Chapter 7
The Dutch and the European Choice of Law Rules on Divorce Compared

7.1 Introduction

In the chapters two and three above, the Dutch choice of law rules on divorce and on the termination of registered partnerships have been discussed respectively. In the three chapters that followed, the European dimension of both international family law in general as the choice of law on divorce in particular were highlighted.

Whereas the field of private international law was previously a matter of the national competence of the Member States, the European Union has shown an increasing interest in the unification of matters of private international law in the past decades. Since 1999 the European legislature is competent to enact proper private international law rules. Aspects of international family law are also subject to this European unification process, including the choice of law rules on divorce. The latter choice of law rules have been introduced in the Brussels II*ter*-Proposal. As became clear in the previous chapter, the Member States have not succeeded in reaching a compromise on the issue of a common choice of law on divorce. Consequently, a unified European choice of law on divorce will probably be still quite a long time coming.

Even though the adoption of the Brussels II*ter*-Proposal has been cancelled, the comparison between the Dutch and the European system of the choice of law on divorce remains of importance to the general question of this research. This comparison will be helpful to answer the question whether from the attempt to unify the choice of law on divorce on the European level some more general directions can be deduced as regards the European methodology of international family law at large.[1] In addition, the comparison pursues two specific objectives: on the one hand, to reveal the precise obstacles of the Brussels II*ter*-Proposal from Dutch perspective to the European legislature and, on the other hand, to answer the

[1] This issue will be dealt with in Chap. 8.

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question whether the Dutch government has rightly opposed the introduction of a common choice of law on divorce.

This chapter will address the similarities and differences between the choice of law systems on divorce of the Netherlands and of the European Union. These similarities and differences will be analysed and — if possible — explained. The comparison at issue between an existing system and a system being 'in the process of formation' is — by its very nature — an imbalanced one. Obviously, the Dutch system is much more evolved than the European, which is a very logical consequence of the fact that the European system has not entered into force (yet). The Dutch choice of law rules on divorce, by contrast, already exist since 1981 and many judicial decisions have given shape to the regulation of the Choice of Law Act on Divorce.

The comparison of the two systems will commence in Section 7.2 with a number of general observations. Subsequently, the comparison will concentrate on the following aspects: the composition of the choice of law rules on divorce (Section 7.3), the applicable law by choice of the parties (Section 7.4), the formal requirements of the *professio iuris* (Section 7.5) and the applicable law in the absence of a *professio iuris* (Section 7.6). Finally, Section 7.7 will elaborate on the question whether the Netherlands has rightly opposed the Brussels II*ter*-Proposal. An important reason for the Netherlands to be set against the common choice of law rules is that it has decided to adhere to the *lex fori*-approach in the future.[2] In 1995 the Dutch Standing Committee on Private International Law has proposed to amend the choice of law rule on divorce, which has been taken up in the Dutch Proposal on Private International Law of September 2009. Pursuant to this proposal Dutch law (the *lex fori*) will apply in all divorce cases, unless (one of) the spouses has opted for the application of their common national law. Throughout this chapter the choice of law rules of the Brussels II*ter*-Proposal will be compared to both Article 1 CLAD and its proposed amended version.

In the following the European choice of law rules that have been laid down in the last Council draft on the Brussels II*ter*-Proposal will be taken as point of departure.[3]

As seen above, the Brussels II*ter*-Proposal solely designates the applicable law to divorce and to legal separation and it does not apply to the termination of registered partnerships.[4] Consequently, hereinafter a comparison will only be drawn between the Brussels II*ter*-Proposal and the Dutch choice of law rules on

[2] See *supra* Sect. 2.6 and the Reply of the Dutch Government to the Green Paper on Divorce, p. 2. This Reply is available at: http://ec.europa.eu/justice_home/news/consulting_public/divorce_mat-ters/news_contributions_divorce_matters_en.htm. See equally Oderkerk 2006, p. 124.

[3] This draft has been annexed to this study as Appendix No. 2.

[4] See *supra* Sect. 5.4.2.3.

divorce. No comparison will be made with the Dutch choice of law rules on the termination of registered partnerships.[5]

7.2 General Observations

Before comparing the current Dutch and the proposed European choice of law on divorce as regards their content, three general observations will be placed on some characteristics that strike in the comparison of these two systems. The first observation concerns the arrangement of the choice of law. Secondly, the foundation of the Dutch and the European choice of law on divorce will be compared. The third observation, finally, relates to the scope of application of the two legal systems.

7.2.1 Arrangement of the Choice of Law: General and Specific Provisions

A remarkable difference between the European and the Dutch system of the choice of law on divorce is that the Brussels II*ter*-Proposal as such is more comprehensive. Whereas the Dutch law contains solely one provision on the choice of law (Article 1 of the CLAD), the Brussels II*ter*-Proposal contains eight provisions on the issue (Articles 20a–20f of the Proposal). For many issues the Dutch Choice of Law Act on Divorce does not contain any specific provision; in Dutch law the general doctrines of private international law, such as *renvoi* and the public policy exception, have been arranged on a more general level. However, many of these general doctrines have thus far remained uncodified.[6] The Brussels II*ter*-Proposal, on the contrary, does make an explicit mention of the general doctrines of private international law. The explicit mention of these general doctrines in European context can be explained by the absence of an already existing private international law system. The European legislature only has the competence to enact measures in the field of private international law since 1999.[7] Ever since, the European

[5] In Sect. 7.2.3 one exception to this exclusion will be made in order to answer the question whether it is a lost opportunity that the Brussels II*ter*-Proposal does not apply to the termination of registered partnerships.

[6] It is to be noted that the Dutch Proposal on Private International Law contains several stipulations on the latter doctrines in its general provisions (Articles 1–17). See on these general provisions also Staatscommissie 2003.

[7] See *supra* Sect. 4.2 on the development of the European legislature's competence in the field of private international law.

Union has put this power to good use by producing a large number of instruments in the field of private international law. But the European Union is currently establishing its own private international law system in a very fragmented way by regulating several sub-fields of private international law separately.[8] Consequently, a coherent system underlying the European system of private international law is lacking.[9] As a result there is at present no European approach to the general doctrines of private international law.[10]

Recently several academics have plunged into the development of general provisions of European private international law, derived from the existing and proposed instruments in the field of private international law.[11] The creation of general provisions of private international law is to be welcomed, as it prevents the same general issues from being subject to different approaches in the separate instruments.[12]

Although the Dutch choice of law rules have been embedded in a national system, in which the latter doctrines have been arranged for on a more general level, there is very well case for the structure of the Brussels II*ter*-Proposal. In the absence of codified provisions on the general doctrines of private international law on a general level, the structure of the Brussels II*ter*-Proposal is to be preferred: at a single glance all relevant provisions are available. Nevertheless ideally it is most preferable to establish the structure as envisaged by the Dutch legislature in which all provisions — both the general and the specific ones — are assembled in one Act.[13]

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[8] According to Fiorini the reason for this 'atomization' is '*that it will be easier to achieve consensus on these issues taken in isolation than it would have been had work been undertaken on a wider area of family law*'. See Fiorini 2008b, p. 195. Separate instruments have been or will be established in the following sub-fields of private international law: contractual obligations, non-contractual obligations, divorce, maintenance obligations, wills and succession and matrimonial property.

