Chapter 6
The Failure of the Establishment of a Common European Choice of Law on Divorce

6.1 Introduction

The previous chapter analysed the Brussels II*ter*-Proposal; it enhances *inter alia* the introduction of common European choice of law rules on divorce. These rules introduce a limited possibility for the spouses to designate by a common agreement the law applicable to their divorce. In the absence of such a choice, the applicable law is determined on the basis of a cascade rule based in the first place on habitual residence.

The preceding analysis has shown that the Brussels II*ter*-Proposal contains quite some issues that still need to be clarified. Some of these issues have been highly debated during the many Council meetings on the Brussels II*ter*-Proposal. However, since the beginning of the negotiations in 2006, consensus in the Council appeared difficult to reach.[1] A number of Member States have taken an obstructive stance with regard to a unified choice of law on divorce: Malta, for example, has repeatedly made clear to be unwilling to support a European regulation on the law which is applicable to divorce because of its substantive law approach.[2] The United Kingdom and Ireland have both declined to opt-in and, hence, do not participate.[3] Some other Member States, among which are the Netherlands, Sweden and the Czech Republic, have threatened to use their power of veto in order to prevent the Brussels II*ter*-Proposal from entering into force.

[1] The Brussels II*ter*-Proposal has even been referred to as a 'political minefield'. See 'Justice and Home Affairs: EU divorce legislation too tricky to tackle', *European Report*, No. 3332, 22 June 2007.

[2] Cf., *supra* Sect. 5.2.1: Malta is the only Member States that does not provide for divorce at all in its legislation. Maltese law does provide for legal separation.

[3] The United Kingdom and Ireland do not participate in measures pursuant to Title V of the third part of the Treaty on the Functioning of the European Union. Pursuant to a Protocol both countries do have the possibility to join these measures by means of an 'opt in' clause. See further *supra* Sect. 4.6.1.

N.A. Baarsma, *The Europeanisation of International Family Law*,
DOI: 10.1007/978-90-6704-743-2_6,

Measures in the field of international family law need a unanimous Council decision.[4] But 'insurmountable difficulties' precluded the required unanimity on the Brussels II*ter*-Proposal.[5] Some of these difficulties could have been solved by means of amendments of the provisions of the Proposal. Other problems underlying the Brussels II*ter*-Proposal are by contrast more fundamental and have ultimately led to the failure of the establishment of a unified choice of law on divorce.[6] Ironically speaking, the European Union is thus split over divorce.

In this chapter the question 'where did it go wrong?' will be dealt with. Three distinct issues which underlie the failure to reach an agreement on the Brussels II*ter*-Proposal can be distinguished: the position of Malta (Section 6.2), the question of Union competence as regards the choice of law on divorce (Section 6.3) and a complicated methodological problem (Section 6.4). To two of these issues a solution was indeed found during the negotiations in the Council. Ultimately the methodological problem proved to be insurmountable.

In June 2008 the Slovenian Presidency has concluded that all possibilities for a compromise have been exhausted.[7] The procedure on enhanced cooperation has consequently been launched and has resulted in the Regulation on enhanced cooperation in the field of divorce (Section 6.5). However, it is debatable whether this conclusion could have been taken as true. At the end of this chapter (Section 6.6) the issue of possible alternatives for yet another compromise in the field of a unified choice of law on divorce will be elaborated upon.

6.2 The Position of Malta

In the whole debate on the establishment of unified choice of law rules on divorce, Malta occupies a special position. In its legislation Malta does not provide for divorce at all and it has repeatedly declared to oppose any proposal that would oblige the Maltese courts to apply foreign law to circumvent its ban on divorce. However, Malta did adopt the Brussels II*bis*-Regulation. Although Malta was obliged to accept the latter regulation as part of the *acquis communautaire* at acceding to the European Union, the introduction of the Brussels II*bis*-Regulation did not really lead to much debate in Malta.[8] By contrast to the latter Regulation, Malta did have problems with the Brussels II*ter*-Proposal.

The Council has tried to find a solution to this Maltese problem. Firstly, the possibility of an opt out, which would exempt the Maltese courts from applying

---

[4] See *supra* Sect. 4.4.5.

[5] See Press Release of the 2887th Meeting of the Justice and Home Affairs Council of 24 and 25 July 2008, p. 23, available at: http://ue.eu.int/uedocs/NewsWord/en/jha/102007.doc.

[6] Paulino Pereira 2007, p. 394.

[7] See background note of the Justice and Home Affairs Council of 5–6 June 2008, pp. 7–8, at: http://www.eu2008.si/en/News_and_Documents/Background_Information/June/0506_JHA.pdf.

[8] See Farrugia 2007, p. 205.

that part of the regulation on applicable law, has been considered.[9] But the Committee on Civil Law Matters (Rome III) concluded that an opt out was not a feasible option. Any opt out would have to be considered in the light of two specific criteria, i.e. an objective justification and a temporary nature. The concerns raised by Malta could not be met by means of a derogation of a temporary nature. Moreover, most Member States considered that it was difficult to objectively justify an opt out in the context of a European instrument that aims at unifying the national choice of law rules of the Member States.[10]

During the negotiations in the Council it has been stressed that the Brussels II*ter*-Proposal does not establish the legal institution of divorce in a Member State which does not know such institution nor does it oblige a Member State to introduce divorce in its national law.[11] Following on this statement the Council made another attempt to solve the Maltese problem by means of the addition of a special provision to the Brussels II*ter*-Proposal stipulating that

> nothing in this Regulation shall oblige the courts of a Member State whose law does not provide for divorce […] to pronounce a divorce by virtue of the application of this Regulation.[12]

This last attempt obviously had the desired effect: at the Justice and Home Affairs Council Meeting of 26 January 2008 Malta indicated that it no longer intended to oppose the Brussels II*ter*-Proposal.[13]

As a counterpart to this solution to the Maltese problem, a provision functioning as a remedy for situations in which the applicable law 'does not provide for divorce' has been inserted in the Brussels II*ter*-Proposal. In such cases, the *lex fori* will apply:

> 1. Where the law applicable pursuant to Article 20a and 20b does not provide for divorce or does not grant one of the spouses because of his or her gender equal access to divorce or legal separation, the law of the forum shall apply.[14]

Although the arrangement of this provision is not desirable from a methodological perspective,[15] it is to be applauded that Malta and the other Member States have reached this compromise.

---

[9] Council Document No. 8038/08 JUR 48 and JUSTCIV 62 of 2 April 2008.

[10] See Council Document No. 9985/08 JUSTCIV 106 of 29 May 2008, para 11, p. 4.

[11] See Council Document No. 8549/07 JUSTCIV 91 of 17 April 2007, p. 6.

[12] Article 20e-1 as proposed in Council Document No. 8587/08 JUSTCIV 73 of 18 April 2008. This issue appeared for the first time in Council Document No. ST 8028/07 JUSTCIV 75 of 30 March 2007.

[13] 'Justice and Home Affairs: Rome III: Swedish opposition not yet insurmountable', *European Report*, No. 3458, 28 January 2008.

[14] Article 20b-1 on the application of the law of the forum; see Council Document No. 9712/08 JUSTCIV 106 of 23 May 2008, p. 15. See further on this provision *supra* Sect. 5.5.3.3.

[15] See further *supra* Sect. 5.5.3.3.

6.3 The Problem of Competence

The second problem underlying the failure to reach a consensus on a common choice of law on divorce concerns the competence of the European legislature. As seen above, the competence of the European legislature as regards the Brussels II*ter*-Proposal was based on Article 65 EC-Treaty.[16] Article 65(b) EC-Treaty granted the European Community the competence to enact measures on the choice of law. However, this competence was subject to certain limits: it must concern rules in the field of judicial cooperation in civil matters, be necessary for the proper functioning of the internal market and promote the compatibility of the rules applicable in the Member States on conflict of laws. In addition, the principles of subsidiarity and proportionality must be fulfilled.

The Czech Republic, the Netherlands and the United Kingdom did not consider the European legislature to be competent on the subject of the unification of the choice of law on divorce.[17] Their objections concern two different aspects: the fulfilment, on the one hand, of the internal market requirement and, on the other, of the principles of subsidiarity and proportionality.

6.3.1 Does the Internal Market Require a Unified Choice of Law on Divorce?

Currently each Member State autonomously provides for rules on the law applicable to divorce. But these rules differ from one Member State to another.[18]

According to the European Commission the absence of unified choice of law rules on divorce is characterised by a lack of legal certainty and predictability for the spouses, insufficient party autonomy, the risk of results that do not correspond to the legitimate expectations of the citizens, the risk of difficulties for Community citizens living in third States, and the risk of rushing to court.[19] As a means to eliminate these shortcomings, the European Commission has proposed the introduction of unified choice of law rules on divorce.

The Dutch Parliament objected to the assumption that the nature and scope of these problems are so serious as to constitute an obstacle to the proper functioning of the internal market, thereby necessitating the establishment of the proposed measure:

> According to the figures of the European Commission, an estimated 170,000 "international" divorce proceedings take place each year. It follows that approximately 340,000

[16] Cf., *supra* Sect. 4.7.

[17] See the Annex to the COSAC Report for the precise concerns raised by these Member States.

[18] See further *supra* Sect. 5.2.2.

[19] See Green Paper on Divorce, pp. 3–6.

> people are faced each year with the conflict-of-law rules of the Member States, which is equivalent to some 0.074% of the EU population (about 457 million). The possible scope of the (potential) obstacles to the free movement of persons in the internal market should therefore not be overestimated.
>
> The question of in what percentage of these 170,000 cases the differences between national conflict-of-law rules actually result in the problems identified by the European Commission, including lack of legal certainty and the "rush to court", is disregarded. For example, it is evident from the answers to the questions in the "Green Paper on applicable law in divorce matters" that there is no (statistical) proof available of the "rush to the courts" in the majority of the Member States that have responded to the Green Paper. […] It may therefore be considered very probable that the problems outlined by the European Commission do not occur in all the 170,000 divorce proceedings concerned.
>
> Both Chambers also have insufficient evidence that the supposed problems do *actually* constitute an obstacle to the free movement of persons or even represent a *potential* obstacle to the proper functioning of the internal market. Both Chambers therefore have serious doubts about the opportuneness of the decision to choose Article 65 of the EC Treaty as the legal basis for the proposed Regulation.[20]

The European Commission responded to these concerns by challenging the statistical derivations of the Dutch Parliament: the dimension of the problems needs to be considered in the light of the free movement of persons. Only a fraction of the total EU population currently makes use of this right. Therefore, a comparison of the number of international divorces with the total number of divorces is more revealing: the approximately 170,000 international divorce proceedings that take place each year in the EU represent roughly 19% of all divorces.[21]

The question whether the internal market requires a common choice of law on divorce should indeed be considered in the context of the free movement of persons. This is a fundamental freedom that enhances the internal market and that contributes to the establishment of a proper European judicial area.[22]

---

[20] *Kamerstukken I/II* 2006–2007, 30 671, E and No. 5. The English translation was provided in the Dutch response to the COSAC Report; see its Annex, p. 92. The fulfillment of the internal market requirement of Article 65 EC was equally questioned by both the Czech Parliament ('*It is arguable to what extent a measure in the area of family law fulfills the last criterion, i.e. how unification of the conflict-of-law rules applicable in matrimonial matters contributes to the proper functioning of the internal market.* […] *neither the explanatory memorandum nor the impact assessment to the proposal removes doubts* [*about; NAB*] *the necessity of a Community legal instrument regulating such conflict-of-law rules.*') and the British House of Lords ('[…] *the House of Lords EU Committee doubts whether the Commission's statistical analysis provides a sufficient basis on which to act.*'); see Annex to the COSAC Report, pp. 24–25 and 120, respectively.

[21] See the letter of the Vice-President of the European Commission of 7 December 2006, *Kamerstukken I/II*, 2006–2007, 30 671, F and No. 6: '*De omvang van het probleem in het licht van het vrije personenverkeer kan niet worden gemeten aan de totale bevolking van de EU, aangezien slechts een fractie van die bevolking thans gebruik maakt van het recht om naar een andere lidstaat te verhuizen in verband met werk. Een vergelijking van het aantal echtscheidingsgevallen waarbij collisieregels een rol spelen, met het totale aantal echtscheidingen is veelzeggender. Geschat wordt dat jaarlijks zo'n 170 000 «internationale» echtparen in Europese Unie scheiden, wat neerkomt op ongeveer 19% van alle echtscheidingen.*'

[22] See more elaborately *supra* Sect. 4.7.2.

