law. This protection also extends to international cases of termination of registered partnerships in the Netherlands:

> Zo zou het denkbaar zijn dat naar het recht van het land waar het geregistreerd partnerschap is aangegaan, de beëindiging met wederzijds goedvinden kan plaatsvinden door middel van een onderhandse akte. In dergelijke gevallen dient rekening te worden gehouden met de beschermingsgedachte van het interne Nederlandse recht. Zo verlangt artikel 80c, onder c, van Boek 1 BW de betrokkenheid van deskundigen en in artikel 80d van Boek 1 BW, zij het niet op straffe van nietigheid, het regelen van een aantal onderwerpen. Ter bescherming van derden verlangt artikel 80e, tweede lid, van Boek 1 BW inschrijving in de registers van de burgerlijke stand. Om deze reden wordt in artikel 23, vierde lid, van het voorstel bepaald dat de wijze waarop het geregistreerd partnerschap dat in het buitenland is aangegaan, kan worden beëindigd met wederzijds goedvinden of ontbonden, door het Nederlandse recht wordt beheerst.[94]

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[92] Cf., the *professio iuris* on divorce, *supra* Sect. 2.3.4.3.

[93] See Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 17.

[94] Explanatory Memorandum (MvT), *Kamerstukken II* 2002–2003, 28 924, No. 3, p. 17.

The legislator has put forward two reasons for the application of Dutch law to the formal requirements of the termination of a registered partnership. One of the important cornerstones of Dutch law is third party protection. Dutch law therefore requires the registration of the termination of a registered partnership in the Registry of Births, Deaths, Marriages and Registered Partnerships. Furthermore, a minimum level of protection of the parties is guaranteed by the assistance of at least one expert.

What is meant by this provision? The Dutch Standing Committee on Private International Law formulated that the *professio iuris* of Article 23(2) and (3) of the CLARP is limited to the substantive requirements.[95] This means that the *lex loci celebrationis* solely determines the ground(s) for termination of the registered partnership.[96] Article 23(4) implies that the formal requirements as posed by Article 1:80c to 1:80e of the Dutch Civil Code should be complied with; this means *inter alia* that the termination has to be entered into the Dutch Registry of Births, Deaths, Marriages and Registered Partnerships.

If, however, the *professio iuris* only applies to the ground(s) for termination, it can be questioned whether the provision of Article 23(4) does not overleap the goal of the *professio iuris*, i.e. increasing the chance that the termination of the registered partnership will be recognised in the country in which it had been entered into. In other words, is the manner in which the termination has taken place decisive for recognition of the termination? Problems may arise with regard to the recognition of the administrative termination of a registered partnership.[97]

It should be pointed out that the partners are not strictly bound by the Dutch formal requirements of the termination of registered partnerships. The partners can have their registered partnership terminated in the country in which it has been entered into according to the local rules and, subsequently, have the termination of their registered partnership recognised in the Netherlands according to Article 24 CLARP.[98] The latter Article stipulates:

1. A registered partnership terminated outside the Netherlands by mutual consent will be recognised when it has been lawfully decreed.
2. Dissolution of a registered partnership obtained outside the Netherlands after a proper legal process will be recognised in the Netherlands, if pronounced by a court decision or a decision of another authority with jurisdiction in respect thereof.

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[95] See Staatscommissie 1998, para 7 at Article 31.

[96] Cf., Frohn 2004, p. 293; Curry-Sumner 2005, p. 458; and De Groot 2007, p. 344. These authors mention that this provision concerns the form and manner of the termination.

[97] See Curry-Sumner 2005, p. 480 concludes that '[*I*]*t is* […] *unlikely that recognition of foreign administrative dissolutions of non-marital registered relationships will raise substantive problems in the countries studied* [i.e. *Belgium, France, the Netherlands, Switzerland and the United Kingdom; NAB*].' It is, however, not impossible that other jurisdictions refuse to recognise an administrative termination of a registered partnership.

[98] Cf., Joppe 2000, p. 393. The rules on recognition and enforcement of the Brussels II*bis*-Regulation do not apply to the termination of registered partnerships, since the termination of non-marital relationships does not fall within the material scope of the Regulation (Article 1).

