THE SECOND REVISION OF THE BRUSSELS II REGULATION: JURISDICTION AND APPLICABLE LAW

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1. THE MYTH OF CERTAINTY AND PREDICTABILITY

I have been teaching private international law for more than thirty five years now, and I have been a part-time judge adjudicating conflicts cases for more than twenty. In all those years, I have seldom met anybody who was not a lawyer who was even aware of the problems conflicts law is meant to solve, let alone that they would have any idea of the way they are actually solved. I once conducted a little quiz among my non-lawyer friends explaining the problem of international divorce and asking them which law they thought would govern the judicial consequences of the breakdown of a marriage: divorce, maintenance, parental authority, matrimonial property, etc. Most of them assumed that courts can only apply their own law, and when I told them that occasionally they do apply foreign law as well, they were all agreed that, in that case, an international divorce should be governed by the law of the country 'under whose law the spouses were married', by which they obviously meant the *lex loci celebrationis.*

Given this unawareness of the general public of the problems and solutions of private international law, it never ceases to amaze me that so many of my colleagues apparently show much faith in concepts like legal certainty, predictability and uniformity of result. Private international law, they claim, should conform to the parties' justified expectations as to jurisdiction and applicable law. In my experience, particularly as a judge[1], the parties in a divorce case have no expectations at all other than being heard in a court in their own country and being treated with fairness, which usually means that they expect the court to support their point of

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1. In 1985, I was appointed as a part-time judge in the District Court of Alkmaar, where I was asked to deal with conflict-of-law cases only. The bulk of my case load – roughly estimated at 90 % – involved divorce and ancillary matters (maintenance, matrimonial property and parental responsibility). Over the years that followed, I have adjudicated a few thousand of such cases. In only a few of them – less than a dozen perhaps – did the central issue focus on jurisdiction or the applicable law. This experience also contradicts the Commission's assertion that, due to the lack of uniform conflict-of-law rules, forum-shopping frequently occurs.

view. That has nothing to do with expectations as to the law to be applied, but at best with notions of substantive justice.

That is why I cannot quite believe in the cogency of the harmonization of divorce choice of law, as professed by the European Commission in the explanatory memorandum accompanying its proposal for a second revision of the Brussels II Regulation: 'The great differences between, and complexity of national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their matrimonial proceeding'.[2] I very much doubt that international couples ever cared about those complexities and differences before their lawyers explain the problem to them at the time they are contemplating divorce. That is why I do not have much faith in the added value of the provisions allowing choice-of-forum and choice-of-law agreements proposed by the Commission. As long as the spouses are still living in (pre-)marital bliss, very few of them will contemplate the consequences of a break-up, and fewer still will think of something abstruse as a choice of the court that will handle their divorce, or the law they want to be applied.[3] By the time divorce has become an inevitable reality, the spouses may be instructed by their lawyers on their freedom of choice, but at that stage their willingness to come to an agreement is probably slight.

Well, that is only to set the mood. I have much more to say about the Commission's proposal, and I intend to do so in an orderly way. First, I will give an overview of the changes the EU member states may expect with regard to international divorce if and when the revision of Brussels II-*bis* enters into force (2 and 3). After that, I should like to focus on the proposed conflict-of-law rules, particularly in light of the principles underlying contemporary choice of law. To that end, I will have to make a few preliminary remarks on the objectives of modern conflicts law (4) and the policies expressed in the substantive divorce laws of the member

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2. COM (2006) 0399 final, 17 July 2006, at p. 3. Since then, the German Presidency and the (incoming) Portuguese Presidency – on the basis of meetings of the Committee on Civil Matters and the comments of the delegations – have published four more drafts: 5274/07 JUSTCIV 4, 12 January 2007; 6258/07 JUSTCIV 26, 13 February 2007; 7144/07 JUSTCIV 47, 9 March 2007; and 11295/07 JUSTCIV 183, 28 June 2007.
3. A relatively small number of future spouses may have the benefit of being advised by an attorney or notary public on the financial consequences of their marriage. After Brussels II-*ter* enters into force, their legal advisors would do well to address the issue of divorce as well, pointing out the possibilities for a choice of forum and a choice of law. However, if the fiancés are nationals of the same country and still have their habitual residence there at the time of marriage, their lawyers are likely to overlook the international complications that may present themselves after one of the spouses, or both of them, have moved abroad. In other words: in very few cases will the spouses be alerted to possible conflicts issues until they actually contemplate divorce.

states (5), so as to enable us to assess the methodological validity of the proposed choice-of-law rules (6). To end on a constructive note, I will come up with an alternative solution (7).