As part of the question whether the unified choice of law on divorce complies with the internal market requirement of Article 65 EC, the European Union Committee of the British House of Lords has expressed serious doubts concerning the reliability of the European Commission's statistical analysis:

> 18. Only 13 Member States could provide the information requested and in five cases not for the full period of time (four years) requested. Significantly only one large Member State (Germany) responded. The UK was unable to do so because it does not keep the sort of statistics requested by the Commission. Whether it is safe to extrapolate for the whole Union on the basis of the Commission's study has been questioned. Practitioners expressed concern that the responses from smaller Member States with high numbers of foreign residents (such as Luxembourg and Belgium) may have skewed the statistics. […] How, in the apparent absence of statistical data from any large Member State save Germany, the Commission can state that "the rates of international marriages and divorces do not vary enormously amongst the larger EU countries" is extraordinary.
> 19. Even if there are some 170,000 international divorces each year, doubts have been expressed as to whether this is sufficient to justify the action being proposed: what the Commission's statistics do not reveal is the number or percentage of cases where the question of applicable law has been a problem.
> […]
> 28. [A] second concern is that the rules in Rome III could apply to cases which may have little connection with the Internal Market.
> 29. […] the substantial variations in the figures would not seem to justify the conclusions drawn for the whole Union. The statistics are not a safe basis on which to act.[23]

To my knowledge, the Commission has never responded to these concerns.[24] However, as long as these concerns have not been refuted, they undeniably damage the credibility of the basis of the Community action.[25]

It should be borne in mind, however, that not only the scale of the problems resulting from the lack of unified choice of law rules on divorce has incited the Commission to regulate this field. A common European choice of law on divorce should be seen in a broader perspective, i.e. the realisation of a common judicial area that makes life easier for the EU citizens.[26] Moreover, the principle of mutual recognition also plays an important part in this respect:

> [T]he harmonisation of conflict-of-law rules facilitates the mutual recognition of judgments. The fact that courts of the Member States apply the same conflict-of-law rules to

[23] See House of Lords Rome III Report, pp. 8–11. The Commission's proposal on a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final/2 shows that the previous statistical analysis was in fact slightly overdone. See p. 6 of the proposal: 'In 2007 there were 1 040 000 divorces in the 27 Member States of the European Union, of which 140 000 (13%) had an 'international' element.'

[24] The reason that the Commission has not responded to these concerns is probably that the concerns have been published in a Report of the House of Lords. The House of Lords has not adopted a formal reasoned opinion as such. See the Annex to the COSAC-Report, p. 120.

[25] The same goes for the already observed inconsistency in the percentage representing the number of international divorces in the EU: is it 16 or 19%? See *supra* note 236 of Chap. 4.

[26] See Impact Assessment on Divorce, p. 28.

determine the law applicable to a given situation reinforces the mutual trust in judicial decisions given in other Member States.[27]

Although both the objective of the realisation of a common judicial area and the principle of mutual recognition do shed light on the reasons for the establishment of a unified choice of law on divorce, they do not relate to the internal market requirement of Article 65 EC-Treaty.

In Chapter 4 above, it became clear that the latter requirement should not be interpreted too strictly and can be complied with rather easily. A stimulating effect towards the internal market is already enough for a Community act to comply with the internal market requirement. The shortcomings indicated by the Commission and the three other defaults hinder the free movement of persons. Therefore, the unification of the choice of law rules on divorce will remove an obstacle to the free movement of persons and will, hence, contribute to the proper functioning of the internal market.[28]

6.3.2 *Fulfilment of the Principles of Subsidiarity and Proportionality*

The Explanatory Memorandum to the Brussels II*ter*-Proposal justifies the fulfilment of the principles of subsidiarity and proportionality:

- **Subsidiarity principle**
  The objectives of the Proposal cannot be accomplished by the Member States but require action at Community level in the form of common rules on jurisdiction and applicable law. Jurisdiction rules as well as conflict-of-law rules must be identical to ensure the objective of legal certainty and predictability for the citizens. Unilateral action by Member States would therefore run counter this objective. There is no international convention in force between Member States on the question of applicable law in matrimonial matters. The public consultation and the impact assessment have demonstrated that the scale of the problems addressed in this proposal is significant and that it concerns thousands of citizens each year. In light of the nature and the scale of the problem, the objectives can only be achieved at Community level.
- **Proportionality principle**
  The Proposal complies with the principle of proportionality in that it is strictly limited to what is necessary to achieve its objectives. […]
- **Choice of instrument**
  With regard to the type of legislative instrument, the nature and the objective of the proposal require the form of Regulation. The need for legal certainty and predictability calls for clear and uniform rules. The proposed rules on jurisdiction and applicable law are detailed and precise and require no implementation into national law. To leave Member States any margin of discretion for the implementation of these rules would endanger the objectives of legal certainty and predictability.[29]

---

[27] Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 2.

[28] See *supra* Sect. 4.7.2.

[29] Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 7. See further *supra* Sect. 4.4.4 on the principles of subsidiarity and proportionality.

Yet some Member States consider the Brussels II*ter*-Proposal in breach of the principles of subsidiarity and proportionality.[30] In November 2006 COSAC held a 'Subsidiarity and Proportionality Check' of the Brussels II*ter*-Proposal. The result of this check was that the great majority of the participating parliaments did not consider the Brussels II*ter*-Proposal to be in breach of the principles of subsidiarity and proportionality. However,

> some parliaments found that the Commission did not sufficiently justify the need for the proposed legislation with regard to the legal basis, given that Art. 65 TEC applies only in so far as it is necessary for the proper functioning of the internal market. Some of the concerns raised when checking subsidiarity and proportionality of the proposal seem to rather refer to the question of legal basis than to the principles of subsidiarity and proportionality.[31]

The COSAC Report rightly emphasised that some of the concerns expressed by the Member States with regard to the principles of subsidiarity and proportionality seem to rather challenge the legal basis of the Brussels II*ter*-Proposal.[32]

The Netherlands is one of the Member States that has raised concerns about the fulfilment of the principle of subsidiarity.[33] In the view of the Dutch Parliament, the problems indicated in the Green Paper on divorce resulting from the absence of unified choice of law rules on divorce cannot be sufficiently solved on the level of choice of law.[34] These problems can in essence be reduced to differences in the substantive divorce laws of the Member States. Therefore, the encountered problems should be solved by unifying the Member States' substantive divorce

---

[30] E.g. the Czech Republic, the Netherlands and the United Kingdom.

[31] See the Conclusion of the COSAC Report, p. 14.

[32] The European Union Committee of the British House of Lords did frankly admit that in their view the concerns regarding the Brussels II*ter*-Proposal raise both *vires* and subsidiarity questions. See House of Lords Rome III Report, p. 10.

[33] See the Reply of the Dutch government to the Green Paper on Divorce, p. 2. Available at: http://ec.europa.eu/justice_home/news/consulting_public/divorce_matters/contributions/contribution_netherlands_en.pdf. A special Dutch Temporary Commission on Subsidiarity has examined the European Commission's Proposal as to compatibility with the principles of subsidiarity and proportionality and has concluded that the Brussels II*ter*-Proposal does not comply with these principles, *KamerstukkenI/II* 2005-06, 30 671, D and No. 4. See for an in-depth analysis of the Dutch concerns raised with regard to the principles of subsidiarity and proportionality: Pontier 2007, pp. 203–216.

[34] The Czech Chamber of Deputies agreed with this point of view, although it considers the Brussels II*ter*-Proposal 'disputable' in terms of the principle of subsidiarity. See the Annex to the COSAC Report, p. 25: '*The Commission's effort towards the unification of conflict-of-law rules (that Commission wrongly designates this as "harmonization") can be considered as a step towards the harmonization of family law of the Member States, since the main objective of the proposal, i.e. "legal certainty and predictability" can be attained in full only through the complete harmonization of substantive family law of the Member States.*'

laws. The Dutch Parliament concluded accordingly that the provisions on choice of law should be deleted from the Brussels II*ter*-Proposal.[35]

The Dutch Parliament rightly stresses that the diverging substantive divorce laws of the Member States are the very source of the encountered problems. Accordingly, the unification of the substantive law provisions on divorce of the Member States would certainly solve the problems pointed out.[36] However, the European Union has no competence to unify substantive law, since measures to be taken under Article 81 TFEU are limited to those having 'cross-border implications'.[37] Due to this lack of competence, no progress can be made. The establishment of a common choice of law on divorce would mean a step forward and a, albeit partial, solution to the problems observed.[38] Furthermore, even if the EU was competent to unify substantive family law, it is highly doubtful whether a unification of the substantive divorce laws of the Member States is feasible considering the large differences in this respect.[39] It should be noted that there are some tendencies towards convergence of the substantive divorce laws of the Member States, even though the common core of divorce law in Europe is currently rather scarce.[40] Possibly these tendencies towards convergence may make a unification of the choice of law on divorce more feasible in the future.

It is, however, somewhat strange that the Dutch Parliament has not at an earlier stage opposed the establishment of European rules on jurisdiction and on recognition and enforcement in matrimonial matters (the Brussels II(*bis*)-Regulation). Theoretically speaking, the same line of reasoning would apply to these issues. Moreover, it would equally apply to other issues: why has the Dutch Parliament not adduced this line of reasoning with regard to the choice of law on, e.g., maintenance obligations? From the Dutch reply to the relevant Green Paper no similar objections can be derived.[41] Nevertheless the problems encountered in this field of law equally originate from diverging substantive law of the Member States.[42] One can therefore question whether the concerns raised by the

---

[35] See *Kamerstukken I/II* 2006–2007, 30 671, E and No. 5.

[36] See on the unification of substantive family law in general *inter alia* Boele-Woelki 1997 and Antokolskaia et al. 1999.

[37] See *supra* Sect. 4.4.2.

[38] Cf., the letter of the Vice-President of the European Commission of 7 December 2006, *Kamerstukken I/II* 2006–07, 30 671, F and No. 6.

[39] See for a broad overview of these differences *supra* Sect. 5.2.1.

[40] See Boele-Woelki et al. 2004; Antokolskaia 2006, p. 357 ff; and Boele-Woelki 2007, pp. 265–267. See also the efforts of the Commission on European Family Law (CEFL).

[41] See for the Dutch reply to the Green Paper on maintenance obligations (COM(2004) 254 final): www.europapoort.nl/9345000/1/j9vvgy6i0ydh7th/vg7slw5im1tl?key=vguwawrau0qt.

[42] This differentiation can, however, be explained by the fact that maintenance is a field of law that is less sensitive than divorce, as it verges on the law of obligations and — unlike divorce — the substantive laws of the Member States on maintenance obligations resemble each other to a large extent. An account of the Member States' laws on maintenance obligations is available on the European Judicial Network website: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_gen_en.htm.

Netherlands in this respect are actually meant to challenge the principles of subsidiarity and proportionality, or whether they in fact imply a substantive objection against the Brussels II*ter*-Proposal considering the *favor divortii* prevailing in Dutch (private international) law.[43]

The European Union Committee of the British House of Lords has raised concerns as regards both the principle of subsidiarity and the principle of proportionality. The latter Committee considers the Brussels II*ter*-Proposal in breach of the principle of subsidiarity as the Commission's statistical analysis is not reliable.[44] In its view the principle of proportionality is neither complied with, as:

> 30. […] the objective might be achieved by less simpler, possibly less prescriptive, means.
> 31. It has been suggested that if the jurisdictional rules (Brussels II) were to be improved then it would not be necessary to harmonise applicable law rules.[45]

Also to this objection the Commission has, to my knowledge, never responded.[46] The marginal justification of the fulfilment of the principle of proportionality in the Explanatory Memorandum to the Brussels II*ter*-Proposal does not succeed satisfactorily in refuting this objection.

The Czech Chamber of Deputies considers the Brussels II*ter*-Proposal 'disputable' in terms of the principle of proportionality, as it questions whether the European Union is the appropriate level for the harmonisation of the choice of law on divorce[47]:

> […] the form of the international convention adopted by the Hague Conference on Private International Law is probably the most appropriate and widely acceptable form in the field of international family law. There is no doubt that a regulation-with regard to its direct effect and direct applicability-represents a more effective tool, but if we accede to the unification of conflict-of-law rules on divorces, we should not limit the rules only to the Member States. It is not just a problem of the European Union, it is an international problem. In addition, Denmark is not participating in the adoption of this proposal, so the unification of conflict-of-law rules in the whole European Union is just illusory.[48]

---

[43] Cf., the letter of the Minister of Foreign Affairs of 2 October 2006. *Kamerstukken II*, 2006–2007, 22 112, No. 465. In this letter the Minister states: *'De kans is niet gering dat het resultaat van de onderhandeling zal zijn een regeling van het conflictenrecht die minder gunstig is dan de huidige Nederlandse regeling, en dat aldus voor echtgenoten in Nederland meer barrières worden opgeworpen om uit elkaar te gaan dan thans het geval is.'*

[44] See *supra* Sect. 6.3.1.

[45] See House of Lords Rome III Report, p. 11.

[46] Cf., *supra* note 24 of Chap. 5.

[47] Although the Czech Republic considers this concern as an issue of proportionality, it is rather an issue of subsidiarity, as it regards the question of the appropriate level to achieve the policy objectives and to address the problems in the current situation. See further on the content of the principles of subsidiarity and proportionality *supra* Sect. 4.4.4.