[9] Cf., Fiorini 2008a, p. 7: '*Although the unification of private international law is very much a priority for the Community, work in this area is proceeding in a very disjointed fashion.* […] *Indeed coordination between the various dossiers, a very arduous exercise, is at best weak and superficial if not completely inexistent; the unification of private international law rules in Europe is very much proceeding* via *a piecemeal approach* […].' See on this issue further *infra* Sect. 8.4.1.

[10] See *infra* Sect. 8.4.4.2 for a discussion *de lege ferenda* of these general doctrines.

[11] See *inter alia* Leible 2007; Heinze 2008; Kreuzer 2008; Sonnenberger 2008; and Leible 2009.

[12] See Siehr 2008, p. 92. Currently there is a risk that, due to the present fragmented unification of European private international law, a coherent approach of the general doctrines of private international law may never arise. Theoretically, in each Regulation a distinct approach on these general doctrines can be adopted; e.g. *renvoi* may be excluded in one instrument, yet permitted in another.

[13] This holds true for Dutch as well as for European private international law. Cf., for such European system Boele-Woelki 2008, p. 783.

7.2.2 Foundation of the Choice of Law on Divorce

Both the current Dutch and the proposed European choice of law on divorce are based on the principle of the closest connection. The Dutch rules are furthermore based on the principle of *favor divortii*, entailing that the choice of law rules aim to favour the possibility to obtain a divorce.[14]

The situation for the Brussels II*ter*-Proposal is somewhat different. The substantive law on divorce varies so much from one Member State to another, that solely a neutral approach as regard the choice of law on divorce can be followed in European context. This neutral approach implies the establishment of choice of law rules that are blind to the result they achieve in terms of substantive law. In the previous chapter it became clear, however, that one can wonder whether the European choice of law rules are actually neutral. Although the Commission has introduced a neutral choice of law approach, the compromises that have been made in the Council have altered this neutral point of departure.[15] This friction is the very source of the failure of the establishment of a European unified system of choice of law on divorce.[16] The European choice of law on divorce should not be based on or have any tendency towards the principle of *favor divortii*, but it should instead consist of strictly neutral rules.

7.2.3 Scope of Application

In the discussion on the scope of application of both systems two specific issues arise. The first concerns the dissolution of same-sex marriages and the second the termination of registered partnerships.

With regard to the dissolution of same-sex marriages neither the Dutch nor the European choice of law on divorce provides for a satisfactory basis.

The Dutch choice of law rules on divorce pre-date the substantive law reform concerning the opening of the marriage to same-sex couples.[17] According to the Dutch Standing Committee on Private International Law Article 1 of the CLAD equally applies to the dissolution of same-sex marriages.[18] Although the Dutch

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[14] See Werkgroep IPR NVvR 1993, p. 137; Boele-Woelki 1994, pp. 173–174; Vlas 1996, p. 200; and Mostermans 2006, p. 41. See further *supra* Sect. 2.2.3.

[15] Examples of these compromises having a *favor divortii* tendency can be found in the solutions to the situations in which the applicable law does not provide for divorce. Both the jurisdictional rules and the choice of law rules of the Brussels II*ter*-Proposal contain a provision for the latter situations: the introduction of the *forum necessitatis* in international divorce cases (Article 7a) and the application of the *lex fori* as a remedy for cases in which the applicable law does not provide for divorce (Article 20b-1).

[16] See further *supra* Sect. 6.4.

[17] See *supra* Sect. 2.2.2.

[18] Staatscommissie 2001, Sect. 8, p. 15.

legislature will in all probability follow the advice of the Standing Committee, there is currently no clarity as regards the question whether Article 1 of the CLAD applies to same-sex marriages. The Dutch legislature is namely not bound by the Standing Committee's advice. Article 56 of the Dutch Proposal on Private International Law changes this situation, as it will apply to the dissolution of same-sex marriages.

Unfortunately, the Brussels II*ter*-Proposal does not provide for a clear and concise regulation with respect to the dissolution of same-sex marriages.[19] The proposal is rather halfhearted in this respect: it does not determine the law applicable to marriage.[20] Consequently, the definition of marriage and the conditions of the validity of a marriage are left to the national law of the Member States. This position leaves discretion to each individual Member State, which may apply the proposed choice of law rules to the dissolution of any type of marriage it recognises. Considering the position of many Member States as regards the institution of same-sex marriage, it is likely that the majority of the Member States will not apply the choice of law rules of the Brussels II*ter*-Proposal to the dissolution of the latter type of marriage.

The position of same-sex marriages is, therefore, not well arranged for in neither system. Obviously, this is not a desirable situation, as it leads to legal uncertainty and to legal inequality for same-sex spouses.

With regard to the issue of the termination of registered partnerships the question can be asked whether it is a lost opportunity that the termination of registered partnerships is not covered by the Brussels II*ter*-Proposal. With respect to this question a distinction must be made between its desirability and its feasibility.[21]

In Section 4.3.1 a number of objectives have been listed that would be fulfilled by the unification of the choice of law in the European context. Such unification would increase legal certainty, contribute to decisional harmony, grant better protection to the legitimate expectations of the parties, minimise the risk of limping relationships and enable the achievement of justice. These objectives would fully apply to the unification of the choice of law on the termination of registered partnerships and mainly the arguments of increasing legal certainty and preventing the risk of limping relationships are very convincing. Consequently, such unification would certainly be desirable.

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[19] See *supra* Sect. 5.4.2.2.

[20] See Press Release No. 8364/07 (Presse 77) of the 2794th Council Meeting of Justice and Home Affairs held in Luxembourg 19–20 April 2007, p. 11. See equally Article 20e-1 of the Brussels II*ter*-Proposal: 'Nothing in this Regulation shall oblige the courts of a Member State whose law […] does not recognise the marriage in question for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.'

[21] See the analysis of whether it is desirable, and if so possible, to strive for the unification or harmonisation of private international law rules in the field of non-marital registered relationships in general by Curry-Sumner 2005, spec. p. 517 ff.

However, the feasibility of a European unification of the choice of law rules on the termination of registered partnerships is quite a different matter. This question is divisible into two distinct issues: on the one hand, the question whether the issue at hand is suitable for European unification at all and, on the other, whether the Brussels II*ter*-Proposal could be extended to the termination of registered partnerships.