> 3. Dissolution of a registered partnership obtained outside the Netherlands which does not meet any of the terms laid down in the preceding paragraph, will nevertheless be recognised in the Netherlands when it is evident that the other party to the foreign proceedings agreed, explicitly or implicitly, either during or after such proceedings to have acquiesced to such a dissolution.[99]

As becomes clear from the wording of this provision, the termination of a registered partnership obtained abroad will quite easily be recognised in the Netherlands.[100]

3.5 Public Policy Exception

The Choice of Law Act on Registered Partnerships does not contain an explicit public policy exception concerning the termination of registered partnerships.[101] A specific public policy exception is provided for in Article 3:

> Notwithstanding Article 2, a registered partnership entered into outside the Netherlands will not be recognised, if such recognition would be irreconcilable with Dutch public policy.[102]

However, this exception only applies to the recognition of registered partnerships entered into outside the Netherlands. Even if the registered partnership meets all the requirements specified by Art 2(5) CLARP, it will not be recognised, if such recognition would be irreconcilable with Dutch public policy.

The provision of Article 3 CLARP does not apply to the termination of registered partnerships. Yet a general - implicit - public policy clause applies. The problems with regard to the application of foreign law in case of termination of registered partnerships are far less pressing than in case of divorce. Since the registered partnership is a concept that is (practically) solely known in Western legal systems,[103] the problems described above in Section 2.5 concerning divorce do not arise in case of the termination of a registered partnership. According to the choice of law rules of the CLARP only Dutch law and the *lex loci celebrationis*

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[99] Translation by Sumner and Warendorf 2003, p. 251.

[100] See further Curry-Sumner 2005, p. 469 ff; and Mostermans 2006, pp. 110–111.

[101] The Dutch Choice of Law Acts rarely hold a public policy clause; if any, it only relates to recognition of foreign legal concepts, e.g. Article 3 of the CLARP. None of the Acts contains a public policy clause with regard to choice of law. The Dutch Proposal on Private International Law contains a public policy clause in Article 6 stipulating that the application of foreign law is to be left aside, if this would be manifestly incompatible with Dutch public policy. See on this provision more elaborately Staatscommissie 2002, p. 52 ff; Explanatory Memorandum (MvT), *Kamerstukken II* 2009–2010, 32 137, No. 3, p. 13–15.

[102] Translation by Sumner and Warendorf 2003, p. 245.

[103] This is shown by the list of countries that recognise registered partnership included in Boele-Woelki et al. 2007, p. 103 in footnote no. 1.

can be applied to the termination of a registered partnership; these legal systems recognise the concept of registered partnership.

Although it may only be a theoretical possibility, it might occur that a certain ground for the termination of a registered partnership pursuant to the *lex loci celebrationis* violates the fundamental principles and values of Dutch society. In such a case, the public policy exception guarantees that the court or the expert(s) involved in the establishment of the contract by which the registered partnership is terminated has the possibility to leave the application of the applicable foreign law aside and to apply Dutch law instead. It should be recalled, however, that public policy can only come into play in case of a manifest violation of the Dutch fundamental principles and values.[104]

3.6 Will the Dutch Proposal on Private International Law Bring any Changes?

As seen above, in September 2009 the Dutch Proposal on Private International Law was published.[105] This codification did not intend to bring about a fundamental amendment of the existing choice of law rules, save for those changes necessary to gear these existing rules to one another and to the general provisions.[106]

The applicable law to the termination of registered partnerships is provided for in Articles 86 and 87 of the Dutch Proposal on Private International Law. Article 86 determines the law applicable to the termination of registered partnerships that have been entered into in the Netherlands. This provision-setting out the application of Dutch law-has remained unchanged. Equally Article 87, determining the law applicable to the termination of registered partnerships that have been entered into abroad, has remained unchanged: its principal rule is the application of Dutch law. In deviation from the application of Dutch law, (one of) the partners can choose the application of the *lex loci celebrationis*. Article 87 did undergo some small textual changes.