2. A BRIEF SURVEY OF THE PROPOSED RULES: JURISDICTION

In the field of jurisdiction, the revision of Brussels II-*bis* – the result of which is likely to be dubbed 'Brussels II-*ter*' – introduces two major innovations. First of all, it would seem that there will no longer be any room for recourse to national law, as allowed under the 'residual' standards of Article 7 Brussels II-bis.[4] This Article is going to be replaced by a provision on 'subsidiary jurisdiction'[5] for situations in which the spouses do not have a common EU nationality and neither of them is habitually resident in a member state. In such cases, jurisdiction is conferred (1) upon the national courts of either spouse and (2) on the courts of the member state in which the spouses had their habitual residence for at least three years before they moved elsewhere, as long as they did not move from that country more than three years before the court was seized. For instance: a Greek husband is married to a Swedish wife. They have been living for ten years in France, then move to the United States. Under Article 3 of Brussels II-bis, no court in the European Union would have jurisdiction. Under Article 7 of the revised version, a petition for divorce could be lodged with a court in Greece (being the *forum patriae* of the husband), in Sweden (*forum patriae* of the wife), or in France (as the member state where the spouses were habitually resident for more than three years) provided the parties did not leave France more than three years before the court was seized. According to the Explanatory Memorandum, the new version of Article 7 is meant to be a 'uniform and exhaustive rule', inspired by the fact that national rules on international jurisdiction 'do not always effectively ensure access to court for spouses although they may have a close connec-

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4. In Brussels II-*bis*, Article 6 provides that the regulation's rules on divorce jurisdiction exclude recourse to national law if the respondent is either a resident or a national of a member state, while Article 7 stipulates that 'residual' jurisdiction shall be determined by national law 'where no court of a member state has jurisdiction pursuant to Articles 3, 4 and 5'. In Brussels II-*ter*, Article 6 will be deleted. In footnote 9 of the latest draft (of 28 June 2007, *supra*, note 3), it is suggested that 'a recital could clarify that the deletion of Article 6 does not change the exclusive nature of the provisions on jurisdiction'. The big difference, however, is the replacement of Article 7 by a provision that no longer allows the application of national rules of jurisdiction in extracommunity cases but directly confers jurisdiction on the courts of the member states if none of the conditions of Article 3 has been met.
5. Incomprehensibly, the Commission used the phrase 'residual jurisdiction' as a caption for a provision (Article 7 Brussels II-*ter*) that does not allow recourse to national law, but, instead, introduces additional jurisdictional grounds. In the draft of 12 January 2007, submitted by the German Presidency (*supra*, note 2), this heading was rightly rephrased as 'subsidiary jurisdiction'.

tion with the Member State in question'.[6] That implies that, as far as divorce jurisdiction is concerned, the territorial scope of Brussels II-*ter* will be universal.

The second innovation in this field is the introduction of prorogation in matrimonial matters, as it already existed in Brussels II-bis with regard to parental authority.[7] In proceedings relating to divorce and legal separation, the spouses are allowed a choice of court. The choice is limited, however, to the fora listed in Article 3 and the fora introduced by the new version of Article 7. In other words: the parties may not select *any* forum within the European Union but only those with which they have some connection on account of the nationality or habitual residence of either spouse, their common nationality or their former common habitual residence. I do not quite see why such restrictions are necessary, and why the spouses are not allowed to choose any forum within the European Union, as I have argued in a comment on the *first* revision of the Brussels II Regulation:

> 'The reason for not allowing the spouses a choice of forum lies probably in the differences between the divorce laws in force in the various member states and between their choice-of-law rules for divorce. [...] One of the objectives of the European Commission to be achieved in the immediate future is the unification or harmonization of choice-of-law rules with regard to divorce. Once that mission has been accomplished, I cannot think of any reason why adult people would not be allowed to start divorce proceedings before the court of their choice in any EU member state, as long as the Regulation guarantees that courts in all member states will arrive at the same choice-of-law result, while another Regulation, Brussels II, guarantees the mutual recognition of their decrees. If Article 12(1) Brussels II-*bis* allows the spouses to ask the *forum divortii* for a decision on parental responsibility for a child habitually resident

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6. COM (2006) 399, at p. 9 (Article 7). It could be argued that a court may resort to national criteria if jurisdiction cannot be based on Articles 3, 3a, 4, 5 or 7 of the proposed regulation. However, the Explanatory Memorandum makes it clear that Article 7 is an 'exhaustive' rule. Besides, it is hard to see on what (national) ground a court in a member state could reasonably assume jurisdiction if the case is not linked to the forum state by any of the connections listed in the regulation. In my opinion, the only useful forum missing from the regulation's jurisdictional catalogue is the *forum necessitatis*.
7. *Cf.* Art. 12(1) and Art. 12(3) Brussels II-*bis*. There is a curious discrepancy between the wording of these provisions and that of Article 3a Brussels II-*ter*. Where it says in Article 12 Brussels II-*bis* that 'the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner ... at the time the court is seised', Article 3a Brussels II-*ter* evidently expects the spouses to behave in a proactive way: 'The spouses may agree that a court or the courts of a Member State shall have jurisdiction ...'. It would seem that the emphasis in Article 12 is on (express or implied) acceptance by the respondent, while Article 3a requires an agreement explicitly endorsed by both spouses. However, Article 3a(5) also allows tacit submission to jurisdiction, without the requirement (laid down in Article 12) that it must be clear, at the time the court is seized, that the respondent will not object to its jurisdiction. In other words, under Article 3a(5) petitioner is not required to file some kind of statement that respondent is prepared to submit to the court's jurisdiction. Provided the respondent does not contest jurisdiction, entering an appearance suffices. I fail to see why this form of tacit submission would be unacceptable under Article 12. See also, *infra*, note 10 and accompanying text.

in another member state, why could it not be the other way round? Why are they not allowed, then, to choose a *forum divortii* in the member state where their child is habitually resident?'[8]