In the first place, the question must be asked whether a unified choice of law on the termination of registered partnerships is feasible at all. The most difficult task in this respect would be to agree on a definition of the registered partnership to be regulated or to specify its main characteristics. Not all EU Member States have currently legally regulated the issue of registered partnerships.[22] In addition, the national regulations in this field of law of the Member States that have introduced the registered partnership or a similar institution largely differ.[23] These two circumstances make it very hard to reach consensus on the issue.[24] The EU Member States can in imitation of the issue of same-sex marriages equally decide to leave the definition of a registered partnership to the discretion of each individual Member States. However, this would probably not lead to legal certainty and predictability. A European unification of the choice of law rules on the termination of registered partnerships does therefore not seem to be feasible.

Should such unification be feasible, it is in addition questionable whether the Brussels II*ter*-Proposal is the most suitable instrument for the regulation of this issue. In other words, are the proposed choice of law rules on divorce suitable to be extended to the termination of registered partnerships or does the latter category demand for a different approach?

Dutch law has regulated the termination of registered partnerships in a separate Act, which did try to conform as much as possible to the equivalent rules on divorce.[25] The conformity in Dutch law of the choice of law rules on registered partnership to those on marriage is accounted for by the resemblance of these two institutions.[26] In other countries such resemblance between marriage and registered partnership is not always present. In some countries the institution of registered partnership is considered merely to create a simple contractual relationship, while in other legal systems the institution determines personal status. Therefore, the institution of registered partnership demands for a different instrument on the Euro-pean level. As the institution of the registered partnership does not *per se* resemble the marriage, it makes no sense with regard to the choice of law rules on

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[22] As seen in note 11 of Chap. 3, currently 14 EU Member States have enacted some form of registered partnership.

[23] In this respect the termination of registered partnerships differs from the dissolution of same-sex marriages. Although the institution of same-sex marriage has not been regulated by many Member States, the national regulations of the Member States that have regulated the institution largely correspond.

[24] Cf., *supra* Sect. 3.2. See also Curry-Sumner 2005, p. 530.

[25] See *supra* Sects. 3.3.2 and 3.4.1.

[26] See *supra* Sects. 3.3.3 and 3.4.3.

the termination of registered partnerships to try to join the latter rules on divorce. Arguably different choice of law rules should be adopted with regard to the termination of registered partnerships than the ones on divorce on the European level. It might moreover be easier to establish common choice of law rules on this issue in a separate instrument, which would also provide for jurisdictional rules and rules on recognition and enforcement. Furthermore, such a separate instrument should not be limited to the issue of the termination of registered partnerships, but should equally cover other issues related to registered partnerships, such as its establishment.

Consequently, the fact that the choice of law rules of the Brussels II*ter*-Proposal do not apply to the termination of registered partnerships is not to be considered a lost opportunity. Already with the scope of application being limited to divorce and legal separation, it proved to be impossible to reach consensus between the Member States. It is thus not hard to imagine which fate that a project on the unification of the choice of law rules on the termination of registered partnerships would currently meet.

7.3 Structure and Composition of the Choice of Law Rules on Divorce

The underlying structure of the current Dutch and the European choice of law on divorce is similar: party autonomy is regarded as the prevailing principle. Only in the absence of a *professio iuris* on divorce, the applicable law to divorce is determined by a cascade rule, which is based on the principle of the closest connection.[27]

However, despite this similarity of the structure, the composition of the current Dutch and European choice of law on divorce differs. The European system contains two separate provisions regulating the *professio iuris* on divorce and the applicable law to divorce in the absence of such a choice (Articles 20a and 20b of the Brussels II*ter*-Proposal respectively). This division makes perfectly clear that the *professio iuris* is the principal rule of the Proposal. The Dutch system, on the other hand, does not possess such a clear organisation: the fact that party autonomy is the prevailing principle is more or less hidden.[28] It follows from Article 1(4) CLAD that the spouses, irrespective of their nationality or their place of habitual residence, can always opt for Dutch law as the law applicable to their divorce.

[27] Both the alternatives out of which parties can choose with regard to the law applicable to divorce as well as the cascade of connecting factors are not identical in the Dutch and the European choice of law on divorce, see further *infra* Sects. 7.4 and 7.6 respectively.

[28] Cf., Van Rooij 1981, p. 424.

In the event that the spouses possess a common nationality, they can equally choose the application of this common national law on the basis of Article 1(2), second sentence of the CLAD.

It requires little explanation that the composition of the European choice of law on divorce is preferable to the Dutch one. By means of the organisation of the choice of law, the European system provides much more clarity in two ways. In the first place, from the composition of the Brussels II*ter*-Proposal it is clear that party autonomy is its principal rule, as it clearly states that Article 20b only applies in the absence of a *professio iuris* on the basis of Article 20a. In the second place, equally the alternatives out of which the spouses can choose have been articulated more clearly, simply by listing them in one and the same section. Therefore, the European choice of law on divorce succeeds better in providing clarity and legal certainty for the spouses.

The structure of the proposed amendment of the Dutch choice of law on divorce will differ greatly from the Brussels II*ter*-Proposal. Party autonomy will no longer be the prevailing principle of the Dutch choice of law on divorce. Instead its principal rule will be the application of Dutch law. This rule will only be derogated from in case (one of) the spouses chooses the application of their common national law. The composition of this amendment is a better reflection of the structure of the choice of law on divorce though: it clarifies the principal rule and the possible exception to it.

7.4 The Spouses' Choice as to the Applicable Law

Pursuant to the Dutch choice of law on divorce and to the Brussels II*ter*-Proposal the spouses have the opportunity to choose the law applicable to their divorce. However, as the current and proposed Dutch choice of law differ in this respect, the comparison with the Brussels Ii*ter*-Proposal will be drawn separately.

7.4.1 Current Dutch Choice of Law on Divorce

It is clear from the previous paragraph that both the Dutch and the European choice of law on divorce regard party autonomy as the prevailing principle. Another similarity is that the Dutch as well as the proposed European provision on the spouses' choice as to the applicable law do not allow spouses to choose any law as the applicable law to their divorce: the *professio iuris* is limited.

Dutch law grants the spouses the following possibility to choose the applicable law to their divorce; the parties can choose between:

- Dutch law (Article 1(4) CLAD); and
- the spouses' common national law (Article 1(2), second sentence CLAD).