[48] See Resolution of the Czech Chamber of Deputies, Annex to the COSAC Report, p. 25.

The Czech Republic thus considers the Hague Conference on Private International Law to be the most appropriate level to unify the choice of law on divorce. If there would already be a convention on this issue that could be ratified by the Member States or if there would be tangible prospects of such a convention, it would certainly be preferable that the choice of law on divorce be dealt with through a Hague convention.[49] However, in divorce there is neither a convention nor any prospect to it.

Although the Commission has not succeeded in satisfactorily justifying the fulfilment of the principles of subsidiarity and proportionality, these principles seem to have been fulfilled as regards the unified choice of law on divorce.[50] As no Member State acting alone is able to solve any problems created by the lack of uniform choice of law rules on divorce in Europe, the problems mentioned above can best be solved at the Community level. Consequently, the Community is actually competent to enact common choice of law rules on divorce.

Furthermore, even the Brussels II*ter*-Regulation — suppose that it enters into force — would be challenged non-compliance with the principles of subsidiarity and proportionality, it is doubtful what the consequences of such challenge will be. As seen above, the European legislature has a margin of appreciation with regard to the principles of subsidiarity and proportionality: a measure can only be reviewed on the grounds of these principles if it is manifestly inappropriate.[51] Since the Commission has shown in the Brussels II*ter*-Proposal that it has taken account of both principles, it is not likely that the Court of Justice will find it to be in breach of either principle.[52]

6.3.3 Problem of European Competence Solved?

In addition to the solution found to the problem concerning the position of Malta, also the problem of competence seems to have been 'solved', considering the following statement as a result of the Justice and Home Affairs Council meeting of 26 January 2008:

---

[49] Cf., the issue of maintenance obligations. A European Regulation applies to the issues of jurisdiction and recognition and enforcement in the matter of maintenance obligations. Ancillary to the 2007 Hague Convention on the Recovery of Child Support a separate Protocol on the law applicable to maintenance obligation has been concluded. In accordance with Article 24 of the Protocol, the European Council will most probably sign it on behalf of the European Community; see the Proposal for a Council decision on the conclusion by the European Community of the Protocol on the Law Applicable to Maintenance Obligations, COM(2009) 81 final. See further *infra* Sect. 8.4.4.3.

[50] See further *supra* Sect. 4.7.2.

[51] See *supra* Sect. 4.4.4.

[52] See also Fiorini 2008, pp. 185–186.

> Both the Netherlands and Malta, two […] countries that were known previously to have reservations, signalled at the meeting that they do not intend to oppose the text.[53]

Consequently, it appears that the initial opposition of the Member States against the Brussels II*ter*-Proposal due to the lack of Community competence with regard to a common choice of law on divorce would not have obstructed the adoption of the Brussels II*ter*-Proposal.[54]

As seen above, the alleged lack of Community competence was one of the reasons of the opposition of both the United Kingdom and Ireland against the Brussels II*ter*-Proposal. Accordingly, both Member States did not avail themselves of their opportunity to opt into the Brussels II*ter*-Proposal. But, due to the special position of the United Kingdom and Ireland with regard to judicial cooperation in civil matters, their participation is no *conditio sine qua non* for the establishment of a common choice of law on divorce. Consequently, the Brussels II*ter*-Proposal could have been adopted without the participation of these Member States.[55]

As far as the Netherlands is concerned, it has apparently decided to give up its initial opposition against the Brussels II*ter*-Proposal.[56] Despite its objections, the Netherlands has continued to 'labour for a final compromise that would fit to the current Dutch views on choice of law on divorce and that would, therefore, be acceptable to the Netherlands.'[57] According to the Dutch Minister of Justice, the

---

[53] 'Justice and Home Affairs: Rome III: Swedish opposition not yet insurmountable', *European Report*, No. 3458, 28 January 2008.

[54] However, it cannot be stated with certainty that the problem of competence is solved, as the position of the Czech Republic in this respect is unclear. Possibly the Czech Republic never intended to use its power of veto with regard to the Brussels II*ter*-Proposal, considering the following statement in the Presidency Agenda of January 2009: '[*T*]*he Czech Republic participated in the negotiations with the parliamentary reservations.*'; see: http://www.justice2009.cz/en/justice-2009/redakce/presidency-agendas/civil-agenda/c66.

Yet, the mentioned statement can also be interpreted in a way that the Czech Republic has possibly felt that it should remain neutral on such politically sensitive issue while holding the European Presidency (first half of 2009). Consequently, the position of the Czech Republic as regards the Brussels II*ter*-Proposal remains unclear.

[55] Cf., the Maintenance Regulation has equally been adopted without the United Kingdom having opted in. Ireland did, however, opt into this Regulation. See Recitals Nos. 46 and 47 of the Preamble to the Maintenance Regulation. On 3 February 2009, after the adoption of the Maintenance Regulation, the United Kingdom has requested the Commission to opt in. The Commission has agreed to the UK's participation on 21 April 2009. The difference is, however, that the Maintenance Regulation does not provide for choice of law rules. Although the first draft of the Maintenance Regulation did contain a regulation on the law applicable to maintenance obligations, the adopted Regulation refers as regards the applicable law to the Hague Protocol on the law applicable to maintenance obligations of 23 November 2007. The United Kingdom did, however, not opt in (yet) to this Protocol. The Protocol will, by contrast, apply to Ireland.

[56] See also Boele-Woelki 2008b, p. 785: '*Ultimately, the Netherlands reluctantly accepted the Rome III proposal, although it strongly supported the* lex fori *camp*.'

[57] See letter of the State Secretary of Justice of 2 July 2008 to the Committee on Justice and Home Affairs of the Dutch Upper House of the Parliament (No. 5551493/08/6). This letter can be found at: http://www.europapoort.nl/9345000/1f/j9vvgy6i0ydh7th/vhcedoimzey0.

Netherlands has accordingly advocated in COREPER[58] to bring up anew the French proposal on the law applicable to divorce in the absence of a *professio iuris*. This proposal would allow the courts to apply the *lex fori* as long as neither party requests the application of the law designated by Article 20b Brussels II*ter*-Proposal.[59] However, in COREPER there was no inclination to reconsider the French Proposal.[60] This position of the Dutch Parliament once again endorses that it can be questioned whether the Dutch concerns are actually meant to challenge the European legislature's competence or rather imply a substantive opposition against the Brussels II*ter*-Proposal.[61]

6.4 The Methodological Problem

The last problem under discussion is the methodological problem, which is strongly connected to the different choice of law approaches to divorce that currently exist within the European Union. As indicated above, the EU Member States can be broadly divided into two categories.[62] The first category is constituted by Member States that determine the applicable law to divorce on the basis of the approach of the closest connection. The majority of the Member States belong to this category.[63] In the second category, the Member States systematically apply their own national law (*lex fori*) in international divorce proceedings.[64]

---

[58] COREPER ('Comité des représentants permanents') is a European institution preparing the decision-making of the Council. It is a permanent liaison body for the exchange of information between the national administrations and the institutions of the European Communities. See further Kapteyn and VerLoren van Themaat 1998, p. 193 ff.

[59] Cf., *supra* Sect. 5.5.3.3 on the French proposal. See also *infra* Sect. 6.5.3.2.

[60] *Kamerstukken II* 2007–08, 23 490, No. 510, Parliamentary Report of a General Consultation, p. 6.

[61] The Minister of Foreign Affairs has furthermore indicated that the decision of the United Kingdom and Ireland not to opt into the Brussels II*ter*-Proposal is an obstacle to the Netherlands: '*Een Nederlands belang is ook dat het Verenigd Koninkrijk en Ierland een "opt-in"-verklaring afleggen.*' See Letter of the Minister of Foreign Affairs of 2 October 2006, *Kamerstukken II*, 2006–2007, 22 112, No. 465. Strangely enough, this argument has not been raised with regard to the Maintenance Regulation, which has been adopted without the United Kingdom having opted in to it.

[62] See *supra* Sect. 5.2.2. Two Member States do not come under the two categories mentioned: France applies unilateral choice of law rules which only determine when French law applies and Malta does not provide for divorce in its substantive law and does, hence, not have any choice of law rules on this issue either.

[63] These Member States are: Austria, Belgium, Bulgaria, Estonia, Germany, Greece, Hungary, Italy, Lithuania, Luxemburg, the Netherlands, Spain, the Czech Republic, Poland, Portugal, Romania, Slovakia and Slovenia.

[64] Seven Member States belong to this category: Cyprus, Denmark, Finland, Ireland, Latvia, Sweden and the United Kingdom.

The choice of law rules of the Member States cannot be seen in isolation of their substantive divorce laws: the objectives that the substantive divorce laws are meant to achieve (partly) influence the arrangement of the related choice of law rules. As seen above, the objectives of the substantive divorce laws of the Member States differ fundamentally. They range from the rigid position of Malta that does not permit divorce at all, to the liberal attitude of Sweden, where divorce will be granted without a specific ground being required. In between, there is a wide variety of conditions, such as mutual consent, or in the absence of an agreement, a *de facto* separation for at least six months in the Czech Republic to five years in Cyprus.[65]

These profound differences in approach as regards divorce between the Member States constitute a serious obstacle to the establishment of unified choice of law rules in this area.[66]

The Commission has decided to unify the choice of law rules on divorce on the basis of the principle of the closest connection.[67] The principle of closest connection requires such arrangement of the choice of law rules that they lead to the application of a law to which both spouses are connected.[68] Yet, the Commission does not explain the rationale behind this approach. Most probably the unified choice of law on divorce is based on the approach of the closest connection for the fact that the majority of the Member States currently propagate this approach. However, a recent evaluation of the private international law rules on divorce of eight European countries has shown that in all of them the application of the *lex fori* was general or quasi-general.[69]

Although the analysis below will show that the principle of the closest connection is the best approach for the common choice of law on divorce, the lack of explanation of the chosen approach is not likely to contribute to its acceptation by the Member States that currently adhere to the *lex fori* approach.

Which choice of law methodology should underlie the European choice of law on divorce?

De Boer considers both the principle of party autonomy and the principle of functional allocation not suitable as a basis for common choice of law rules on divorce, as both principles would encounter difficulties: the social policies underlying the substantive divorce laws of the Member States are too

---

[65] A very broad classification of the substantive divorce laws of the Member States is given above in the table included in Sect. 5.2.1.

[66] See also Rüberg 2005, p. 106 ff; Bonomi 2007, pp. 779–780; Boele-Woelki 2008b, pp. 784–785; De Boer 2008, p. 334 ff; Kohler 2008b, p. 195. See more general Cadet 2004, p. 9.

[67] See the Green Paper on Divorce, p. 7.

[68] *Supra* Sect. 2.4.

[69] Romano 2006, pp. 457–519. It is to be noted that seven of these countries are EU Member States and only one of them (the United Kingdom) expressly adheres to the *lex fori* approach. Cf., the position of the Netherlands, which currently belongs to the category of States that determine the applicable law on the basis of the closest connection. However, in its reply to the Green Paper on Divorce it has advocated a *lex fori* approach. See on this issue already De Boer 2001, p. 211.

divergent.[70] With regard to the principle of functional allocation — i.e. the choice of law approach based on the function of the corresponding substantive law, mainly in order to protect the weaker party — he rightly stresses that in case of divorce the weaker party cannot be allocated.

De Boer regards the introduction of the principle of party autonomy, which allows the spouses to choose between alternative laws, useless as long as the result to be favoured is not agreed upon: dissolution of the marriage at the request of either spouse, or preservation of the marriage as long as possible. The Member States which adhere to a *favor matrimonii* approach are not likely to approve the principle of party autonomy: allowing the spouses to choose the law applicable to their divorce *de facto* evidently implies that party autonomy will often be used to choose a 'divorce-friendly' law.[71] But does this necessarily mean that the principle of party autonomy is unsuitable as such for an area in which the substantive law approaches of the Member States differ greatly?

Strikingly, during the preparatory phase of and the negotiations on the Brussels II*ter*-Proposal the introduction of party autonomy in the field of divorce did not seem to be highly opposed.[72] This at least suggests that the diverging substantive law approaches do not necessarily constitute an insurmountable barrier to the introduction of the principle of party autonomy.