Now that we have actually reached the stage of choice-of-law harmonization – or rather unification – I still cannot think of any reason why the spouses should not be allowed to choose any forum within the European Union, and why their freedom of choice should be limited to a number of options under the general motto that they have 'a substantial connection' with the forum state.[9] If the harmonization of conflict-of-law rules is thought to be an effective means to prevent forum-shopping, there cannot possibly be any objection to allowing the spouses to choose any court within EU territory as long as either of them has some connection with one of the member states, not necessarily the forum state.[10] Besides, if the European Union is to become one big '*espace juridique*', it would suffice to adopt one or more rules attributing jurisdiction on 'the courts of the EU member states' collectively, while the exact venue could be determined by a set of (non-mandatory) distributory rules. If we are prepared to experiment with the recognition and enforcement of sister-state judgments without the requirement of a 'special procedure' – to promote the free movement of judgments – I do not see why an adult couple who have access to the courts of one member state (for instance on the ground that the respondent is habitually resident in that state) may not sue one another, by mutual agreement, in the courts of an EU sister-state. Would that be a greater infringement upon the member states' sovereign power to adjudicate than the obligation to enforce sister-state judgments unconditionally?

The conditions laid down in the first two paragraphs of Article 3a(1) – one of the spouses should be a national of the forum state, or the spouses should have had their last common habitual residence in that state – should be met at the time the choice-of-court agreement is con-

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8. TH.M. DE BOER, Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation, *Netherlands International Law Review* 2002, p. 307-351, at p. 342/343.
9. Art. 3a(1) Brussels II-*ter*.
10. *Cf.* Art. 23 Brussels I Regulation, allowing the parties to choose any court within the EU as long as one of them is domiciled in a member state, not necessarily the forum state. The Commission's proposal for a regulation on international maintenance obligations COM (2005) 649, 15 December 2005, contained a similar provision. Unfortunately, however, this provision has been brought into line with the Brussels II-*ter* proposal. *Cf.* Article 4 of the latest draft, 11281/07 JUSTCIV 180, 28 June 2007: with regard to maintenance, the parties may choose one of the fora that would have jurisdiction if there had been no choice-of-court agreement, or the *forum patriae communis*, or the courts of the member state in which the (former) spouses had their last common habitual residence for a minimum length of time (one year? three years?). On the other hand, the maintenance proposal has retained the provision of Article 24 Brussels I (tacit submission to the jurisdiction of the court seized), while the Brussels II-*ter* proposal

cluded. Thus, if a French/American couple agree to choose a divorce court in Paris, that court will have jurisdiction even if the French spouse subsequently lost his or her citizenship. There has been some debate on the time factor to be used if one of the fora listed in Article 3 is chosen, as allowed by the final paragraph of Article 3a(1). According to the latest draft, the jurisdiction of the chosen court should be measured against the time the court is seized rather than the time the agreement was concluded.[11] The choice between the two options reveals a basic flaw in the reference to jurisdictional grounds that were meant to be used in the *absence* of a choice-of-court agreement. If the spouses choose a forum before they actually contemplate a divorce, they have no way of knowing who is going to be the petitioner and who is going to be the respondent, both crucial data for the application of Article 3. If the conditions of Article 3 should be measured against the time of the agreement, the only foolproof criterion listed in that provision is the common residence of the spouses at that time.[12] All other factors that determine jurisdiction under Article 3 are unknown at the time the agreement is made. If, on the other hand, those factors should be measured against the time the court is actually seized, chances are that, since the date of the agreement, the circumstances have changed in such a way that the conditions of Article 3 are no longer satisfied.[13]

That is why I would have preferred a list of eligible fora rather than a reference to the fora of Article 3. Legal certainty demands that the time of the agreement rather than the time the court is actually seized determines the validity of the choice. Included in the list should be, in my opinion, all fora with which one or both of the spouses have a meaningful connection by virtue of (1) the nationality of either spouse, (2) the habitual residence of either spouse, and,

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does not allow tacit submission unless the court seized 'would otherwise have jurisdiction under this Regulation': Art. 3a(5).

11. In the previous draft, the two options were still open to debate. In the draft of 28 June 2007, it is noted (in footnote 5) 'that the majority of Member States expressed a preference for this alternative'.

12. This is also true if they choose a forum in the member state of their common nationality: Article 3(1)(b). However, this alternative is redundant next to the first choice allowed in Article 3a: the court(s) of the member state of which *one* of the spouses is a national.

13. For instance: in their marriage contract, a Dutch husband (living in the Netherlands) and a Belgian wife (living in Belgium) have agreed that a German court should have jurisdiction in case of divorce, as the couple intend to take up residence in Germany after they are married. After two years in Germany, the marriage breaks down, the husband moves to Spain and the wife returns to Belgium. As agreed, the husband starts divorce proceedings in Germany. Under Article 3, a German court would have no jurisdiction, as neither spouse resides in Germany anymore, nor are they German nationals. If the choice-of-court agreement were to be measured against the conditions at the time the court is seized, it would therefore be invalid. If the date of conclusion were to be decisive, the agreement would also be invalid since neither husband nor wife were German residents or nationals at that time. If the parties had made their agreement at the time they were already living in Germany, it would be valid only if the date of agreement is deemed decisive, since, at that time, both spouses had their habitual residence in the (intended) forum state: Article 3(1)(a), first indent.

arguably, (3) the habitual residence of any of the children for whom they share parental responsibility. Ideally, however, they should be allowed to choose any forum within the EU, as long as one of them is a EU citizen or resident at the time of the agreement.