The Brussels II*ter*-Proposal offers some more option to the spouses. Article 20a provides for the following alternatives out of which the spouses can choose:

- the law of the State where the spouses are habitually resident;
- the law of the State where the spouses were last habitually resident insofar as one of them still resides there;
- the law of the state of the nationality of either spouse; and
- the law of the Member State where the court is seised

In Section 2.3.1 above the limitation of the possibility to choose the applicable law to divorce according to Dutch law has been questioned. In general a limitation of the legal systems out of which the spouses can choose is appropriate in view of the requirement of the existence of a connection between the spouses and the law to be applied to their divorce. However, from this perspective the limitation of the alternatives out of which the spouses can choose according to Dutch law is not very convincing. The Brussels II*ter*-Proposal succeeds better in this respect by allowing the spouses more options as regards the legal systems out of which they can choose. All the alternatives of Article 20a(1) of the Brussels II*ter*-Proposal meet the requirement of reflecting a (close) connection between the spouses and the law to be applied to their divorce. The greater freedom of choice as proposed in the Brussels II*ter*-Proposal should be welcomed with regard to increasing flexibility for the spouses and, not in the least, to legal certainty. By means of the *professio iuris* the parties can assure the application of a certain law to their divorce, leading in consequence to more legal certainty.

The preceding analysis in the Chapters 2 and 5 above has shown that the *professio iuris* of the Dutch choice of law on divorce is based on a completely different foundation — *favor divortii* — than the *professio iuris* of the European choice of law on divorce — increasing flexibility for the spouses. The alternatives out of which the spouses can choose according to Article 20a of the Brussels II*ter*-Proposal do more justice to the underlying objective than the ones according to Dutch law. An extension of the alternatives out of which the spouses can choose should also be considered in Dutch law. The principle of *favor divortii* would most certainly benefit from it: the spouses both have more opportunities to influence the law applicable to their divorce. Moreover, the spouses who both wish to get divorced and who are offered the opportunity to influence the law to be applied to their divorce are likely to choose the law most favourable to divorce in their case.

7.4.2 Proposed Dutch Choice of Law on Divorce

In contrast to Article 1 CLAD the possibility to choose the applicable law to divorce is no longer the principal rule of Article 56 of the Dutch Proposal on Private International Law, but merely the exception to it. The *professio iuris* will be limited to the law of the common nationality of the spouses. As the amendment

involves that Dutch law will apply in any cross-border divorce case, the possibility to choose Dutch law is no longer of use.

The difference with the *professio iuris* of the current choice of law on divorce is that the limitation of the *professio iuris* of its proposed amendment does not seem to be inspired by the principle of *favor divortii* — of which the principal rule is the expression — but rather by motives relating to the prevention of limping legal relationships.[29] The rationale is that the application of the spouses' common national law will increase the chance that the divorce will be recognised in their country of origin.[30]

Although the proposed amendment of Article 1 CLAD will certainly ensure that Dutch law will be applied in the vast majority of international divorce cases, the rationale behind the limitation of the *professio iuris* is not obvious. According to the Dutch Standing Committee on Private International law the extension of the alternatives out of which the spouses can choose would produce a too complicated choice of law rule.[31] Yet wouldn't the principle of *favor divortii* be better served if the parties have a less limited choice as to the applicable law? Furthermore, what difference does it make for the court to apply the common national law of the spouses or yet the law of their common habitual residence? In both cases the court would, in derogation from Dutch law, apply foreign law to divorce.

Compared to Article 20a of the Brussels II*ter*-Proposal the degree of party autonomy pursuant to the proposed Dutch rule is even further restricted.

7.5 Formal Requirements of the *Professio Iuris*

Large differences exist between the Dutch and the European rules with regard to the formal requirements of the *professio iuris*. Three aspects of the formal requirements are to be distinguished: the first one relates to the form of the choice (Section 7.5.1), the second to the impossibility to impliedly choose the applicable law (Section 7.5.2) and the third to the time of the choice (Section 7.5.3).

7.5.1 Form of the Professio Iuris

With regard to the form of the *professio iuris* there are two major differences between the European and the current Dutch rules.

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[29] This thought currently also underlies Article 1(2), second sentence CLAD, by virtue of which the spouses can choose the application of their common national law.

[30] It is to be noted that this same argument would equally apply to the place of the common habitual residence of the spouses.

[31] See Staatscommissie 1995, p. 5.

In the first place, Dutch law does not require a specific agreement between the spouses on the *professio iuris*. By contrast, Article 20a(2) of the Brussels II*ter*-Proposal does require a specific agreement: the *professio iuris* must be determined by a written agreement that has been dated and signed by both parties.

The second difference as regards the form of the *professio iuris* concerns the explicit consent of both spouses.[32] According to Article 20a(2) of the Brussels II*ter*-Proposal the agreement on the *professio iuris* on divorce can only be made jointly. A unilateral choice by one of the spouses cannot meet the requirements posed by Article 20a(2). The explicit consent of both spouses on the designation of a certain legal system as the law applicable to divorce is thus required. Conversely, in addition to a joint choice of the spouses, Articles 1(2) and 1(4) of the CLAD do allow a unilateral, but uncontested, choice of one spouse. Consequently, Dutch law does not require a common choice of the spouses and, hence, no explicit consent between them either. Although Dutch law does actually require the consent of the spouses with regard to the law applicable to divorce, the court will rather easily assume such consent.

The proposed amendment of the Dutch choice of law rule on divorce does not involve an alteration of the requirements as to the form of the *professio iuris*. It maintains the requirement of a choice 'that has been made jointly by the parties or such a choice remains uncontested by one of the parties'. The proposal did add an extra paragraph determining that the choice as to the applicable law should be made expressly or be sufficiently clear from the wording of the initiatory petition or the written defence.[33]

The different requirements as regards the form of the *professio iuris* make clear that, whereas under Dutch law the parties can benefit from the opportunity to choose the applicable law in any divorce case, be it a case on a petition of one spouse or on their joint application, this is not the case under European law. Pursuant to Article 20a of the Brussels II*ter*-Proposal the parties who wish to initiate divorce proceedings on the basis of mutual consent will benefit the most from the possibility to choose the applicable law, save for those cases in which the agreement on the *professio iuris* has been concluded upon before the marriage or during happier times of the marriage. The requirement of a joint choice as to the applicable law forces the parties to reach an agreement, which — on the average — will not be an easy task in the absence of mutual consent.

The formal requirements as regards the form of the *professio iuris* as posed by the Brussels II*ter*-Proposal are as a result considerably stricter than the Dutch ones.

The absence of strict formal requirements as regards the *professio iuris* in Dutch law can be explained by the principle of *favor divortii*. Given the thought of this principle — i.e. the possibility to dissolve the marriage is favoured — it is not surprising that Dutch law does not require any strict formalities to be complied

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[32] See equally Ibili 2006, p. 744.

[33] This requirement is mainly meant to prevent the assumption of an implied *professio iuris*. See further *infra* Sect. 7.5.2.

with regarding the form of the *professio iuris*. For the absence of strict formal requirements encourages the choice for the application of the Dutch — 'divorce-friendly' — law.