In European context the principle of party autonomy should be considered as a principle of European private international law that aims to allow parties to more

---

[70] See De Boer 2008, p. 336: '*The principle of party autonomy can hardly be reconciled with the notion that divorce cannot be granted on the grounds of mutual consent, a that view still prevails in a number of member states. The principle, allowing a choice between alternative laws, is useless as long as we are not agreed on the result to be favoured: dissolution of the marriage at the mere request of either spouse, or preservation of the marital status as long as possible. The principle of functional allocation, calling for the application of the law of the weaker party's social environment, cannot be resorted to either, because it is impossible to mark either husband or wife as the weaker party.* […] *That leaves us — at least as a basis for unification — with the neutral choice-of-law criterion of the closest connection.*'

[71] See equally Bonomi 2007, p. 783. Bonomi argues furthermore that allowing party autonomy would join the development in several Member States of increasingly submitting divorce to the free disposal of the spouses: '*Sur le plan des principes, elle peut cependant se justifier si l'on considère que dans la plupart des Etats la dissolution du mariage au cours des dernières décennies a été de plus en plussoumise à la disponibilité des époux. L'évolution en grande partie achevée en Europe du principe de divorce par faute, voire de la prohibition du divorce, en faveur d'un régime fondé sur le constat de la rupture irréversible de la communauté conjugale, l'introduction de procédures facilitées en cas de requête conjointe et plus récemment, l'admission, même dans des pays traditionnellement restrictifs, de mécanismes presque automatiques de divorce, fondés sur la simple requête unilatérale de l'un des époux et sans aucun véritable pouvoir de contrôle de la part de l'autorité compétente sont autant de manifestations d'une véritable métamorphose du droit de divorce. Dans ce contexte, l'attribution aux époux, dans des situations internationales, du droit de désigner la loi applicable n'est, pour la plupart des pays européens, pas choquante.*' See equally Kohler 2008b, p. 195.

[72] Cf., Oderkerk 2006, pp. 124–125; Boele-Woelki 2008b, p. 784. It must be admitted that some Member States (e.g. Finland) did support the introduction of the *professio iuris* on divorce in their reply to the Green Paper on Divorce, but they wished to limit the choice to the *lex fori*.

or less fashion their legal relationships to their own needs. All current and proposed European regulations providing for choice of law rules contain the possibility to choose the applicable law as principal rule.[73]

Moreover, according to Bonomi the introduction of a *professio iuris* on divorce would be no more than to openly recognise the party autonomy that is currently already indirectly provided for by the Brussels II*bis*-Regulation:

> Il convient d'ajouter que, dans les faits, les époux, et même l'un seul d'entre eux bénéficient d'ores et déjà de la liberté de déterminer (au moins indirectement) le droit applicable au divorce, dans la mesure où ils peuvent saisir l'un ou l'autre des tribunaux compétents sur la base du Règlement "Bruxelles II-*bis*". Ils peuvent exercer ce choix en fonction du droit qui sera finalement appliqué au fond à leur demande de divorce. Face à un tel *forumshopping*, mieux vaut reconnaître ouvertement le droit de désigner le droit applicable, car cela permet de mieux garantir la sécurité et la prévisibilité du droit.[74]

Consequently, the area of divorce does not seem to necessarily be opposed to the introduction of the principle of party autonomy.

In view of the formal requirement of the *professio iuris* as regards its form — a common agreement is required pursuant to Article 20a(2) of the Brussels II*ter*-Proposal — not all parties will be able to use the possibility to choose the law applicable. Therefore, the common choice of law should contain a provision that determines the law applicable to divorce in the absence of a *professio iuris*.

In this regard the fact that divorce is an area in which the substantive law approaches of the Member States differ greatly does truly affect the arrangement of the choice of law. The common choice of law rules should be neutral, i.e. rules which are blind to the result they achieve in terms of substantive law. Only in case of neutral choice of law rules the Member States are likely to ignore the strong social policies that underlie their choice of law rules.[75] Choice of law rules which are based on the principle of the closest connection are - in principle - neutral. The principle of the closest connection does not make any distinction on the basis of the content or the source of the applicable law, and neither between foreigners or 'own' citizens.[76] A legal relationship is referred to a certain legal system by means of specific objective criteria, i.e. connecting factors, determining with which jurisdiction a certain type of legal relationship has the closest connection. The principle of the closest connection does imply that the choice of law rules may sometimes lead to the reference of a specific case to a foreign legal system. However, some Member States take the position that they do not want their courts to apply foreign divorce law, since such law might be more restrictive or more liberal than their own law. These Member States wish to continue to apply their own substantive law (the *lex fori*) to any divorce requested in their courts, regardless of the nationality or the place of habitual residence of the

[73] See further *infra* Sect. 8.4.3.

[74] Bonomi 2007, pp. 774–775.

[75] Cf., De Boer 2008, p. 336.

[76] See Pontier 1997, p. 377.

spouses.[77] Although the decision of the United Kingdom and Ireland not to opt in to the Brussels II*ter*-Proposal for this reason could have been foreseen, also other Member States strongly opposed the Brussels II*ter*-Proposal for this reason.[78] The strongest opponent in this respect, Sweden, has repeatedly declared that it is not willing to accept the application of any other law than its own liberal law in international divorce cases.[79] Kohler has pointed out that this position does not show much willingness to cooperate in the framework of the European integration and, moreover, that it contravenes the principle of mutual trust:

> Kritisch betrachtet werden muss die Haltung, die sich grundsätzlich gegen die Anwendung fremden Rechts in Ehesachen wendet. […] Diese Haltung nimmt das Recht und die Identität anderer an einer auslandsverknüpften Situation beteiligten Staaten und Personen nicht ernst und wirkt im globalen Zusammenhang provinziell. In einer Integrationsgemeinschaft wie der Europäischen Union steht sie im Widerspruch zu dem vom Gemeinschaftsgesetzgeber und vom *EuGH* hervorgehobenen Grundsatz des gegenseitigen Vertrauens, das die Mitgliedstaaten einander entgegen bringen sollen und das auf der vorausgesetzten Gleichwertigkeit der Rechtsordnungen beruht.[80]

Although Kohler rightly stresses that the refusal of some Member States to apply any other law than their own does not express much willingness to cooperate, the emphasis on the violation of the principle of mutual trust can be questioned. Does the principle of mutual trust actually entail that Member States can no longer propagate a *lex fori*-approach? This seems a too extensive interpretation of this principle, as a refusal to apply foreign law does not necessarily infringe the equivalence of the legal systems of the Member States.

There is yet no denying that the Council was confronted with the problem that some Member States refused to apply foreign law and it has—by means of a compromise — tried to give the *lex fori* a more prominent position in the Brussels II*ter*-Proposal, *inter alia* by the addition of the possibility to apply the *lex fori* in

---

[77] This resistance is (partly) connected with the universal character of the proposed choice of law rules, as they can designate the law of a Member State or the law of a third State. See further *supra* Sect. 5.4.1.1. In extra-European cases it might happen that the applicable law is the law of a country where, for instance, religion (such as the Islam) plays a central role, which might disrespect the principle of the equality of the spouses. See on this issue Boele-Woelki 2008b, p. 784.

[78] See also Kohler 2008a, p. 1678.

[79] See e.g. www.thelocal.se/9784/20080126/. Jänterä-Jareborg 2008, p. 340 has listed the three intertwined objections on which Sweden's opposition is primarily based. Firstly, according to Swedish law the right to divorce is a fundamental right. Secondly, the Swedish Parliament considers that the Brussels II*ter*-Proposal does not pay due regard to the effects of immigration from countries outside of the European Union and the importance of integration and equality. Finally, as far as forum shopping or rush to court occur, it is not motivated by the differences between the Member States' choice of law rules on divorce. Decisive is instead what rules apply to the various ancillary claims to divorce. The Brussels II*ter*-Proposal does not solve this essential problem.

[80] Kohler 2008b, p. 196. Cf., Israël 2001, p. 141, who regards the application of a foreign Member State's law as a *comitas Europaea*, which is consequence of the principle of mutual recognition.

cases in which the applicable law does not provide for divorce.[81] However, such an addition is no longer in line with the objective of neutral choice of law rules. And that is exactly where the next series of problems start. A revealing statement in this respect has come from two Irish authors who regard the Brussels II*ter*-Proposal as having swept aside any prospect of reconciliation between spouses who have links to other EU jurisdictions by imposing a *favor divortii* regime.[82]

The neutrality of the choice of law rules of the Brussels II*ter*-Proposal can, therefore, be questioned: although the initial Proposal of the Commission did succeed in establishing neutral choice of law rules, the negotiations in the Council and the resulting amendments give the opposite impression and seem to rather propagate a *favor divortii* approach.[83]

The resistance of the Member States against the Brussels II*ter*-Proposal at issue consequently seems to be the result of a lack of agreement as to its methodological approach.

In respect of the desirable neutrality of the European choice of law on divorce the following two remarks must be made.

In the first place, the question must be asked to what extent a neutral regulation of the choice of law on divorce is still within the bounds of the possible.[84] The Brussels II*bis*-Regulation, currently providing for rules on jurisdiction and on recognition and enforcement in matrimonial matters and in matters of parental responsibility, clearly reflects the intention to facilitate the dissolution of a marriage.[85] Some even consider both the jurisdictional rules and the rules on recognition and enforcement to be based on a *favor divortii* approach.[86] Article 3 of the Brussels II*bis*-Regulation contains seven alternative grounds for jurisdiction, which has the effect that the spouse who wishes to obtain a divorce may have several options as regards the competent court. From the automatic recognition of foreign decisions on divorce (Article 21 et seq Brussels II*bis*-Regulation) it is even

---

[81] See *supra* Sect. 5.5.3.3.

[82] McNamara and Martin 2006, p. 16 who even refer in this respect to divorce as '*a commodity that can be bought on the European market*'. Such reaction was already predicted by Meeusen 2007, p. 343.

[83] See equally Kohler 2008b, pp. 195–196: '*Während in dem Vorschlag der Kommission eine materielle Aufladung der Anknüpfungen vermieden wird, zeigen* […] *die bisherigen Arbeiten in dem Rat ein anderes Bild. Hier stehen sich* favor divortii […] *gegenüber.*' See also Fiorini 2008, p. 193 observing that '*the proposal is based on a number of substantive presuppositions: there is a right to divorce, divorce should be egalitarian, easy, and quick,* à la carte.'

[84] Provided that neutral choice of law rules can be provided for at all; very sceptic on this issue is De Boer 2004, pp. 39–55.

[85] Cf., Van den Eeckhout 2004, pp. 58–59; Van den Eeckhout 2008a, pp. 89–90. The proposed amendments of the jurisdictional rules in the Brussels II*ter*-Proposal liberalise these rules even more by introducing the possibility of a choice of court (Article 3a Brussels II*ter*-Proposal) and the *forum necessitatis* (Article 7a Brussels II*ter*-Proposal).

[86] See e.g. Kohler 2001, p. 41 ff; Mostermans 2006, p. 2 ff (with regard to jurisdiction) and pp. 74–75 (with regard to recognition and enforcement); Bonomi 2007, p. 771 ff; Shannon 2007, pp. 149–150.

more clear that the Brussels II*bis*-Regulation is inspired by a *favor divortii* approach: the rules on recognition only apply to decisions granting a divorce and not to those rejecting a divorce.

Furthermore, De Boer has entered upon the question whether the principle of the closest connection can be considered as the best approach of the unification of choice of law rules in an area in which strong social policies determine the content of the corresponding substantive law.[87] Since the policies of the Member States with regard to divorce can be considered as being largely incompatible, the results of such a neutral choice of law would prove to be unsatisfactory — not to say unacceptable — in cases in which the applicable foreign law is directly conflicting with the *lex fori*, as it proves to be too liberal or too restrictive. As a consequence, the national courts will be tempted to fall back on escape devices, such as the public policy exception in order to circumvent the application of foreign law.[88] This certainly is a conceivable risk. However, as argued above, a possible solution to this problem would be for the Member States to reach a basic agreement on what can and cannot constitute a 'manifest incompatibility' with the public policy in the sense of Article 20e Brussels II*ter*-Proposal. Such an agreement should largely remove the mentioned problem. The mentioned objections do not convince and, hence, the principle of the closest connection seems to remain the most suitable basis for the common choice of law.[89]

In the end, this methodological problem has led to the failure to reach an agreement on the Brussels II*ter*-Proposal.[90] Consequently, two possible solutions were left so as to overcome the resulting paralysis: either to abandon the Proposal, or to search for alternatives. The Council has chosen for the latter solution.

6.5 Will There be a Common Choice of Law on Divorce in the EU in the Future?

Now that it has become clear that the Commission's Proposal and the attempts the Council has made to reach consensus on the issue of a unified system of choice of law on divorce have all been rejected, the question arises whether there are any alternatives.

While looking for alternatives, the question that inevitably comes up is whether the European Union actually needs common choice of law rules on divorce. After all, one could conclude that the current regulation on recognition, pursuant to which divorces issued in one Member State have to be recognised in all other Member States independently from the law applied (Article 21 in conjunction with

[87] De Boer 2008, p. 339.

[88] Ibid., p. 339.

[89] See *supra* Sect. 5.7.

[90] See equally Boele-Woelki 2008a, p. 261.

Article 25 Brussels II*bis*-Regulation), suffices. In other words, what is the purpose of choice of law rules if a divorce pronounced in one Member State can be recognised throughout the European Union after all?