3. A BRIEF SURVEY OF THE PROPOSED RULES: APPLICABLE LAW

A true novelty in the proposal for the revision of the Brussels II Regulation is the inclusion of a chapter on the applicable law in matters of divorce and separation. The plans for a so-called 'Rome III Regulation' have taken shape in Articles 20a and 20b of the 'Brussels II-*ter*' proposal. Basically, the Commission has suggested two conflicts rules, one allowing a limited form of party autonomy, the other designating the applicable law in the absence of. To start with the last one, Article 20b calls for the application of the law of the state where the spouses have their common habitual residence at the time the court is seized, or if they are by then living in different countries, the law of their last common habitual residence provided that one of them still resides there. If not, the law of their common nationality shall apply[14], and if they do not have a common nationality, lex fori will fill the gap. To illustrate the operation of this set of rules: let us assume that an Irish couple have been living in the Netherlands until their marriage breaks down and the Irish wife decides to return to Ireland. The husband files for divorce in the Netherlands. The law to be applied is Dutch law, as the law of the couple's last common habitual residence. If the husband had moved from Holland to Belgium, and if he had filed for a divorce there, a Belgian court would have to apply Irish law as *lex patriae communis*. If either spouse had not been Irish, Belgian law would apply as lex fori.

Considering that quite a few member states have a strong preference for the application of their own law in matters of family law, including divorce, it is hardly surprising that, in the negotiations over Brussels II-*ter*, several attempts have been made to give the lex fori a more prominent role than that of a stopgap. One of those attempts has resulted in the adoption of a remedy for situations in which the applicable law 'does not provide for divorce'. In such cases, lex fori shall apply. According to the German Presidency, this provision not only covers cases where the applicable law does not know the concept of divorce at all, but also cases 'where the applicable law does not allow one of the spouses to lodge an application for di-

14. There has been some debate on the order of Article 20b(1)(b) and (c). The French, it would seem, would rather give precedence to the *lex patriae communis* over the law of the last habitual residence of the spouses. See *infra*, text accompanying notes 17 and 18.

vorce'.[15] Does the latter condition include situations in which the applicable divorce law is based on fault and 'does not provide for divorce' if the petitioner is the guilty party? Or did the Presidency only mean to refer to some (Muslim?) law that does not permit women to file for divorce? On the other hand, that situation already seems to be covered by an explanatory footnote accompanying the provision on Article 20e, where it is suggested that public policy could be invoked if 'the application of a foreign divorce law would discriminate one of the spouses, for example by not providing for the same rights for each spouse with respect to divorce or legal separation'.[16] It is to be hoped that the recital 'clarifying' this issue will be clearer than the Presidency's footnotes.

Another attempt to boost the role of lex fori in divorce proceedings was made by the French delegation. Based on the doctrine of facultative choice of law, their proposal would allow the courts to apply their own law as long as neither party requests the application of the (foreign) law designated by Article 20b. In the Netherlands, a similar approach has been widely supported since the early 1990s, when it was clear that under the International Divorce Act the courts were obliged to apply Dutch law in virtually all cases except those in which (one of) the spouses expressly requested the application of their common national law.[17] Unfortunately, the French proposal does not quite conform to the rule applied in Dutch judicial practice. First of all, lex fori may only be used as a point of departure if both parties have entered an appearance; in default proceedings, the applicable law is determined by the criteria listed in Article 20b. Secondly, this implies that lex fori can be displaced by foreign law on at least two counts; either because the spouses have a foreign common nationality, or because they

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15. Footnote 7 in the draft of 9 March 2007 (= footnote 29 in the draft of 28 June 2007), in which it is suggested that a recital should clarify the meaning of the phrase 'does not provide for divorce'.
16. Footnote 35 of the draft of 28 June 2007.
17. Pursuant to Article 1 *Wet conflictenrecht echtscheiding* (International Divorce Act), the spouses may opt for the application of either Dutch law or the law their common nationality. Even a unilateral choice will be upheld if it remains uncontested (which is *eo ipso* the case in default proceedings). In the absence of a choice by (one of) the parties, the primary reference is to the *lex patriae communis*. If the spouses are nationals of different countries, or if one of them no longer has a 'true social connection' with his or her home country, the law of the spouses' common habitual residence will be applied, and failing that, the lex fori. Since jurisdiction usually hinges on the condition that one of the spouses is habitually resident in the Netherlands (*cf.* Art. 3 Brussels II-bis), the law of the spouses' common habitual residence is likely to be Dutch law. By the same token, it is readily assumed that the spouse residing in the Netherlands is not likely to have maintained a true social connection with his or her home country. The result is the application of Dutch law in all cases save those in which the spouses have a common nationality and both of them may be deemed to have retained a true social connection with their home country, or, if not, one of them has requested the application of their national law and the other one does not object.

had their last common habitual residence abroad.[18] The Dutch approach, on the other hand, also allows facultative choice of law in default proceedings – which implies the application of Dutch law unless the petitioner relies on foreign law – and there is no other choice-of-law alternative than the application of the spouses' common national law. In other words: the necessity of applying foreign law is considerably less than it will be if the French proposal were to be adopted.