By contrast, the introduction of the *professio iuris* on divorce in the Brussels II*ter*-Proposal is based on other principles.[34] In this respect the two most important objectives of the Brussels II*ter*-Proposal are, on the one hand, increasing flexibility and party autonomy and, on the other, strengthening legal certainty and predictability. A balance between these two objectives must be found with respect to the regulation of the *professio iuris* and the stricter approach regarding the form of the agreement is a logical consequence of this balance. The objective of increasing flexibility would entail a (considerable) number of legal systems out of which the spouses can choose. However, the *professio iuris* pursuant to Article 20a of the Brussels II*ter*-Proposal is not without limitation: it is restricted by virtue of both the objective of strengthening legal certainty and predictability and the principle of the closest connection in order to ensure the application of a law with which the spouses have a close connection. The objective of strengthening legal certainty and predictability furthermore requires a strict framework within which the agreement should be concluded. A carefully contemplated decision on the *professio iuris* on divorce is — given its possible implications — desirable and it is certainly conducive to legal certainty. As the formal requirements of Article 20a(2) of the Brussels II*ter*-Proposal compel to a contemplated choice on the law applicable to divorce both the objective of increasing flexibility and the objective of strengthening legal certainty are complied with.

7.5.2 Implied Choice of the Spouses as to the Applicable Law

Both Dutch and European law do not allow an implied choice as to the law applicable to divorce. Yet the reason for not allowing such a choice differs between the current Dutch law and the Brussels II*ter*-Proposal. There is yet no difference between the Brussels II*ter*-Proposal and the proposed Dutch provision in this respect.

The exclusion of an implied choice is a good cause, since the application of a certain legal system to the divorce can have far-reaching consequences. Parties must have been aware of all these (possible) consequences. Even though an explicit choice as to the applicable law does not fully guarantee that the parties are actually aware of the consequences of their choice, the chance that they will be unduly surprised is more remote than in case of an implied choice.

Moreover, as already argued above, a *professio iuris* presumes that the parties have been aware, firstly, of the possibility of the option to choose the law applicable to their divorce and, secondly, of the consequences that such a choice

[34] See *supra* Sect. 5.3 on the objectives underlying the Brussels II*ter*-Proposal.

might involve.[35] Therefore, the competent court should not assume a *professio iuris* in cases in which parties did not intend it: the fact that parties did not make any explicit mention as regards the applicable law cannot be seised in order to assume an implied choice for the application of a certain legal system. In addition, it is not in the least certain that the parties have been aware of the international character of their divorce.[36]

Consequently, the assumption of an implied choice as to the applicable law to divorce is not desirable.

7.5.2.1 Comparison to the Current Dutch Law

Whereas pursuant to the current Dutch law an implied choice might be within the bounds of the possible in the absence of strict formal requirements on the *professio iuris*, the formal requirements of Article 20a(2) of the Brussels II*ter*-Proposal demanding an written agreement between the spouses on the law to be applied to their (possible) divorce already before the divorce proceedings have commenced preclude the assumption of an implied choice.

7.5.2.2 Comparison to the Proposed Dutch law

The third paragraph of Article 56 of the Dutch Proposal on Private International Law contains the following provision:

> A choice of law as meant in the preceding paragraph [*i.e.* the *professio iuris* for the common national law of the spouses; NAB] should be made expressly or be sufficiently clear from the terms used in the petition or the written defence.

This provision clearly relates to the issue of the implied choice as to the applicable law. In 1993 the Working Group on Private International Law of the Netherlands Association for the Administration of Justice has determined that a *professio iuris* can only be made by means of an explicit reference or be otherwise sufficiently clear from the wording of the initiatory petition.[37] Article 56 of the Dutch Proposal on Private International Law reflects this position.

As the formal requirements of the *professio iuris* are tightened in Article 56 of the Dutch Proposal on Private International Law, the regulation of the issue of the implied choice is actually very similar to the proposed European rule: neither one allows the assumption of an implied choice as to the applicable law.

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[35] See *supra* Sects. 2.3.4.2 and 5.5.2.2 respectively.

[36] Cf., with regard to the Dutch choice of law on divorce Vonken (Groene Serie Personen- en familierecht) Article 1 CLAD, n. 3.4.

[37] Werkgroep IPR NVvR 1993, pp. 145 and 147–148.

7.5.3 Time of Choice as to the Applicable Law

Another important formal requirement of the *professio iuris* concerns the time factor, i.e. the question as of when and until when the *professio iuris* can be validly made.

Although the Dutch Choice of Law Act on Divorce currently does not contain any specific provision with regard to the time of choice, it is clear from the parliamentary history that a *professio iuris* on divorce can only be made in the course of the divorce proceedings. According to Dutch law a *professio iuris* on the law applicable to divorce in a marriage contract has no legal consequences. However, pursuant to Dutch law a *professio iuris* can still be agreed upon before the court during the proceedings, provided that there is case of defended divorce proceedings. In case of default of appearance the requesting party must make the *professio iuris* in the initiatory petition on divorce in order to make sure that the respondent is informed.[38]

The proposed amendment of Article 1 CLAD does expressly provide for a time factor: the choice as to the applicable law has to be made 'during the proceedings'. The introduction of the time factor is thus an expression of the already existing practice in this regard.

By contrast, the situation as regards the time factor is virtually completely opposite under the Brussels II*ter*-Proposal. Pursuant to Article 20a(2) Brussels II*ter*-Proposal the agreement on the *professio iuris* can be concluded at the latest at the time the court is seised, thus at any time before the divorce proceedings have started. This requirement entails that a marriage contract is a document *par excellence* in which the choice as to the applicable law to divorce can be made. Article 20a(4) contains a specific provision with regard to extending the time-limit to the course of the divorce proceedings. Whether the parties can take advantage of this extended time-limit depends on the law of the forum. Consequently, the spouses may not be in a position to designate the applicable law before the court in the course of the divorce proceedings in each Member State.[39]

The position that both these legal systems take with regard to the time factor of the *professio iuris* thus differs greatly. In Section 5.5.2.3 the possibility introduced by Article 20a(2) of the Brussels II*ter*-Proposal to determine the law applicable to a possible divorce in a marriage contract has already been questioned.[40]

The Dutch position with regard to the time factor of the *professio iuris* on divorce is to be preferred, as it ensures that the choice is made by (one of) the spouses at the time the divorce actually occurs. If one carries the Dutch position to European law, it would mean that the application of a legal system to the divorce

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[38] Cf., Memorandum of Reply (MvA), *Kamerstukken II* 1980–1981, 16 004, No. 7, p. 3. See equally Wendels 1983, pp. 70–71; Mostermans 2006, p. 43; Vonken (Groene Serie Personen- en familierecht) Article 1 CLAD, n. 3.3.