Kohler is very clear on this issue. Already strongly opposed to the *Anerkennung statt IPR*-approach in general,[91] he has specifically argued for the urgency of the establishment of common choice of law rules on divorce, considering the different interests that are involved as regards affairs of status:

> Die Pflicht zur Anerkennung kollisionsrechtlich abweichender Entscheidungen bewirkt in Übrigen eine Verdrängung der Verweisungsnormen des Anerkennungsstaates des dortigen internationales Privatrechts. Dies kann in personenstandsrechtlichen Materien, in denen es nicht nur um Individualinteressen geht, zur kritikwürdigen Widersprüchen innerhalb der Rechtsordnung des Anerkennungsstaates führen. Um diese empfindliche Schwäche der Rechtsvereinheitlichung in der EU zu beseitigen, ist die Schaffung einheitlicher Kollisionsnormen vordringlich.[92]

Besides, as has already been discussed in Section 4.4.4.2 above, the need for choice of law rules on divorce is explained by the fact that these rules actually have a proper function, mainly as regards the achievement of justice. In addition, the choice of law equally plays an important part in terms of legal certainty and predictability for the spouses. Therefore, it is important to continue to look for alternatives in order to establish a unified choice of law on divorce.

In July 2008 the procedure on enhanced cooperation was commenced so as to overcome the paralysis that has resulted from the failure to reach a consensus on the issue of a unified choice of law on divorce. This procedure will be discussed below in Section 6.5.1.

There may nevertheless have been more alternatives to overcome the deadlock that has arisen in the establishment of unified choice of law rules on divorce in the EU. Hereinafter the conceivable alternatives will be inquired into, in connection with the question whether the discussed alternative is feasible, and if so desirable. The following alternatives will be discussed: limiting the scope of application of the choice of law to intra-European cases (Section 6.5.2), the *lex fori in foro proprio*-approach, the 'French proposal' and other means to enhance the role of the *lex fori* (Section 6.5.3), and, finally, the possibility of a less stringent interpretation of the principle of the closest connection (Section 6.5.4).

---

[91] Cf., Kohler 2003, p. 412. See further on this approach *supra* Sect. 4.4.4.2.

[92] Kohler 2008a, p. 1675. See equally Kohler 2002, pp. 711, 713: '*Es muß in das Bewußtsein gerückt werden, daß bei divergierenden Kollisions-und Sachrecht der Mitgliedstaaten die Anerkennung und Vollstreckung fremder Entscheidungen ohne Rücksicht auf das angewendete Recht zu Widersprüchen führt, welche die Kohärenz der nationalen Rechtsordnungen in Frage stellen und die gerade im Familien- und Erbrecht häufig nicht erträglich sind. Sind aufgrund der einheitlichen Zuständigkeitsregeln die Gerichte mehrerer Mitgliedstaaten mit divergierenden Kollisionsnormen konkurrierend zuständig, so bestimmt die Wahl des Gerichts zugleich das anwendbare Recht, ohne daß dem in dem oder den Anerkennungsstaaten entgegengetreten werden könnte.*'

6.5.1 Enhanced Cooperation

In June 2008 the Slovenian Presidency concluded that all possibilities for a compromise on the establishment of a common choice of law on divorce have been exhausted.[93] Accordingly, the Justice and Home Affairs Council of 5 and 6 June 2008 confirmed somewhat cryptically:

> A large majority of Member States supported the objectives of this proposal for a Council Regulation [i.e. the Brussels II*ter*-Proposal; NAB]. Therefore and due to the fact that the unanimity required to adopt the Regulation could not be obtained, the Council established that the objectives of Rome III cannot be attained within a reasonable period by applying the relevant provisions of the Treaties. Work should continue with a view to examining the conditions and implications of possibly establishing enhanced cooperation between Member States.[94]

It is the first time in history that some of the national parliaments have threatened to exercise their power of veto awarded by ex-Article 67(5) EC-Treaty (now: Article 81(3) TFEU).

In an attempt to reach yet another compromise, the idea of enhanced cooperation has been launched. This procedure allows a group of Member States to move ahead in one particular area, even though other states are opposed. In July–August 2008, nine Member States (Austria, Bulgaria, Greece, Spain, Italy, Luxembourg, Hungary, Romenia and Slovenia) formally requested enhanced cooperation, asking the Commission to legislate for a common standard for divorces of international couples on their territory. In January 2009, France also addressed a similar request. In March 2010, Greece withdrew its request.[95] Thus the proposed mechanism just managed the required number of 'at least' nine participating Member States. In the meantime five other Member States decided to participate as well: Belgium, Germany, Latvia, Malta and Portugal.

Enhanced cooperation is regulated by Article 20 of the EU-Treaty and Articles 326 to 334 of the Treaty on the Functioning of the European Union. Although the Treaty of Amsterdam already provided for the possibility of enhanced cooperation, it is the first time such a procedure has started.[96] The procedure is meant to be a 'last resort'-option, any subsequent agreement reached is open to all other Member States; the Commission is placed under an active responsibility to ensure that

---

[93] See background note of the Justice and Home Affairs Council of 5–6 June 2008, pp. 7–8, available at: http://www.eu2008.si/en/News_and_Documents/Background_Information/June/0506_JHA.pdf.

[94] See EU Council Factsheet on decisions in civil law matters, p. 2, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/101000.pdf.

[95] See Commission proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final/2, p. 3.

[96] See for analysis of the procedure of enhanced cooperation: Prinssen 2008, spec. 62–67; and Amtenbrink and Kochenov 2009.

Member States are encouraged to participate.[97] According to Article 329 TFEU the Member States intending to establish enhanced cooperation themselves should address a request to the Commission. It will then be up to the Commission to make a proposal to the Council based on the request. Subsequently, the Council has to authorise the establishment of enhanced cooperation acting by qualified majority. An important element is that the enhanced cooperation should aim to further the objectives of the Union, protect its interests and reinforce its integration process (Article 20(1) EU-Treaty). According to the Commission, these requirements are complied with by establishing enhanced cooperation in the field of divorce.[98] However, one can have doubts whether the creation of a 'divided' European area in the field of the choice of law on divorce would reinforce the Union's integration process.[99]

In March 2010, the European Commission published the proposal on enhanced cooperation in the field of divorce. Because of the lapse of time between the request of the mentioned Member States and the actual proposal and because of a number of statements from the Commission, this proposal was published rather unexpectedly. However, the proposal on enhanced cooperation is one of the first actions undertaken by the new EU Justice Commissioner Ms. Reding.[100]

The European Commission initially proved to be willing to examine favourably the formal request of the Member States to present a proposal for enhanced cooperation. The Commission did not want to indicate beforehand what the terms of such a proposal might be.[101] It stressed that it would consider the request in the light of the political, legal and practical aspects of a proposal of this nature. At the informal Council meeting of 15 and 16 January 2009 the possibility of enhanced cooperation in the field of the choice of law on divorce was discussed. The discussions made clear that the Member States are divided on the issue.[102] During this meeting the Commission has postponed the procedure.[103] Apparently it wishes to

---

[97] See Kortenberg 1998, p. 833, stating that '*closer cooperation must* […] *be temporary, and everything possible should be done to allow those States who are not part of an initial group to join in as soon as possible.*'

[98] See Commission proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final/2, pp. 3–12.

[99] See equally Boele-Woelki 2008b, p. 789.

[100] See: http://blog.divorce-online.co.uk/?p=534: '*incoming EU justice commissioner Viviane Reding said she would present a demand for "enhanced cooperation" in this area within three months of taking office*.'

[101] See Council Document No. 11984/08 JUSTCIV 150 of 23 July 2008, para 14.

[102] See *Kamerstukken II* 2008–2009, 23 490, No. 541, p. 5: '*De meeste ministers die het woord voerden, gaven aan weinig heil te zien in versterkte samenwerking voor Rome III. Daarbij merkten enkelen op dat het familierecht nu juist een terrein is waar samenwerking met minder dan 27 lidstaten geen goede optie is, anderen wilden versterkte samenwerking op dit gebied niet uitsluiten, maar benadrukten dat de groep van deelnemende landen dan wel belangrijk groter moet zijn dan het minimum van 8 lidstaten. Weer andere landen hielden vast aan hun wens tot versterkte samenwerking.*'

[103] At this meeting the then Commissioner for justice and home affairs, Mr. Barrot, declared that there was, as yet, not enough support. See: www.dw-world.de/dw/article/0,,3950713,00.html.

avoid creating a 'divided' European area.[104] In June 2009 it seemed as if the Commission did not intend to present a proposal for enhanced cooperation; instead, it announced to present a revised proposal for a regulation.[105] Furthermore, the Stockholm Programme also seemed to hint at the establishment of a common EU-wide choice of law on divorce.[106]

The EU nevertheless moved ahead with enhanced cooperation and in December 2010 the Regulation on enhanced cooperation in the field of divorce. This regulation essentially reproduces the choice of law rules as introduced by the failed Brussels II*ter*-Proposal (if compared to the last Council draft of the Brussels II*ter*-Proposal of 23 May 2008): although a number of issues which have been pointed out as problematic in the previous chapter have been addressed,[107] the possible legal systems out of which the spouses can choose have remained the same as well as the cascade rule providing for the applicable law in the absence of a *professio iuris*.

The choice of law provisions on divorce and legal separation of this regulation will apply in fourteen Member States[108] as from 21 June 2012.[109]

Is the Regulation on enhanced cooperation in the field of the choice of law on divorce to be welcomed? Foremost, it is regrettable that the Member States failed to agree on a common choice of law on divorce, for reaching a consensus is obviously to be preferred. However, the mechanism of enhanced cooperation allows at least a number of Member States to proceed and maybe the advantages of their enhanced cooperation will persuade other Member States to join the

---

[104] See Vandystadt 2009, p. 11; 'Brussels seeks compromise over divorce laws proposal', *Times of Malta* of 28 March 2009, available at: http://www.timesofmalta.com/articles/view/20090328/local/brussels-seeks-compromise-over-divorce-laws-proposal: '*In a bid to secure a deal, EU Justice Commissioner Jacques Barrot said the Commission intended to present a fresh proposal on transnational divorce, known technically as Rome III, without resorting to the mechanism of enhanced cooperation requested by 10 member states.*'

[105] See: http://blog.divorce-online.co.uk/?p=205. However, from a communication of the Commission of 10 June 2009 it seemed strangely enough as if the Brussels II*ter*-Proposal was still pending. See the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Justice, Freedom and Security in Europe since 2005: An Evaluation of the Hague Programme and Action Plan of 10 June 2009, COM(2009) 263 final, p. 12: '*A legislative proposal on the law applicable to divorce (known as 'Rome III') is being discussed in the Council and Parliament.*'

[106] See Stockholm Programme, p. 24: 'the European Council considers that the process of harmonising conflict-of-law rules at Union level should also continue in areas where it is necessary, like separation and divorces.' However, the Commission considers that using enhanced cooperation is in line with this statement in the Stockholm Programme; see Commission Proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final/2, p. 12.

[107] E.g. the application of the *lex fori* if the foreign applicable law 'does not provide for divorce' is defined more clearly in Article 10 of the regulation on enhanced cooperation. Cf., *supra* Sect. 5.5.3.3.

[108] Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxemburg, Malta, Portugal, Romania, Slovenia and Spain.

[109] Cf., Article 21 of the Regulation on enhanced cooperation in the field of divorce.

cooperation. Yet, now the Regulation on enhanced cooperation largely mirrors the failed Brussels II*ter*-Proposal it is highly unlikely that all Member States will eventually join the cooperation.

Moreover, enhanced cooperation certainly has more shortcomings. There is a risk that it will result in an even more complicated situation than the current one, namely in a patchwork of rights, powers and procedures which will be complicated for legal practitioners and their clients.[110] In addition, the major risk is the precedent that enhanced cooperation in the field of divorce creates for all future EU projects on international family law, such as matrimonial property and succession.[111]

Finally, Boele-Woelki has pointed out to the risk that the enhanced cooperation can be established not only by those Member States supporting the Brussels II*ter*-Proposal, but:

> […] then another group of Member States might move in a different direction. Those who favour the *lex fori* approach, for instance, might come up with a new Rome III proposal which contains the uncomplicated rule that the competent court can apply its own law provided that the parties have not chosen the applicable law […] This would then result in two Rome III instruments which contain different rules for the applicable law. Undoubtedly this would create uncontrollable layers of complexity. In addition another important detail should be kept in mind: the enhanced cooperation cannot become exclusive; any other Member State must be able to join the original group at a later stage and also a switch from one instrument to the other should be possible.[112]

Although this risk theoretically exists, it is not very likely to occur in view of the role of the Commission in the initiation of enhanced cooperation. It is not very probable that the Commission would allow other Member States to establish enhanced cooperation on a different basis. Furthermore, allowing two different enhanced cooperation instruments on one issue would clearly be contrary to the requirements posed by Article 20(1) EU-Treaty, as it would neither further the objectives of the Union nor reinforce its integration process.