In the latest draft of the Brussels II-ter proposal, the Presidency has included an 'escape clause' favoring the application of lex fori.[19] It appears that such a clause was deemed necessary, as it was feared that nationals of a divorce-friendly country returning home after the break-up of their marriage would be unable to get a simple divorce under the law of the couple's last habitual residence. As it stands now, the clause is meant to displace the law of the spouses' last common habitual residence in favor of lex fori, provided that (1) one of the spouses so requests; (2) their common residence abroad lasted less than three years, and (3) the requesting spouse has a 'substantial connection' with the forum state, either on account of his or her nationality, or because he or she was a resident of the forum state for at least ten years before departing to another country, provided that less than three years have elapsed between the date of departure and the moment the court is seized. As I see it, this exception to Article 20b(1)(b) tries to reconcile a policy-oriented approach (allowing the application of a divorce-friendly lex fori) with the principle of the closest connection. From a methodological point of view, such a compromise should be rejected, as it obscures the true nature of the escape clause. What it is meant to achieve is a quick and easy divorce under forum law, not an adjustment of the closest connection.

The other conflicts rule I mentioned, Article 20a, allows the spouses a choice between the law of their common habitual residence, the law of their last common habitual residence as long as one of them still resides there at the time of the designation, the national law of either

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18. If jurisdiction is based on nationality – *cf.* Article 3(1)(b) and Article 7(b) – or, in extracommunity cases, on the fact that the spouses had their habitual residence in the forum state for at least three years – *cf.* Article 7(a) – foreign law may also be applicable as the law of the country were both spouses currently have their common habitual residence: Article 20b(1)(a).

19. Article 20b(1a). In a 'Presidency non-paper' of 21 March 2007, the following elements of such an escape are enumerated: (a) it should only be used to escape application of the law of the spouses' last habitual residence; (b) it should not be applied *ex officio* but only at the request of one of the spouses, provided that the requesting spouse has a 'significantly closer connection' with the forum state than with the state of their last habitual residence, and (c) the escape clause should specify the conditions determining a significantly closer connection.

spouse, or the law of the forum. In fact, the alternatives are hardly different from the laws that would apply under Article 20b[20], but the main difference is that the parties may choose a law that would not be applicable under that provision, either because they have chosen an alternative that would not be the primary choice in the absence of an agreement, or because the circumstances at the time of their choice were different from those at the time of divorce. To illustrate this point, let us go back to the example I gave in the context of jurisdiction. A Greek husband and his Swedish wife had been living in France until they both moved to New York. The marriage breaks down, and the wife moves to California. Suppose that the husband wants to file for divorce in Europe. A French court would have jurisdiction under Article 7 if no more than three years have elapsed since the couple's departure from France, but the petition could also be filed in Greece or Sweden, both qualifying as *forum patriae*. Without a choice by the parties, these courts would have to apply New York law, as the law of the couple's last common habitual residence. If the spouses could reach an agreement on the law to be applied, they could rule out the application of New York law by choosing either Greek law or Swedish law, as the law of their respective nationalities, or, if the action is brought in France, French law as lex fori.[21]

Most of the debate over this provision, thus far, concerned the *form* of the choice-of-law agreement and the *time period* within which it should be concluded. Apparently, some member states are not satisfied with a formal requirement that calls for a written agreement that is dated and signed by both spouses. To meet their objections, the proposal now features an extra rule on form[22]: if, at the time the agreement is concluded, either of the spouses is habitually resident in a member state providing for stricter formal requirements (a notarial document? witnesses?) those requirements should be satisfied. If the agreement is part of a marriage contract, the formal requirements for such contracts apply.

With regard to the time factor, the proposal allows the parties to choose the applicable law at any time before the court is seized, and possibly even later. The draft of 28 June 2007 offers

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20. While Article 20b refers to the *common* national law of the spouses, Article 20a allows them to choose the national law of *either* spouse.
21. If the spouses had agreed on the applicable law while still living in France, or at a time when one of them was still living in that country, they could have chosen French law as *lex domicilii (communis)* under Article 20a(a) or 20a(b). The time of designation is decisive.
22. The same applies to the form of choice-of-forum agreements: Article 3a(3). In the draft of 13 February 2007, the additional rules on formalities were still couched as an option. In the later drafts, they are presented as a complement to the basic requirement of a written, dated and signed document.

several options: at the latest, the agreement must have been concluded (1) at the time the court is seized, or (2) at the first court hearing, or (3) in the absence of a court hearing, in the course of the first exchange of writs or, in case of a joint application, in the writ of application. An alternative solution, mentioned in a footnote, would allow the spouses to designate the applicable law before the court in the course of the proceedings if the law of the forum so provides. Curiously, the debate has not focused on the period *before* the court is seized.[23] Allowing the parties to choose the applicable law – as well as the competent court – even before they are married would seem to be a bigger problem than allowing them to do so during the proceedings. How can they assess the consequences of an agreement that must be carried out, if at all, in a distant future they do not want to contemplate as yet, under circumstances they cannot possibly foresee? Can one of them later opt out of the agreement without the cooperation of the other? Which law governs issues of consent or the principle of *rebus sic stantibus* when raised during the divorce proceedings? Such questions are more difficult to answer, in my opinion, than the ones now under discussion in Brussels.