[39] See further *supra* Sect. 5.5.2.3.

[40] Cf., De Boer 2008, pp. 330–331.

with which the spouses have a close connection at the time of the divorce is equally ensured. The consequence of the time factor as foreseen by Article 20a(2) of the Brussels II*ter*-Proposal is that it may lead to the application of a certain legal system with which the spouses had a close connection at the time of the agreement, but with which no close connection exists at the time of the divorce. For the circumstances at the time of the divorce and those at the time of the conclusion of the marriage contract can be as different as night and day.[41]

7.6 The Law Applicable to Divorce in the Absence of a *Professio Iuris*

According to Article 1 of the CLAD and to Articles 20a and 20b of the Brussels II*ter*-Proposal, the law applicable to divorce is determined by a cascade rule only in the absence of a *professio iuris*. The respective rules provide for the reference of an international divorce case to the legal system with which it is most closely connected. The current Dutch law and the Brussels II*ter*-Proposal will be compared in Section 7.6.1 below.

Article 56 of the Dutch Proposal on Private International Law provides by contrast for a completely different approach: the exclusive application of the *lex fori* (i.e. Dutch law) to any cross-border divorce case. In Section 7.6.2 this proposal will be compared to the Brussels II*ter*-Proposal.

7.6.1 Current Dutch Choice of Law on Divorce

Both the current Dutch and the proposed European choice of law rules on divorce are based on the principle of the closest connection. The Dutch rules are furthermore based on the principle of *favor divortii*.

In order to determine the law applicable to divorce in the absence of a *professio iuris*, both systems provide for a cascade rule. However, the order in the cascade of the two systems does differ. According to the current Dutch law (Article 1(1) to (3) of the CLAD), an international divorce is governed by:

1. the law of the state of the common nationality of the spouses or, in the absence thereof,

[41] See *supra* Sect. 5.5.4, where the proposed date of reference with regard to the *professio iuris* has been criticised. The existence of a connection between the spouses and the law to be applied is reviewed at the time of the conclusion of the agreement and not at the time of the divorce, which seems to contravene the principle of the closest connection, on which the Brussels II*ter*-Proposal is based.

2. the law of the state of the common habitual residence of the spouses or, in the absence thereof,
3. Dutch law.

The cascade rule of Article 20b of the Brussels II*ter*-Proposal determines that an international divorce is governed by:

1. the law of the state of the common habitual residence of the spouses or, in the absence thereof,
2. the law of the state in which the spouses were last habitually resident provided that that period did not end more than one year before the court was seised and provided that one of the spouses still lives there or, in the absence thereof,
3. the law of the state of the common nationality of the spouses or, in the absence thereof,
4. the law of the state where the court is seised (the *lex fori*).

What strikes one most is that both the Dutch and the European choice of law rule on divorce make use of the same connecting factors: habitual residence and nationality. Moreover, both systems use the *lex fori* as a last resort option.

However, whereas the Dutch choice of law rule uses the nationality of the spouses as a primary connecting factor, Article 20b of the Brussels II*ter*-Proposal awards this position to the habitual residence of the spouses. This difference of approach can be explained by two factors. In the first place, the Dutch choice of law rule on divorce was established in 1981: at that time the principle of nationality was still predominating in international family law. This prevalence explains the priority that has been given to nationality as a connecting factor in the CLAD, even though the principle of residence has obtained an important supplementary role in the Dutch choice of law on divorce.[42]

Secondly, the objectives of the European Union, in which the fundamental freedom of movement of persons is to be guaranteed, incite to a more flexible approach with regard to the choice of law.[43] In addition, habitual residence does not — as opposed to nationality — depend on national definitions, but is rather an autonomous concept.

An important difference between the Dutch and the European choice of law on divorce arises in the situation in which the choice of law rules designate a law that does not provide for divorce. According to Dutch law the consequence is that the Dutch court cannot pronounce the divorce; it is a consequence that should be accepted in view of the advantage of the simplicity of the system.[44] The Brussels II*ter*-Proposal provides in this regard for a special provision that functions as a remedy for situations in which the applicable law 'does not provide for divorce'.

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[42] See further *supra* Sect. 2.4.1.

[43] See *supra* Sect. 5.5.3.2.

[44] Explanatory Memorandum (MvT), *Kamerstukken II* 1979–1980, 16 004, No. 3–4, p. 11. See further *supra* Sect. 2.4.

In such cases, the *lex fori* will apply.[45] Proceeding from the principle of the closest connection, this provision is far from being welcomed. By means of this provision, which is clearly based on the principle of *favor divortii*, the neutral foundation of the choice of law rules on divorce of the Brussels II*ter*-Proposal is disrupted.[46] If such a provision is deemed necessary at all, a more just solution would be to proceed to the next alternative connecting factor provided for and not automatically to the *lex fori*.

Remarkably enough, the issue at hand shows a *favor divortii* tendency of the Brussels II*ter*-Proposal and not of the Dutch choice of law on divorce. Since the European provision has clearly been inserted by way of compromise, the *favor divortii* tendency is most probably not the consequence of a deliberate policy.

Another important difference between the Dutch and the European choice of law on divorce is that Dutch law awards more authority to the court to assess whether the designated law actually complies with the principle of the closest connection. In case of a single nationality, the Dutch court is to apply an authenticity test (*realiteitstoets*, Article 1(2) CLAD) in order to determine whether either of the parties manifestly lacks a 'real societal connection' with the country of his or her nationality. The Dutch court needs to apply a similar test in case of multiple nationalities, i.e. the effectivity test (*effectiviteitstoets*, Article 1(3) CLAD), in order to assess with which of the states of which the person involved possesses the nationality is most closely connected. In applying both these tests the court needs to take all the circumstances of the case into consideration.[47]

The Brussels II*ter*-Proposal does not provide for any such 'correcting' tools to assess whether the designated law reflects a close connection. In the negotiations on the Brussels II*ter*-Proposal this issue has only been dealt with marginally; solely the question of multiple nationalities has been subject of debate in the Council. However, it has been decided to leave this issue to the national laws of the Member States.[48] Otherwise the Brussels II*ter*-Proposal does not contain any (other) correcting mechanisms concerning other situations in which the case proves to be manifestly more closely connected with another country than the one that is referred to by Article 20b. In Section 5.5.3.4 above it has been argued that Article 20b of the Brussels II*ter*-Proposal would benefit from the insertion of an extra paragraph stipulating that 'where it is clear from all the circumstances of the

[45] See 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. '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.'

[46] See *supra* Sect. 5.5.3.3.

[47] See further *supra* Sects. 2.4.2.1 and 2.4.2.2 on the authenticity and effectivity test respectively.