The Commission is aware of the possible disadvantages, but 'considers that the benefits of using enhanced cooperation in the area of the law applicable to divorce and legal separation are numerous compared to the option of the status quo and that the advantages in this particular case of enhanced cooperation outweigh the possible disadvantages.'[113] It must be admitted that, now the establishment of a common choice of law on divorce had clearly arrived at an impasse, it is better to have some Member States sharing a choice of law system in the field of divorce than none. In the situation of enhanced cooperation between the nine participating Member States, the twenty-six different choice of law regimes that currently exist

---

[110] The Estonian government even fears that enhanced cooperation would 'open up a Pandora's box'. See http://www.eubusiness.com/news-eu/1217000821.83/.

[111] See also Boele-Woelki 2008a, p. 261; Mansel et al. 2009, p. 9.

[112] Boele-Woelki 2008b, p. 790.

[113] See Commission Proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 104 final/2, p. 12.

in the twenty-six Member States that participate in judicial cooperation in civil matters would reduce to eighteen different legal regimes.[114]

As mentioned above, there may have been more alternatives to overcome the deadlock that has arisen in the establishment of unified choice of law rules on divorce in the EU. These alternatives will be discussed below.

6.5.2 *Limitation of the Scope of Application to Intra-European Cases*

In the foregoing it became clear that the European Union is competent to enact universal choice of law rules. In addition, the establishment of universal choice of law rules certainly offers advantages, specifically in terms of ease of use of the European choice of law and of legal certainty.[115]

Although these advantages are clear, the Brussels II*ter*-Proposal has shown that it is questionable whether such a universal scope of application is feasible. After all, the major obstacle in the adoption of a common European choice of law on divorce (for Sweden) was that it could possibly lead to the application of foreign law to an international divorce case.[116] As regards the universal scope of the common choice of law on divorce of the Brussels II*ter*-Proposal Beaumont has questioned

> whether it is really necessary for the proper functioning of the internal market to apply foreign law on divorce from outside the Community when the connection with the Community is quite slim […]. In quite a number of cases only one party is connected with the Community and it is also possible that quite a lot of the issues surrounding the marriage might not be connected with the Community. You could therefore have a situation where non-EU law is being applied under this instrument and it is certainly arguable as to whether that is necessary for the proper functioning of the internal market.[117]

Would a restriction of the scope of application of the common choice of law to strictly intra-European situations[118] have solved the observed problems?

The resistance of Sweden — the strongest opponent in this respect — was to a considerable extent connected to the possible application of foreign law to divorce. In extra-European cases it might happen that the applicable law is the law of a state where, for instance, religion (such as the Islam) plays a central role, which might

---

[114] Ibid., p. 9.

[115] See *supra* Sect. 5.4.1.1.

[116] Cf., *supra* Sect. 6.4. Sweden repeatedly expressed the fear that its courts would be obliged to apply 'Iranian divorce law'. See e.g. Küchler 2006.

[117] P. Beaumont in response to Q5 in the Minutes of Evidence taken before the Select Committee on the European Union (Sub-Committee E), 18 October 2006; appendix to the House of Lords Rome III Report.

[118] Provided that this restriction can be made; as seen in Sect. 5.4.1.1 above, the differentiation between intra- and extra-European cases is intricate.

disrespect the principle of equality of the spouses. The restriction of the scope of application to intra-European cases could thus provide for a solution to this issue. However, it does not remove Sweden's other principle objection to the Brussels II*ter*-Proposal, which is related to the fact that according to Swedish law the right to divorce is a fundamental right, which should not way be obstructed at all. The application of a less liberal divorce law of another Member State, such as Irish law, could then still encounter difficulties in Sweden.

Therefore, the limitation of the scope of application of the Brussels II*ter*-Proposal to intra-European cases will not provide for a solution to Sweden's opposition.

Moreover, the jurisdictional rules of the Brussels II*bis*-Regulation would oppose such a limitation of the scope of application of the common choice of law rules on divorce to intra-European cases. These jurisdictional rules do not only apply to Union citizens, but also to third country nationals, as the competence of the courts of the Member States is pursuant to Article 3(1)(a) of the Brussels II*bis*-Regulation primarily based on the habitual residence of the spouses.[119] A limitation of the scope of application of the choice of law to intra-European cases could then very well lead to the situation in which the common jurisdictional rules determine that the court of a Member State is competent, but in which the common choice of law rules do subsequently not apply.

6.5.3 *Enhancing the Role of the* Lex Fori

6.5.3.1 The *Lex Fori in Foro Proprio*-Approach

According to De Boer the future European choice of law on divorce should meet the following three conditions: it needs to be simple, to be in line with the objectives of choice of law harmonisation and to allow the Member States to preserve their respective own ideological views on divorce.[120] Only one choice of law rule meets all these requirements: a choice of law rule referring solely to the *lex fori*. De Boer thus proposes for matters of international divorce — in the absence of a *professio iuris* — the introduction of *Gleichlauf*, i.e. the situation in which the competent court applies its own national substantive rules on divorce.[121]

This approach, also referred to as the *lex fori in foro proprio*-approach, implies that a particular court, designated by specific rules, applies its national substantive

[119] See Mansel 2003, pp. 144–145; Ancel 2007, p. 7.

[120] De Boer 2008, p. 339 ff.

[121] This idea is equally supported by the German Senate and the British International Committee of Resolution. See respectively Bundesrat 3 November 2006, Ratsdok. 11818/06, Drucksache 531/06 (Beschluss), para 3 and the Reply of Resolution to the Green Paper on Divorce, available at: http://ec.euro-pa.eu/justice_home/news/consulting_public/divorce_matters/contributions/contribution_icr_en.pdf.

law to the case.[122] The approach thus involves the ascertainment of the appropriate forum, the *forum legis*, i.e. 'the forum which, owing to its contacts with the parties or the case, can properly apply its own law'.[123] For traditional continental Europe this approach would imply a shift in private international law thinking towards a jurisdictional approach: the search for the *forum legis* will become the primary objective of private international law instead of the search for the applicable law.

According to De Boer there are two convincing arguments that argue in favour of adopting the *lex fori in foro proprio*-approach on the European Union level.[124] Firstly, no Member State will have any objection to applying its own substantive divorce law. Secondly, one of the main objectives of the European unification of the choice of law on divorce is, according to the Commission, to strengthen legal certainty and predictability.[125] In international divorce cases, spouses should know in advance which law will apply to their divorce; such certainty and predictability can be achieved by the *lex fori in foro proprio*-approach.[126] No requesting party or respondent could be unduly surprised if a national court applies its own substantive law. A regulation that requires all Member States to apply the *lex fori* in divorce cases, unless the parties themselves have chosen the applicable law, will put an end to the discordance between the choice of law rules of the Member States.

The *lex fori in foro proprio*-approach implies a shift of attention from choice of law criteria, determining whether forum law or foreign law applies, to jurisdictional standards, determining whether or not the forum may assume jurisdiction. Introducing this approach for matrimonial matters on the European level would entail two important turnovers in the current jurisdictional approach of the Brussels II*bis*-Regulation.

In the first place, the *lex fori in foro proprio*-approach necessitates an amendment of the current rules on jurisdiction of the Brussels II*bis*-Regulation, as coordination between the choice of law and jurisdiction is necessary. Considering the existing alternative grounds of jurisdiction of Article 3 of the Brussels II*bis*-Regulation, it must be recognised that the *lex fori in foro proprio*-approach will render it impossible for any spouse involved in an international marriage, and particularly for the spouse that does not initiate the divorce proceedings, to really

---

[122] This approach is originally advocated by Ehrenzweig. See *inter alia* Ehrenzweig 1960; Ehrenzweig 1965; and Ehrenzweig 1967.

[123] Ibid.

[124] De Boer 2008, p. 339.

[125] See Explanatory Memorandum to the Brussels II*ter*-Proposal, pp. 3–4; see also *supra* Sect. 5.3.

[126] De Boer is in general very sceptic concerning the strengthening of legal certainty and predictability; see De Boer 2008, p. 321 ff, on 'the myth of certainty and predictability'. See *supra* Sect. 5.8, in which is argued that legal certainty and predictability with regard to divorce are not only dependent on the law which is applicable to divorce.

predict which law will be applied to the divorce.[127] The *lex fori in foro proprio*-approach would thus involve either a reduction of the current grounds of jurisdiction of Article 3 of the Brussels II*bis*-Regulation or an allocation of an order of precedence of these jurisdiction grounds.[128] The allocation of a hierarchy is to be preferred to the reduction of the grounds of jurisdiction, as it would contribute to the ascertainment of the most appropriate court to hear the case, i.e. the *forum legis*. This would be the court of that Member State with which the spouses have the closest connection. The competent court would then apply its own substantive law on the basis of the principle of the closest connection. This approach would ideally be accompanied by a provision on a *forum non-conveniens*, i.e. a court has the discretionay power to refuse to hear a case that has been brought before it, if there is a more appropriate forum available to the parties. Such a provision will ensure that the *lex fori in foro proprio*-approach will be fully pursued.

In the second place, as the *lex fori in foro proprio*-approach implies a shift in private international law thinking, it is highly questionable if the current jurisdictional standards of the Brussels II*bis*-Regulation are suitable to serve the specific choice of law objectives.[129] The jurisdictional grounds of the Brussels II*bis*-Regulation are based on 'the principle of a genuine connection between the person and the Member State'.[130] However, it is not clear whether this genuine connection needs to be proven *in concreto*. The Borrás Report seems to assume that nationality and habitual residence express *eo ipso* a substantial connection.[131] This assumption is equally endorsed to by a recent judgment of the European Court of Justice, holding that for the purposes of determining jurisdiction under Article 3(1)(b) in case of spouses who hold more than one nationality, not only the more effective nationality is to be taken into account.[132] Consequently, pursuant to Article 3 of the Brussels II*bis*-Regulation jurisdiction may already be assumed on the basis of a very tenuous connection to the forum. But such a tenuous connection to a certain country contradicts the objectives of the *lex fori in foro proprio*-approach: it does not ensure that the applicable law complies with the principle of the closest connection.

---

[127] In this respect Fiorini 2008, p. 189 pointed out that this approach does not bring any changes with respect to legal certainty and predictability if the couple or family is particularly mobile. However, of all people this category of persons should be aware of the issues surrounding questions of international family law and one can, therefore, wonder whether this category of persons needs special protection.

[128] See equally German Bundesrat 3 November 2006, Ratsdok. 11818/06, Drucksache 531/06 (Beschluss), para 3.

[129] See equally Gaertner 2008, pp. 222–223; Pocar 2007, p. 250. See already Eyl 1965 arguing that the rationale behind jurisdictional rules is different from the choice of law influencing factors.

[130] See the Borrás Report, para 30.

[131] Cf., De Boer 1999, p. 246; Hau 2000, p. 1337; Schack 2001, p. 624. .

[132] ECJ Case C-168/08 *Laszlo Hadadi* (*Hadady*) [2009] ECR I-06871. See equally the Opinion of Advocate General Kokott in this case.

An important disadvantage of the introduction of the *lex fori in foro proprio*-approach in the Union context is that it contravenes the current objectives of the Brussels II*bis*-Regulation. It currently provides for several grounds of jurisdiction that are objective, alternative and exclusive, *inter alia* implying that none of the grounds should take precedence over the others.[133] The introduction of a hierarchy of jurisdiction as part of the *lex fori in foro proprio*-approach would, consequently, run counter to the rationale of the jurisdictional rules of the Brussels II*bis*-Regulation. The grounds for jurisdiction would then no longer be alternative. Therefore, the introduction of the *lex fori in foro proprio*-approach would imply a rigorous break with the current objectives of the Brussels II*bis*-Regulation. An entirely new system would have to be established so as to ensure that solely the most closely connected forum has jurisdiction to hear the international divorce case so as to justify that the competent court applies its own law.

Moreover, equally a reduction of the present alternative jurisdictional grounds is not a suitable solution. It would not alleviate the problems resulting from the absence of common choice of law rules on divorce without severely limiting access to court.[134] A reduction of the jurisdictional grounds would, furthermore, not remove the risk of forum shopping and of a rush to court.[135] The reduction of the jurisdictional grounds thus contradicts the objectives of the Brussels II*ter*-Proposal.

In national legal systems the exclusive application of the *lex fori* has the disadvantage that it could easily lead to limping relationships, i.e. couples that are considered as being divorced in one state and as still being married in another.[136] However, in the European context this disadvantage is less present considering the principle of mutual recognition of Member States' decisions on divorce (Article 21 et seq Brussels II*bis*-Regulation).

The introduction of the *lex fori in foro proprio*-approach on the subject of divorce would thus demand a total turnover of the current theory, structure and arrangement of European private international law.[137] A shift should be made towards a more jurisdictional approach of private international law than has been employed so far. It is highly questionable whether such a turnover is feasible, considering that it would equally entail a reassessment of the jurisdictional

[133] See the Borrás Report, paras 28 and 29. The ECJ has confirmed the exclusive character of the jurisdictional grounds of Article 3 of the Brussels II*bis*-Regulation in case C-68/07 *Sundelind Lopez* v. *Lopez Lizazo* [2007] ECR I-10403, para 28.