4. SOME REMARKS ON THE POINTS OF DEPARTURE OF MODERN CHOICE OF LAW

Before trying to assess the merits of the Commission's conflict-of-law rules, I should like to make a few brief remarks on the principles underlying modern choice of law as it has evolved in Europe since the 1960s. It is probably common knowledge that the choice-of-law process no longer depends on the principle of the closest connection alone.[24] There are at least three other principles supporting the application of the law of another country than the one with which the case may be deemed to be most closely connected in a geographical sense. First of all, we now acknowledge the *principle of party autonomy*, allowing the parties to choose the applicable law themselves, at least in areas of substantive law where social or economic policies do not hamper their freedom of disposition. Examples can be found in the area of con-

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23. A proposal submitted by the Dutch delegation, only allowing the parties to choose the forum and/or the applicable law when divorce proceedings are imminent (six months before the court is seized at the earliest) has found little support.

24. See, generally, TH.M. DE BOER, Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law, Chapter II: Methods and objectives of private international law, *Recueil des Cours* Vol. 257 (1996), p. 223-427, at p. 271-302. See also: DIETER MARTINY, Objectives and Values of (Private) International Law in Family Law, in: *International Family Law for the European Union* (eds. JOHAN MEEUSEN *et al.*), Antwerp/Oxford, 2007, p. 69-99.

tracts and torts, and, to some extent, in the field of matrimonial property, maintenance obligations, succession, and even divorce, as shown by Article 20a Brussels II-*ter*.

Furthermore, we have created conflicts rules that reflect the objectives of the corresponding substantive law rather than an abstracted conception of the closest connection. First of all, there are now choice-of-law rules based on the *function* of the corresponding substantive law. Where substantive law focuses on the protection of the weaker party, such as consumers, employees, children, or maintenance creditors, that focus is translated into a connecting factor referring to the law of the weaker party's daily environment, not necessarily the state with which the case is most closely connected in a geographical way.[25] Examples can be found in Article 4 of the Hague Maintenance Convention of 1973, duplicated in the Commission's proposal for a Regulation on Maintenance, or in the provisions on consumer transactions and employment contracts in the Rome Convention of 1980, duplicated in the 'Rome I' proposal. The principle underlying this type of conflicts rule is known as the *principle of functional allocation*.[26] Secondly, in most European systems of conflicts law, there are rules based on the so-called '*favor*' principle, offering a choice between various alternatives, where the choice is dictated by a predetermined substantive result.[27] Thus, we have choice-of-law rules supporting the *favor negotii* (pertaining to matters of form), or the *favor infantis* (pertaining to the position of illegitimate children), the *favor matrimonii* (a valid marriage is better than a marriage that is null an void), or the *favor divortii* (a law that supports the possibility of divorce is favored over a law that does not). Another example can be found, again, in the Main-

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25. Under the heading 'Protection of the weaker party, child protection', MARTINY, *ibid*. at p. 93, acknowledges the emergence of a new type of conflicts rule: 'Often under national conflict of law rules the law of the nationality of the child is applied. However, today there is also a tendency to apply the law of the habitual residence of the child. This law generally best reflects the situation of the child. The application of the law of the creditor's habitual residence for maintenance claims also follows this concept.'

26. In the Netherlands, it is also known as the 'protection principle' (*beschermingsbeginsel*), as a conflicts rule of this type is meant to protect the weaker party. I am not altogether happy with this appellation, as it suggests that the law designated on the basis of this principle *eo ipso* affords protection to the weaker party. This is not true. Under Article 4 of the Hague Maintenance Convention 1973, for instance, maintenance creditors – even if Article 4 calls for the application of their domiciliary law – might not be entitled to maintenance if their domiciliary law does not provide for it. Similarly, Article 5(3) Rome Convention 1980 leaves a consumer empty-handed if he or she happens to live in a country where consumers are not entitled to protection. The best that could be said about the so-called 'protection principle' is that it achieves equal treatment of consumers, employees, maintenance creditors, children, etc., regardless of whether they are involved in an international or in a domestic relationship. Under Article 5(3) Rome Convention, for instance, all consumers living in the same country will be treated equally, whether their contractual partner is established abroad or not.

27. *Cf*. MARTINY, *supra*, note 24, p. 92: 'In some cases private international law cannot pretend not to be interested in the concrete result of a legal conflict. Instead it favours a certain result.' For an extensive treatment of alternative reference rules, see: HARALD BAUM, *Alternativanknüpfungen: Begriff, Funktion, Kritik*, Tübingen, 1985.

tenance Convention 1973, where Articles 5 and 6 allow the application of the common national law or, respectively, lex fori if the maintenance creditor would be left empty-handed under his or her domiciliary law.[28]

Apart from policy-oriented choice-of-law rules, there are all kinds of conflicts provisions expressing some kind of preference for lex fori. One example is the type of rule in which the applicable law is displaced if it does not meet the forum's minimum standards, as, for instance, a rule referring to the forum's own divorce law if divorce would not be possible under the applicable foreign law.[29] Finally, there are provisions, both in international conventions and in national conflicts laws, giving priority to 'overriding mandatory rules' of the forum state, also known as '*lois de police*', or '*Eingriffsnormen*', or '*norme di applicazione necessaria*'.