[48] Recital No. 5c of the Preamble to the Brussels II*ter*-Proposal. See Council Document No. 8587/08 JUSTCIV 73 of 18 April 2008. See further *supra* Sect. 5.5.3.2.

case that the divorce is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply'.[49] It is beyond doubt that such manifest closer connection should not be assessed on the basis of concerns regarding substantive law, but exclusively on the basis of factual and geographical factors. Even though such a correcting tool could encourage the tendency of the courts to apply their own law and carry a risk with it as regards legal certainty and predictability, these drawbacks should be accepted in light of its favourable effects on the principle of the closest connection.

This difference between the Dutch and the European choice of law system shows that Article 1 CLAD is a better expression of the principle of the closest connection. Although this principle underlies both systems, its effect on the choice of law rules on divorce differs in this respect. By providing correcting tools, the 'static' result of the choice of law rule referring to a certain legal system can be adjusted in order to attain the designation of the most closely connected law. The difference at issue between the two systems can also be partly explained by the principle of *favor divortii* prevailing in Dutch law, as the correcting tools of Article 1(2) and (3) CLAD can equally serve to realise the *favor divortii*.[50]

7.6.2 Proposed Dutch Choice of Law on Divorce

The amendment of the Dutch choice of law on divorce involves a drastic change of the choice of law approach adhered to so far in the Netherlands. Instead of the reference to the most closely connected law, the amendment provides for the exclusive application of Dutch law in international divorce cases.

The approach of the proposed Dutch choice of law on divorce therefore differs from the Brussels II*ter*-Proposal, which is based on the principle of the closest connection. The proposed Dutch choice of law on divorce on the contrary moves away from the approach of the closest connection and adheres to the *lex fori*-approach.

Consequently, whereas the approach of the current Dutch choice of law on divorce and the Brussels II*ter*-Proposal is similar, this does not hold true for the approach of the proposed Dutch choice of law on divorce and the Brussels II*ter*-Proposal. These two proposed systems are therefore miles apart as regards their choice of law approach. The opposition of the Netherlands against the Brussels II*ter*-Proposal can very well be explained by this difference of approach. In the next paragraph this opposition will be analysed in more detail.

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[49] Cf., Article 4(3) of the Rome I-Regulation and Article 4(3) of the Rome II-Regulation.

[50] See *supra* Sect. 2.4.2.1.

7.7 Has the Netherlands Rightly Opposed the Brussels II*ter*-Proposal as Regards Its Content?

In the previous chapter it was argued that the objections that have been raised by the Netherlands as regards the lack of EU competence in the field of a unified choice of law on divorce actually rather imply a substantive objection against the Brussels II*ter*-Proposal motivated by the principle of *favor divortii* prevailing in Dutch law.[51] In other words, the Netherlands has opposed the establishment of the common European choice of law rules on divorce on the basis of its content; it was feared that the common choice of law would be less favourable towards divorce than current Dutch law.[52]

Therefore, the question that can be posed on the basis of the preceding comparison between the current Dutch and the proposed European choice of law on divorce is whether the Netherlands rightly opposed the establishment of the common European choice of law rules. That is, does the Brussels II*ter*-Proposal actually put up more barriers for spouses that wish to obtain a divorce in the Netherlands?

Although the Dutch Minister of Foreign Affairs referred to the *current* law,[53] i.e. Article 1 of the CLAD, a distinction must be made between the current choice of law on divorce and its proposed amendment in order to gain a clear understanding of the expressed fear. For the answer to the question whether the Brussels II*ter*-Proposal actually puts up more barriers for spouses wishing to get divorced in the Netherlands fully depends upon which of these two systems is taken as point of departure.

7.7.1 The Current Dutch Choice of Law on Divorce

The comparison between the current Dutch choice of law on divorce and the Brussels II*ter*-Proposal has shown that the Dutch system is considerably more flexible with regard to the *professio iuris* on divorce. Even though Dutch law does not provide for as many alternative legal systems out of which the spouses can choose as the Brussels II*ter*-Proposal, the *professio iuris* as such is easier to establish pursuant to Dutch law. Compared to Dutch law the formal requirements of Article 20a(2) of the Brussels II*ter*-Proposal imply a substantial complication

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[51] See *supra* Sects. 6.3.2 and 6.3.3.

[52] See the letter of the Minister of Foreign Affairs of 2 October 2006, *Kamerstukken II* 2006–2007, 22 112, No. 465: '*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.*'

[53] Ibid.

for the spouses, mainly since these requirements do not accept a unilateral choice as to the applicable law.

However, these stricter European formal requirements as regard the *professio iuris* do not *per se* imply deterioration. A carefully considered choice as to the law applicable to divorce cannot do any harm given its possible implications as regards the grounds and the conditions for divorce, which, as seen in Section 5.2.1 above, vary considerably among the Member States. Although the stricter requirements of Article 20a(2) can thus be endorsed, the question remains whether they involve that the Brussels II*ter*-Proposal is less favourable than Dutch law. It cannot be denied that the stricter formal requirements do actually raise a barrier as compared to the present Dutch law, which does not require any agreement of the spouses as to the applicable law.

Section 7.6.1 above has shown that the cascade rule of Article 20b of the Brussels II*ter*-Proposal provides for the same connecting factors to determine the applicable law to divorce in the absence of a *professio iuris* as the ones that are currently employed by the CLAD. The sole difference is the order occupied by the connecting factors in the hierarchy of applicability.

The application of Article 20b of the Brussels II*ter*-Proposal would not bring much change for the Dutch courts as regards the interpretation of the connecting factors. The connecting factor of nationality is a clear-cut concept and not subject to any specific European interpretation. Moreover, the Dutch and European choice of law both employ the same definition of the concept of habitual residence, i.e. habitual residence has to be determined on the basis of the specific circumstances of the case. In both systems the permanency of the actual residence and the intentions of the person in question are to be taken into consideration.[54]

Therefore, the cascade rule of Article 20b of the Brussels II*ter*-Proposal is not less favourable than the current Dutch choice of law rule on divorce of Article 1 CLAD.

Finally, it should be mentioned that Article 20b of the Brussels II*ter*-Proposal will more often lead to the application of Dutch law than Article 1 CLAD. The latter Article refers in the first place, in the absence of a *professio iuris,* to the application of the common national law of the spouses to divorce. As the jurisdictional rules of the Brussels II*bis*-Regulation apply pursuant to Dutch law in all situations,[55] the competence of the court is mostly established on the basis of the habitual residence of both spouses or of either spouse. Consequently, Article 1 CLAD may regularly lead to the application of foreign law. From this perspective Article 20b of the Brussels II*ter*-Proposal — which refers to the law of the place of habitual residence — should thus mean a step forward instead of backward.

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[54] See Sects. 2.4.3 and 5.5.3.1 respectively.