[134] By contrast, the Brussels II*ter*-Proposal has explicitly embraced 'ensuring access to court' as one of the objectives it seeks to attain. See Explanatory Memorandum to the Brussels II*ter*-Proposal, pp. 3–4. See also *supra* Sect. 5.3.

[135] This brings Kreuzer 2006, p. 80 to the conclusion that a unification of the choice of law rules can prevent forum shopping and a race to the court in a better and more practical way than attempts to do so through jurisdictional methods.

[136] Cf., Eyl 1965, p. 11.

[137] Supposing that there is a theory underlying the European private international law at all. See on this issue further *infra* Chap. 8

grounds of the Brussels II*bis*-Regulation. Finally, the introduction of the *lex fori in foro proprio*-approach would also imply a clean break with the current general characteristics of European private international law.[138]

6.5.3.2 The 'French Proposal' After All?

As seen above, the Dutch Parliament has in COREPER tried to bring up anew the French proposal on a European choice of law on divorce.[139] This proposal enhances the application of the *lex fori* in Article 20b:

1. In the absence of a choice pursuant to Article 20a, where both parties enter an appearance and neither requests application of another law, divorce and legal separation shall be subject to the *lex fori*.
2. In other cases, divorce and legal separation shall be subject to:w
   a. the law of the spouses' common habitual residence or, failing that,
   b. the law of their common nationality or, failing that,
   c. the law of the spouses' last common habitual residence, insofar as one of them still resides there or, failing that,
   d. the *lex fori*

   The application of a law other than the lex fori [defined according to the criteria laid down in paragraph 2] must be requested before any claim or defence on the merits
3. Where the law applicable to paragraphs 1 and 2 does not provide for divorce, the lex fori shall apply to the application for divorce.[140]

As discussed in Section 5.5.3.3, the French proposal would imply the introduction of a facultative choice of law in the European Union.[141] Pursuant to the facultative choice of law the court solely applies the choice of law at the request of either party.

Although this approach certainly offers advantages in terms of quality and rapidity of judicial decisions, it has four important shortcomings.[142]

---

[138] See for these characteristics *infra* Sect. 8.4.3.

[139] See *supra* Sect. 6.3.3. This proposal of the Dutch Parliament is striking, considering the negative stand of the Dutch Standing Committee on the doctrine of facultative choice of law. See Staatscommissie 2002, para 27. See in general on the doctrine of the facultative choice of law De Boer 1996.

[140] Council Document No. 11295/07 JUSTCIV 183 of 28 June 2007, p. 10, footnote 31. This provision came up for the first time in Council Document No. 6258/07, to know from Council Document No. 7144/07 JUSTCIV 47 of 9 March 2007, p. 9, footnote 2.

[141] See in general on the question whether or not to introduce the doctrine of the facultative choice of law in European context: Van den Eeckhout 2008b, pp. 258–262.

[142] See for an enumeration of the objections against a facultative choice of law: Staatscommissie 2002, para 27.

The facultative choice of law firstly affects the basic premise of choice of law, i.e. both forum law and foreign law are equally eligible for application. Secondly, this approach may have a negative effect on the balance in the procedural position of the parties resulting from their unequal financial possibilities. For the parties do not always have the same (financial) means to examine whether raising the issue of the choice of law might lead to the application of a foreign law that is more advantageous to his or her cause than the law of the forum. Thirdly, the doctrine of facultative choice of law would equally harm the principle of the closest connection, on which the common choice of law rules should be based.[143] Finally, the doctrine of facultative choice of law fails to give the parties certainty as to the applicable law before moving to another country. Such certainty can be gained by reference to the choice of law.[144]

Compared to the *lex fori in foro proprio*-approach, the doctrine of the facultative choice of law does grant the spouses more flexibility, as either by means of a valid *professio iuris* or at the mere request of either spouse the application of the *lex fori* can be set aside. However, all the other shortcomings mentioned with regard to the *lex fori in foro proprio*-approach equally apply to the French proposal. Mainly the problems of a rush to court and forum shopping will not be solved, unless the jurisdictional grounds of Article 3 of the Brussels II*bis*-Regulation will either be strongly reduced or be ordered in priority.

6.5.3.3 Other Means to Enhance the Role of the *Lex Fori*

In one of its drafts, the Council has included an 'escape clause' favouring the application of the *lex fori*.[145] This escape clause could solely apply in case Article 20b determines that the divorce is governed by the law of the last habitual residence of the spouses insofar as one of them still resides there. The clause substitutes the law of the last common habitual residence of the spouses for the *lex fori*, on three conditions:

> By derogation to paragraph 1(b), the law of the forum shall apply where:
> (a) one of the spouses so requests; and
> (b) during their marriage, the spouses had their last habitual residence in the State referred to in paragraph 1(b) for less than [three] years; and
> (c) the requesting spouse has a substantial connection with the Member State of the court seised by virtue of the fact that he or she

[143] Cf., *supra* Sect. 6.4.

[144] Cf., Ten Wolde 2009, pp. 55–56.

[145] Council Document No. 11295/07 JUSTCIV 183 of 28 June 2007, p. 9. In the last Council draft of 23 May 2008 this escape clause had been removed.

(i) has been habitually resident in that Member State for at least [ten] years, provided that that period did not end more than [three] years before the court is seised; or
(ii) is a national of that Member State.

This exception to Article 20b(1)(b) Brussels II*ter*-Proposal attempts to reconcile a policy-oriented approach, i.e. allowing the application of the 'divorce-friendly' *lex fori*, with the principle of the closest connection. But such a compromise should be rejected from a methodological perspective.[146] What the escape clause intends to achieve is a quick and easy divorce pursuant to forum law and not an adjustment of the principle of the closest connection.

6.5.4 Less Stringent Interpretation of the Principle of the Closest Connection

A next possible solution to the indicated problems could be to resort to a less stringent interpretation of the principle of the closest connection. In order to achieve its objective to provide for a clear and comprehensive legal framework, the Brussels II*ter*-Proposal gives a detailed interpretation of the principle of the closest connection. Article 20b contains a cascade rule providing for connecting factors that are assumed to reflect a close connection.

An alternative would be to draw up a choice of law rule on divorce that resembles Articles 3 and 4 of the former Rome Convention on contractual obligations. With regard to the law applicable to contractual obligations, the freedom of choice was the cornerstone of the Rome Convention. In the absence of the parties' choice as to the applicable law the legal relationship was governed by the law which is most closely connected to the contract.[147] Article 4(2) of the Rome Convention subsequently gave a presumption of the most closely connected law.

With regard to unified choice of law on divorce a similar approach could be operated. Most of the Member States could agree on allowing the spouses a limited degree of party autonomy. Therefore, it seems feasible to retain the *professio iuris*. However, most resistance existed concerning the applicable law in the absence of a choice by the parties. The principle of the closest connection is the most suitable basis for the common choice of law.[148] The abovementioned approach entails that for cases in which the spouses have not made a *professio iuris*, a compromise could be made by referring to the law with which the spouses in question are most

[146] Cf., De Boer 2008, p. 329.

[147] Article 3 of the Rome Convention stipulates that a contract shall in principle be governed by the law chosen by the parties. Article 4(1) of the latter Convention determines that, in the absence of a *professio iuris*, a contract shall be governed by the law of the country with which it is most closely connected. Article 4(2) stipulates that a contract is presumed to be most closely connected to the place where the party performing the service characterising the contract has his habitual residence.

[148] See *supra* Sect. 6.4.

closely connected. Subsequently, the provision on the applicable law can give a presumption of the closest connection: the law of the state where the spouses have their common habitual residence at the time the court is seised, or failing that the law of the State where the spouses had their last common habitual residence provided that that period did not end more than one year before the court was seised and insofar as one of them still resides there. Such presumption of the closest connection should be helpful in order to allocate the most closely connected law. However, the presumption is refutable: it can be discarded should a certain case be more closely connection to another country.

This approach certainly has disadvantages, most importantly its subjectivity and unpredictability.[149] When it is left to the court to establish the closest connection on the basis of the actual circumstances, the interpretation will most certainly be coloured by national preferences. It is very tempting to give much weight to circumstances that point to the jurisdiction whose law one prefers and to discount those that point elsewhere in order to circumvent the application of a more liberal or a more restrictive law. When such a choice of law rule is applied, the choice of law process is wide open to manipulation. The ultimate effect is that parties are not able to predict which law will apply to their divorce and this will not have a favourable effect on legal certainty.[150]

For exactly these reasons, the conversion of the Rome Convention into the Rome I-Regulation was accompanied by the amendment of the provision on the law applicable to contractual obligations in the absence of a *professio iuris*.[151] In the Rome I-Regulation the most closely connected law referred to in Article 4 is specified for certain types of contracts.[152] The Explanatory Memorandum to the Rome I-Regulation elucidates this specification:

> [T]he proposed changes seek to enhance certainty as to the law by converting mere presumptions into fixed rules and abolishing the exception clause. Since the cornerstone of the instrument is freedom of choice, the rules applicable in the absence of a choice should be as precise and foreseeable as possible so that the parties can decide whether or not to exercise their choice.[153]

---

[149] See Hatfield 2005, p. 4. See equally De Boer 1996, pp. 278–279.

[150] By contrast, one of the objectives of the Brussels II*ter*-Proposal is to strengthen legal certainty and predictability. See *supra* Sect. 5.3.

[151] Practice has also shown that Article 4 of the Rome Convention affords national courts plenty of opportunity to continue to apply the choice of law rule on contract they used to apply before the Convention entered into force, whether that rule is based on the principle of the characteristic performance, as in the Netherlands, or on the proper law of the contract approach, as in the United Kingdom, or on the presumptive will of the parties, as in Germany. Cf., De Ly 1996.

[152] Article 4(1) specifies the applicable law based on the principle of the closest connection for different categories of contracts (e.g. contract of sale, contract of carriage, contract relating to intellectual property, etc.). For contracts that are not specified by Article 4(1) a special choice of law rule is provided for in Article 4(2).

[153] See Explanatory Memorandum to the Rome I-Regulation, COM(2005) 650 final, p. 5.

Article 4(3) of the Rome I-Regulation does foresee that in the event that a country other than that indicated in the previous paragraphs is manifestly more closely connected to the contract, the law of that other country will apply.

Would a choice of law rule similar to Article 4 of the Rome I-Regulation be helpful to overcome the current deadlock in the establishment of a unified system of choice of law on divorce? Although the addition of a clause similar Article 4(3) of the Rome I-Regulation to the Brussels II*ter*-Proposal is to be welcomed from the point of view of the principle of the closest connection,[154] this approach is not likely to result in a choice of law rule that differs from Article 20b of the Brussels II*ter*-Proposal. Since the Member States could not accept this choice of law rule, the approach concerned will not help to overcome the existing deadlock.

Consequently, with regard to a unified choice of law rule on divorce a provision referring to the most closely connected law, specified by a presumption of this law, would not be a suitable alternative to the failed Brussels II*ter*-Proposal, because it does not really involve a change of the choice of law provision. Replacing the choice of law provisions with a provision that refers solely to the most closely connected law would not be a suitable alternative either, as it involves too much uncertainty.

6.5.5 Synthesis

From the foregoing it appears that the Slovenian Presidency of the Council has rightly concluded that all possibilities for a compromise on a unified choice of law system have been exhausted after all.[155] The present divergences of opinion that exist between the Member States with regard to a unified choice of law on divorce are fundamental and cannot be overcome easily.

All the possible alternatives that have been discussed above are either unfeasible or have major (practical) drawbacks.

In the field of the choice of law on divorce the enhanced cooperation is the 'last resort'-option, which the mechanism is intended to be. Yet since the Regulation on enhanced cooperation essentially reproduces the choice of law as introduced by the failed Brussels II*ter*-Proposal, the prospect of all Member States participating in the cooperation is near to utopian.

6.6 Conclusion

This chapter contains an analysis of the failure to reach consensus on unified choice of law rules on divorce (the Brussels II*ter*-Proposal). Three distinct problems that underlie the failure of the establishment of common choice of law rules

---

[154] Cf., *supra* Sect. 5.5.3.4.

[155] See Press Release of the 2887th Meeting of the Justice and Home Affairs Council of 24 and 25 July 2008, p. 23.

on divorce have been distinguished. In the first place, the position of Malta — the only Member State that does not provide for divorce in its substantive legislation — posed problems. Moreover, doubts existed concerning the EU competence in the field at hand: mainly the fulfilment of the internal market requirement on the one hand and the fulfilment of the principles of subsidiarity and proportionality on the other posed problems. During the negotiations in the Council both these problems seem to have been solved. The last problem observed is the most problematic, as it touches upon the methodological approach of the common choice of law rules. The large differences in substantive law on divorce of the Member States seem to require the adoption of neutral choice of law rules. However, not all Member States agree with such an approach, as they wish to continue to apply the *lex fori*.