The Dutch legislator has indicated not to adjust the unilateral character of the choice of law rules on registered partnerships.[107]

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[104] See Strikwerda 2008, pp. 52–53; and Ten Wolde 2009, pp. 79–80.

[105] See *supra* Sect. 2.6.

[106] See Explanatory Memorandum (MvT), *Kamerstukken II* 2009–2010, 32 137, No. 3, p. 2: 'Met de codificatie is niet beoogd de reeds tot stand gekomen regelingen van conflictenrecht aan een fundamentele herziening te onderwerpen. Het gaat thans in hoofdzaak erom deze wetten op elkaar en op de algemene bepalingen af te stemmen.'

[107] See Explanatory Memorandum (MvT), *Kamerstukken II* 2009–2010, 32 137, No. 3, p. 46: 'Ten aanzien van de in Nederland aangegane geregistreerde partnerschappen is gekozen voor het opstellen van eenzijdige verwijzingsregels, die (alleen) aangeven wanneer het Nederlandse interne recht van toepassing is. Er is thans geen reden de regeling op dit punt aan te passen.'

The Explanatory Memorandum to the Dutch Proposal on Private International Law expresses more clearly the meaning of Article 87(4), determining that Dutch law governs the manner in which the termination of a registered partnership that has been entered into abroad is made.[108] The Explanatory Memorandum clarifies that this provision concerns the formal requirements of the termination.[109] Dutch law thus governs the form and manner of the termination of registered partnerships concluded abroad.

Unfortunately the Dutch legislature has not amended the transitional provision as regards the application of the choice of law rules on registered partnerships (Article 91 of the Dutch Proposal on Private International Law) so as to make an exception to the termination of registered partnerships entered into prior to the entry into force of the CLARP.[110] Consequently, the choice of law rules on the termination of registered partnerships remain only applicable to those registered partnerships which have been entered into after 1 January 2005.

3.7 Conclusion

Despite some activity in this field, to date there is no international treaty providing for a regulation of the private international law aspects of registered partnerships. Since 2005 Dutch law provides for the choice of law on registered partnerships. These rules have been laid down in the Choice of Law Act on Registered Partnerships.

As registered partnerships are placed as much as possible on an equal footing with marriage, the choice of law rules regarding the termination of registered partnerships sought connection to the choice of law rules on divorce.

The choice of law rules on the termination of registered partnerships are determined by Articles 22 and 23 CLARP. A distinction is made between registered partnerships entered into in the Netherlands and those entered into abroad. Article 22 applies to partnerships registered in the Netherlands; Dutch law applies to the termination of these partnerships. The parties are not granted a *professio iuris*. Article 23 determines the law applicable to the termination of registered partnerships concluded abroad. In principle Dutch law applies, unless the parties

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[108] See *supra* Sect. 3.4.5.3.

[109] See Explanatory Memorandum (MvT), *Kamerstukken II* 2009–2010, 32 137, No. 3, p. 52: 'Het vierde lid betreft de formele vereisten: de wijze van beëindiging van het geregistreerd partnerschap dat in het buitenland is aangegaan, wordt beheerst door het Nederlandse recht. Bij ontbinding door de rechter is dus inschrijving van de rechterlijke uitspraak in de registers van de burgerlijke stand vereist.'

[110] The Dutch Proposal on Private International Law does contain a transitional provision on Article 56: the amended choice of law rule on divorce will only apply to divorces and legal separations which have been requested after the entry into force of the latter Act. This transitional provision will be added to the general transitional provisions relating to the Dutch Civil Code (Article 290). Cf., *supra* Sect. 2.6.

have chosen the application of the *lex loci celebrationis*. The application of the *lex loci celebrationis* is, however, restricted to the substantive requirements of the termination; Dutch law governs the formal requirements of the termination, i.e. to the form and manner in which the termination takes place (Article 23(4) CLARP). Consequently, the Dutch choice of law on the termination of a registered partnership is predominated by the *lex fori*.

The Dutch Proposal on Private International Law will not bring any changes to the choice of law on the termination of registered partnerships.

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