In other words, the designation of the applicable law no longer depends exclusively on the closest connection in a geographical sense. In some areas, the policies underlying substantive forum law have been translated into conflicts rules that are no longer blind to the final outcome. As a result, there is now less need for public policy and other corrective devices than there was in the days when mechanical and strictly neutral choice-of-law rules dictated results that were clearly inappropriate, the days when courts tried to bend the orthodox choice-of-law result to what they deemed just and fair by resorting to public policy, or to result-oriented characterization, selective application of the doctrines of renvoi, the incidental question, etc. The days, in short, in which private international law earned its reputation of being 'a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric law professors.'[30]

5. THE POLICIES UNDERLYING SUBSTANTIVE DIVORCE LAW

After this methodological detour, let us focus again on divorce in the conflict of laws. Given that modern conflicts rules are based on various choice-of-law principles, we should ask our-

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28. See also: Art. 13 of the proposal for a regulation on maintenance obligations, COM (2005) 649, 15 December 2005; latest draft: 11281/2007 JUSTCIV 180 of 28 June 2007.
29. *E.g.* Art. 17(1) German *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (*EGBGB*); Art. 61(3) Swiss Statute on Private International Law of 1989. *Cf.* Article 20b(2) Brussels II-*ter* in all drafts following the Commission's proposal: 'Where the law applicable pursuant to paragraph 1(a), (b) or (c) does not provide for divorce, the law of the forum shall apply.' See also the text accompanying note 15.

selves whether the nature of substantive divorce law calls for a conflicts rule that, in some way, reflects the social policy with regard to divorce a state or a group of states should like to further. Obviously, the states that have adopted the Rome Convention of 1980 all subscribe to a policy of protecting consumers and employees. Similarly, a state that supports a policy of equal treatment of legitimate and illegitimate children is likely to adopt a conflicts rule for the recognition of illegitimate children that calls for the application of a law favoring recognition. In areas of substantive law where the parties are not hampered in their freedom of disposition by rules of mandatory law – in other words: in areas where the substantive law does not express a distinct social policy – the conflicts rule is likely to be based on the principle of party autonomy or, in case the parties did not make use of their freedom of choice, by the principle of the closest connection.

So, the first question to be answered is whether the member states of the European Union want to further a distinct policy with regard to divorce, or could it be said that their position vis-à-vis divorce is completely neutral? Is divorce a facility that should be available to any spouse who no longer wants to be bound by the bonds of marriage, or should it be an *ultimum remedium* available only in the most desperate cases? Is divorce meant to offer an abused spouse an escape from an otherwise irrevocable contract? Should divorce be refused if there are still minor children to be raised? Or should it be seen as a right to which any married person is entitled, whatever the cause of their dissatisfaction with their present status?[31]

Having surveyed the grounds for divorce as listed on the websites of the Commission of European Family Law and the European Judicial Network, I came to the obvious conclusion that there are fundamental differences between the member states as to the objectives their divorce laws are meant to achieve. They range from the rigid position of Malta, where divorce is not allowed at all, to the liberal attitude of Spain, where divorce will be granted for no specific reason as long as the marriage has lasted at least three months.[32] In between, there is a wide variety of conditions, such as mutual consent, or in the absence of agreement, fault on

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30. W. PROSSER, Interstate Publication, 51 *Mich. L.Rev*. 959, 971 (1953).
31. On the values and objectives underlying various divorce laws, see, generally: MASHA ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, Antwerp/Oxford, 2006, notably Chapter 14. A (no longer quite up-to-date) overview of the grounds for divorce in 22 European countries can be found in: *European Family Law in Action, Vol. I: Grounds for Divorce* (eds. KATHARINA BOELE-WOELKI *et al*.), Antwerp/Oxford/New York, 2003.
32. See Article 86 Spanish Civil Code, as amended by *Ley 15/2005 de 8 julio 2005*, *B.O.E.* no. 163, 9 July 2005, p. 24458 ff.

the part of one of the spouses, or a de facto separation for at least six months in the Czech Republic to five years in Cyprus.[33] In quite a few member states, a divorce may be refused if it would be detrimental to the interests of the couple's minor children[34], or if the financial support of the children and the other spouse cannot be warranted.[35] In other words: divorce can hardly be considered as a phenomenon in which the community to which the spouses belong, or have belonged, has no interest. On the contrary, most states display a very strong interest in the dissolution of a marriage, resulting in rather restrictive grounds for divorce. All in all, it can be concluded that some member states – and I think they are a minority – support a policy of allowing divorce by mutual consent or for non-specific reasons, while other states continue to adhere to a type of divorce which depends on fault or, at least, on a prolonged period of separation. The latter type reflects a strong public interest, while the former confirms a trend towards privatization.[36] In between are those systems that make an exception for divorce by mutual consent, but rely on specific grounds in the absence of an agreement.[37]

6. THE METHODOLOGICAL VALIDITY OF THE PROPOSED CHOICE-OF-LAW RULES

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33. The five-year period applies to marriages concluded before the adoption of the 'Marriage Law of 2003' and to marriages concluded abroad. If the marriage is within the scope of the Marriage Law 2003, the separation period is four years rather than five, the same duration as prescribed by Irish or Greek law. In France, the separation period used to be six years. Since the enactment of *Loi no. 2004-439 du 26 mai 2004 relative au divorce*, it has been reduced to two years: Art. 238(1) *Code civil*.