The fundamental discord between the Member States concerning the Brussels II*ter*-Proposal has led to the search for alternatives. The alternatives that have been discussed above, *inter alia* enhancing the role of the *lex fori* and interpreting the principle of the closest connection in a less stringent way, do not lead to a proper or feasible solution. Therefore, an alternative to the establishment of a common choice of law does not currently seem to be present. Apparently, the European Union as a whole is not yet ready for a common choice of law on divorce. Consequently, the procedure on enhanced cooperation is the 'last resort' for establishing some form of cooperation between the Member States in the field of the choice of law on divorce. But the establishment of enhanced cooperation in the field of divorce does create a possibly impeding precedent for all future EU projects on international family law, such as matrimonial property and succession.

References

Regulations, Conventions, Reports and other Documentary Sources

Borrás Report. Explanatory Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, [1998] OJ C221/27

Brussels II-Convention. Convention on jurisdiction and recognition and enforcement in matrimonial matters of 28 May 1998, [1998] OJ C221/1

Brussels II-Regulation. Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, [2000] OJ L160/19

Brussels II*bis*-Regulation. Council Regulation (EC) No. 2201/2003 of 27 November 2003 on Jurisdiction and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility, [2003] OJ L338/1

Brussels II*ter*-Proposal. Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final

COSAC Report. Report of the subsidiarity and proportionality check on the Brussels II*ter*-Proposal organised in November 2006 by COSAC, Report No. 1/2006. The COSAC-Report and the Annex thereto are available at: http://www.cosac.eu/en/info/earlywarning/doc/results/

EPEC Study on divorce. Study to inform a subsequent Impact Assessment on the Commission Proposal on jurisdiction and applicable law in divorce matters, undertaken by EPEC, April 2006 available at: http://ec.europa.eu/justice_home/news/consulting_public/divorce_matters/study.pdf

Green Paper on Divorce. Green Paper on applicable law and jurisdiction in divorce maters, COM(2005) 82 final

Green Paper on Matrimonial Property. Green Paper on conflict of laws regarding matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 final

House of Lords Rome III Report. House of Lords - European Union Committee, *Rome III - Choice of Law in Divorce*, 52nd Report of Session 2005-06 (HL Paper 272) December 2006

Impact Assessment on Divorce. Commission Staff Working Document – Annex to the proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, SEC(2006) 949

Regulation on enhanced cooperation in the field of divorce. Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L343/10

Staatscommissie (2002). Staatscommissie voor het Internationaal Privaatrecht, Rapport Algemene Bepalingen IPR, Report of 1 June 2002, available at: http://www.justitie.nl/onderwerpen/wetgeving/over_wet-geving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx

Books and Articles

Amtenbrink F, Kochenov D (2009) Towards a more flexible approach to enhanced cooperation. In: Ott A, Vos E (eds) Fifty years of European integration: foundations and perspectives. T.M.C. Asser Press, The Hague, pp 181–200

Ancel JP (2007) La libre circulation de la famille en Europe. Petites Affiches 199:4–7

Antokolskaia MV (2006) Harmonisation of family law in Europe: a historical perspective. Intersentia, Antwerpen

Antokolskaia MV, De Hondt W, Steenhoff G (1999) Een zoektocht naar Europees familierecht. Kluwer, Deventer

Boele-Woelki K (1997) The road towards a European family law. Electronic Journal of Comparative Law 1.1:1–12

Boele-Woelki K (2007) Building on convergence and coping with divergence. In: Antokolskaia MV (ed) Convergence and divergence of family law in Europe. Intersentia, Antwerpen, pp 253–268

Boele-Woelki K (2008a) Europese unificatie conflictenrecht echtscheiding van de baan. FJR 30:261

Boele-Woelki K (2008b) To be or not to be: enhanced cooperation in international divorce law within the European Union. Victoria University of Wellington Law Review 39:779–792

Boele-Woelki K et al (2004) Principles of European family law regarding divorce and maintenance between former spouses. Intersentia, Antwerpen

Bonomi A (2007) Le divorce en droit communautaire entre règles de droit international privé et objectifs de droit matériel. In: Epiney A et al (eds) Die Herausforderung von Grenzen. Festschrift für Roland Bieber. Nomos, Baden-Baden, pp 771–783

Cadet F (2004) La gestion de l'internationalité par les méthodes communautaires: vers un droit international privé unifié dans l'Union européenne? Petites Affiches 157:3–12

De Boer ThM (1996) Facultative choice of law. The procedural status of choice-of-law rules and foreign law. Recueil des Cours 257:225–427

De Boer ThM (1999) Brussel II: een eerste stap naar een communautair IPR. FJR 21:246

De Boer ThM (2001) Prospects for European conflicts law in the twenty-first century. In: Borchers PJ, Zekoll J (eds) International conflicts of laws for the third millennium, essays in honor of Friedrich K. Juenger. Transnational Publishers, Ardsley, pp 193–226

De Boer ThM (2004) Forum preferences in contemporary European conflicts law: the myth of a 'neutral choice'. In: Mansel H-P et al (eds) Festschrift für Erik Jayme. Sellier. European Law Publishers, München, pp 39–55

De Boer ThM (2008) The Second revision of the Brussels II Regulation: jurisdiction and applicable law. In: Boele-Woelki K, Sverdrup T (eds) European challenges in contemporary family law. Intersentia, Antwerpen, pp 321–341

De Ly F (1996) Het Balenpers-arrest en de eenvormige uitleg van artikel 4 (5) EVO. In: Schmidt GE, Freedberg-Schwartzburg JA (eds) Het NIPR geannoteerd, Annotaties opgedragen aan Dr. Mathilde Sumampouw. T.M.C. Asser Instituut, The Hague, pp 125–133

Ehrenzweig AA (1960) Lex fori—basic rule in the conflict of laws. Michigan Law Review 58:637–688

Ehrenzweig AA (1965) A proper law in a proper forum: a "restatement" of the "lex fori approach". Oklahoma Law Review, pp 340–352

Ehrenzweig AA (1967) Private international law. A comparative treatise on American international conflicts law, including the law of admiralty. General part, vol 1. Sijthoff, Leyden

Eyl HR (1965) Internationale echtscheiding in Nederland. Scheltema & Holkema N.V, Amsterdam

Farrugia R (2007) The impact and application of the Brussel II bis Regulation in Malta. In: Boele-Woelki K, González Beilfuss C (eds) Brussels II bis: its impact and application in the Member States. Intersentia, Antwerpen, pp 205–216

Fiorini A (2008) Rome III—choice of law in divorce: is the Europeanization of family law going too far? International Journal of Law, Policy and the Family 22:178–205

Gaertner V (2008) Die Privatscheidung im deutschen und gemeinschaftsrechtlichen Internationalen Privat- und Verfahrensrecht (diss. Heidelberg). Mohr Siebeck, Tübingen

Hatfield HN (2005) Private international law concepts in divorce. American Journal of Family Law 19(2):4

Hau W (2000) Das System der internationalen Entscheidungszuständigkeit im europäischen Eheverfahrensrecht. Zeitschrift für das gesamte Familienrecht 47:1333–1341

Israël J (2001) Europees internationaal privaatrecht. De EG, een comitas Europaea en 'vrijheid, veiligheid en rechtvaardigheid'. NIPR 19:135–149

Jänterä-Jareborg M (2008) Jurisdiction and applicable law in cross-border divorce cases in Europe. In: Basedow J et al (eds) Japanese and European Private International Law in Comparative Perspecive. Mohr Siebeck, Tübingen, pp 317–343

Kapteyn PJG, VerLoren van Themaat P (1998) Introduction to the law of the European Communities, 3rd edn. edited and further revised by L.W. Gormley. Kluwer Law International, London

Kohler C (2001) Status als Ware: Bemerkungen zur europäischen Verordnung über das internationale Verfahrensrecht für Ehesachen. In: Mansel HP (ed) Vergemeinschaftung des Europäischen Kollisionsrecht. Carl Heymanns Verlag, Köln, pp 41–53

Kohler C (2002) Auf dem Weg zu einem europäischen Justizraum für das Familien- und Erbrecht. Zeitschrift für das gesamte Familienrecht 41:709–714

Kohler C (2003) Der europäische Justizraum für Zivilsachen und das Gemeinschaftskollisionsrecht. IPRax 23:401–412

Kohler C (2008a) Zur Gestaltung des europäischen Kollisionsrecht für Ehesachen: Der steinige Weg zu einheitlichen Vorschriften über das anwendbare Recht für Scheidung und Trennung. Zeitschrift für das gesamte Familienrecht 55:1673–1681

Kohler C (2008b) Einheitliche Kollisionsnormen für Ehesachen in der Europäische Union: Vorschläge und Vorbehalte. Familie Partnerschaft und Recht, pp 193–196

Kortenberg H (1998) Closer Cooperation in the Treaty of Amsterdam. CMLR 35:833–854

Kreuzer K (2006) Zu Stand und Perspektiven des Europäischen Internationalen Privatrechts. RabelsZ 70:1–88

Küchler T (2006) Member States attack divorce law scheme. Available at: http://euobserver.com/9/22882

Mansel HP (2003) Das Staatsangehörigkeitsprinzip im deutschen und gemeinschaftsrechtlichen Internationalen Privatrecht: Schutz der kulturellen Identität oder Diskriminierung der Person? In: Jayme E (ed) Kulturelle Identität und Internationales Privatrecht. C.F. Müller Verlag, Heidelberg, pp 119–154

Mansel HP, Thorn K, Wagner R (2009) Europäisches Kollisionsrecht 2008: Fundamente der Europäischen IPR-Kodifikation. IPRax 29:1–23

McNamara R, Martin F (2006) Brussels calling: the unstoppable Europeanisation of Irish family law. Irish Journal of Family Law 9:8–21

Meeusen J (2007) What has it got to do necessarily with the European Union?: international family law and European (economic) integration. The Cambridge Yearbook of European Legal Studies 2006–2007, pp 329–355

Mostermans PMM (2006) Echtscheiding, 3rd edn. Kluwer, Deventer

Oderkerk AE (2006) Het Groenboek inzake het toepasselijke recht en de rechterlijke bevoegdheid in echtscheidingszaken. NIPR 24:119–128

Paulino Pereira FR (2007) Rome III: La compétence juridictionnelle et la loi applicable en matière matrimoniale. Revue du Marché commun et de l'Union européenne, pp 390–394

Pocar F (2007) Quelques remarques sur la modification du règlement communautaire no. 2201/2003 en ce qui concerne la competence et la loi applicable au divorce. In: Mélanges en l'honneur de Mariel Revillard. Defrénois, Paris, pp 245–252

Pontier JA (1997) Conflictenrecht: grondslagen, methoden, beginselen en belangen (diss. Amsterdam). Ars Aequi Libri, Nijmegen

Pontier JA (2007) Verantwoording van Europese IPR-wetgeving: 'Rome III'. Herziening Brussel IIbis, subsidiariteit en evenredigheid. In: Feteris ET (ed) 'Alles afwegende....' : bijdragen aan het Vijfde Symposium Juridische Argumentatie 22 juni 2007 te Rotterdam. Ars Aequi Libri, Nijmegen, pp 203–216

Prinssen JM (2008) Flexibiliteit in het Verdrag van Lissabon. In: Meeusen J et al (eds) Het Verdrag van Lissabon: de Europese impasse doorbroken (?). Intersentia, Antwerpen, pp 57–75

Romano GP (2006) La bilatéralité éclipsée par l'autorité. Développements récents en matière d'état des personnes. RCDIP 95:457–519

Rüberg S (2005) Auf dem Weg zu einem europäischen Scheidungskollisionsrecht (diss. Konstanz). Available at: http://www.ub.uni-konstanz.de/kops/volltexte/2005/1694/pdf/Rueberg.pdf

Schack H (2001) Das neue internationale Eheverfahrensrecht in Europa. RabelsZ 65:615–633

Shannon G (2007) The impact and application of the Brussel II bis Regulation in Ireland. In: Boele-Woelki K, Borrás A (eds) Brussels II bis: its impact and application in the Member States. Intersentia, Antwerpen, pp 145–166

Ten Wolde MH (2009) Inleiding Nederlands en Europees Internationaal Privaatrecht, Deel A Algemeen deel en materieel IPR Personen-, familie- en erfrecht. Hephaestus, Groningen

Van den Eeckhout V (2004) Communitarization of private international law: tendencies to "liberalize" international family law. Tijdschrift@ipr.be 51–70. Article available at https://openaccess.leidenuniv.nl/bitstream/1887/16146/2/Microsoft+Word+-+engelsveerleiprtijdschriftdefinitief.doc%5B1%5D.pdf

Van den Eeckhout V (2008a) Het Hof van Justitie als steun en toeverlaat in tijden van Europeanisatie van het ipr? NTER, pp 84–90

Van den Eeckhout V (2008b) Europeanisatie van het ipr: aanleiding tot herleving van discussies over facultatief ipr, of finale doodsteek voor facultatief ipr? NIPR 26:258–262

Vandystadt N (2009) Cross-border divorce: we want to avoid enhanced cooperation. Europolitics (3715):11