[55] Article 4(1) of the Dutch Code of Civil Procedure extends the rules of the Brussels II*bis*-Regulation analogously to all questions of international jurisdiction in matrimonial matters.

7.7.2 The Proposed Dutch Choice of Law on Divorce

An important reason for the Netherlands to be set against the Brussels II*ter*-Proposal is that it has decided to adhere to the *lex fori*-approach in the future.[56] Article 20b of the Brussels II*ter*-Proposal refers to the application of the *lex fori* solely in case of absence of the provided connecting factors. However, this approach seems to differ considerably from the proposed Dutch choice of law rule on divorce, which stipulates that Dutch law will be applied in all cases, unless (one of) the parties have chosen the application of their common national law.

Yet, according to the European Commission the competent court will often apply its own substantive law pursuant to the choice of law rule of Article 20b of the Brussels II*ter*-Proposal, as the petition for divorce will generally be filed in the state in which the spouses habitually reside.[57] All six jurisdictional grounds of Article 3(1)(a) of the Brussels II*bis*-Regulation use the habitual residence of (one of) the spouses as a connecting factor. Nationality as a connecting factor for jurisdictional purposes only comes into play in case of a common nationality of the spouses (Article 3(1)(b)). As the international competence of the court is thus mainly grafted onto criteria based on habitual residence, the *lex fori* and the *lex domicilii* often correspond.

However, this assumption of the Commission is open to objections, as only the first two indents of Article 3(1)(a) of the Brussels II*bis*-Regulation correspond to Article 20b(a) and (b) of the Brussels II*ter*-Proposal. The latter provision is restricted to the common or the last common habitual residence of the spouses, whereas Article 3(1)(a) of the Brussels II*bis*-Regulation equally refers to the habitual residence of either spouse for the purposes of assuming jurisdiction. From this perspective the assumption that the competent court can apply its own substantive divorce law in the majority of cases is not that obvious. Most probably in many cases the competence of the court is established on the basis of Article 3(1)(a) first or second indent of the Brussels II*bis*-Regulation, but this is not in the least certain.

Consequently, one cannot state with certainty that the European choice of law on divorce is less favourable than Article 56 of the Dutch Proposal on Private International Law.

7.7.3 Synthesis

From the foregoing it is clear that the answer to the question whether the Brussels II*ter*-Proposal actually puts up more barriers for spouses that wish to get divorced in the Netherlands is dependent on the system that has been taken as point of departure.

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[56] See *supra* Sect. 2.6. See equally Oderkerk 2006, p. 124.

[57] Explanatory Memorandum to the Brussels II*ter*-Proposal, p. 10 and the Impact Assessment on Divorce, p. 26. See equally Lagarde 2004, p. 238; Beyer 2007, p. 23; Bonomi 2007, pp. 780–781; Lazic 2008, p. 90.

In comparison with the current Dutch choice of law on divorce, the position of the Netherlands that the Brussels II*ter*-Proposal puts up more barriers for spouses that wish to get divorced in the Netherlands does not seem to be justified. The preceding analysis of the similarities and differences between the two systems has shown that the European choice of law rules are not *per se* stricter than the Dutch ones, save for the formal requirements of the *professio iuris*. Despite the different underlying principles and the differing accents that have been laid, the Brussels II*ter*-Proposal does not seem to bring many disadvantageous consequences for the Netherlands. The European choice of law on divorce is, therefore, not really less favourable than Article 1 of the CLAD.

However, this conclusion does not hold true for Article 56 of the Dutch Proposal on Private International Law. Pursuant to this provision the Dutch court should, in the absence of a *professio iuris* for the common national law of the spouses, always apply Dutch law in cross-border divorce cases. Although the analysis above has shown that the cascade rule of Article 20b of the Brussels II*ter*-Proposal will lead to the application of the *lex fori* in many cases, the point of departure of the latter proposal differs greatly from the intended amendment of the Dutch choice of law on divorce. It is, therefore, not possible to state with certainty that the Brussels II*ter*-Proposal is less favourable to divorce than Article 56 of the Dutch Proposal on Private International Law.

7.8 Conclusion

Although on the face the current Dutch and the proposed European choice of law on divorce may seem to differ, both systems have many characteristics in common. The underlying structure of both these systems is similar: party autonomy is regarded as the prevailing principle. Only in the absence of a *professio iuris* on divorce, the applicable law to divorce is determined by the choice of law rules, which are based on the principle of the closest connection in both systems. The main differences are to be found in the further details of the regulations.

Article 20a of the Brussels II*ter*-Proposal provides the spouses with more alternative legal systems out of which they can choose as regards the law to be applied to their divorce than Dutch law does. However, the formal requirements of the *professio iuris* posed by Article 20a(2) of the Brussels II*ter*-Proposal are stricter. These requirements differ as regards both the form of the *professio iuris* as the time within which the choice as to the applicable law must be made from Dutch law, which does not demand very strict formal requirements to be complied with.

As far as the situation in the absence of a *professio iuris* is concerned, the current Dutch and the European choice of law rules bear quite some resemblance to each other. The law applicable to divorce is in both systems determined by a cascade rule, in which the same connecting factors are employed. However, the order of hierarchy of the connecting factors differs. Whereas habitual residence is

used as the primary connecting factor in Article 20b of the Brussels II*ter*-Proposal, Article 1 of the CLAD has assigned it a secondary position. Another important difference between the two systems is the absence in the Brussels II*ter*-Proposal of correcting mechanism so as to ensure the application of the law with which the spouses are most closely connected.

However, there are considerable differences between the Brussels II*ter*-Proposal and the proposed amendment of the Dutch choice of law on divorce. Firstly, the intended amendment of the Dutch choice of law will no longer regard the principle of party autonomy as the prevailing rule. Furthermore, while the Brussels II*ter*-Proposal is based on the principle of the closest connection, Article 56 of the Dutch Proposal on Private International Law is based on the *lex fori*-approach.

Chapter 6 showed that the Netherlands opposed the Brussels II*ter*-Proposal for fear of a less favourable choice of law on divorce than Dutch law currently provides for. The analysis in this chapter made clear that whether or not this fear is justified depends on the system which has been taken as a point of departure: the current Dutch choice of law rule of Article 1 CLAD or its proposed amendment. The observed fear is not really justified in comparison with the current Dutch choice of law on divorce. But compared to Article 56 of the Dutch Proposal on Private International Law which adheres to the *lex fori*-approach, the fear of the Netherlands seems to be more justified. Although the application of the Brussels II*ter*-Proposal may in the vast majority of cases lead to the application of forum law, it may very well lead to the application of foreign law considering both the *professio iuris* of Article 20a and the cascade rule of Article 20b of the Brussels II*ter*-Proposal.

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