34. See, *e.g.*, Article 1568 of the German Civil Code. According to the information available on the website of the European Judicial Network – which, with regard to the grounds for divorce of some member states, has proved to be not quite reliable – a divorce may be refused in Latvia 'in exceptional circumstances where the preservation of a marriage is necessary for specific reasons relating to the interests of a minor born within the marriage', a phrase that could have been copied from the German provision.

35. *Cf.* Article 5(1)(c) of the Irish Family Law (Divorce) Act 1996, and the conclusion by GEOFFREY SHANNON in his reply to question 4 of the CEFL 'Questionnaire on Grounds for Divorce and Maintenance between Former Spouses': 'The Irish court has the power to refuse to grant a decree of divorce in circumstances where it is not satisfied that proper financial arrangements have been put in place to ensure that the spouses and dependent family members have been catered for ...': *European Family Law in Action, supra,* note 31, at p. 86/87. In answer to the same questionnaire (question 21), ANDRZEJ MACZYNSKI and TOMASZ SOKOLOWSKI describe a similar exception in the divorce law of Poland: 'Grave financial or moral hardship to one spouse may exclude the divorce if the court finds it contrary to the principles of social intercourse'. *Ibid.*, at p. 268.

36. Even so, divorce brings about a change of personal status, which is usually considered a matter regarding public policy. That is why in most member states a divorce can only be granted by a court of law. On the other hand, an administrative divorce (granted by an administrative authority) is allowed in Denmark and Portugal. As a means to reduce the workload of the courts, it is now under discussion in some other member states, notably the Netherlands and the Czech Republic.

37. For instance: under Belgian law, a divorce may be granted on the ground of mutual consent, or, in the absence thereof, on the ground of fault (adultery, acts of violence, abuse, *injures graves*), or on the ground of a separation for at least two years.

Which conclusions with respect to private international law can be drawn from these observations on substantive divorce law? In my view, the first conclusion is this: the national views on divorce as a social phenomenon – or to put it differently: the social policies underlying the substantive divorce laws of the member states – are too divergent to support the unification of their conflicts rules on the basis of any other choice-of-law principle but the principle of the closest connection. The principle of party autonomy can hardly be reconciled with the notion that divorce cannot be granted on the ground of mutual consent, a view that 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 favored: 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.[38] That leaves us – at least as a basis for unification – with the neutral choice-of-law criterion of the closest connection.

My second conclusion is that the strong social policies expressed in the divorce laws of the various member states are likely to be ignored if a so-called 'neutral' conflicts rule is adopted, a rule which is blind to the result it achieves in terms of substantive law. In other words, an impartial, value-free rule based on the principle of the closest connection is unfit to designate the applicable law in an area in which the corresponding substantive laws reflect deeply ingrained cultural and perhaps religious attitudes of the communities concerned. This conclusion is confirmed by the inclusion, in the draft of 12 January 2007, of an exception allowing the application of lex fori where the applicable law 'does not provide for divorce'.[39] Whatever the proper interpretation of that phrase, it is clear that this provision introduces an alternative reference rule allowing a choice between *lex causae* and *lex fori* in favor of divorce. I consider this addition as an expression of a *European* policy, supporting divorce at least as an *ultimum remedium* that cannot be denied on the sole ground that it is not allowed in the state with which the spouses are supposed to be most closely connected. Yet, I am afraid that it does not solve the problems that are likely to arise under a choice-of-law approach that is still basically 'neutral'. The same is true of the proposed escape clause displacing the law of the

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38. At the CEFL conference in Oslo, someone suggested to me that a respondent opposing the divorce should be considered as the weaker party. I cannot quite see why a respondent in divorce proceedings would be more in need of protection than any other party acting as a defendant. Carried to its extreme, this suggestion implies that any lawsuit should be governed by the defendant's personal law.
39. *Supra*, note 15 and accompanying text.

last common habitual residence in favor of lex fori.[40] While it is obviously inspired by the *favor divortii* – what other motive could one have for requesting the displacement of a foreign divorce law?[41] – its effect is reduced by the requirement that the spouses had their last common habitual residence abroad for less than three years.

My third conclusion follows from the other two. I think it is unwise to force the harmonization of choice-of-law rules in a sensitive area such as divorce, where the substantive laws of the member states are based on conflicting policies, and to do so on the neutral basis of the closest connection. Unless we assume that judges are robots, mindlessly applying the divorce law designated by the Regulation, it is to be expected that they will try to escape a choice-of-law result that does not sit well with the standards and values cherished in the forum state. If they are obliged to apply foreign law, chances are that they will find that law too liberal or too strict, depending on the prevailing attitude towards divorce in the forum state. Two examples may illustrate this view. Let us suppose that a Dutchman has been posted in Ireland to work there for a Dutch company for a period of five years. His wife has joined him, and the couple have lived in Ireland for just three years when the husband has an extramarital affair. The marriage breaks down, and the wife decides to go back to Holland.. She files for divorce in the Netherlands, and unless she and her husband have chosen Dutch law, the Dutch court will have no alternative but to apply Irish law, as the spouses were last habitually resident in that country and the husband still resides there.[42] Under Irish law, a divorce can only be granted if there is no reasonable prospect of reconciliation and the spouses have been living apart for at least four years. As a judge, I would be inclined to manipulate the connecting factors. I could say, for instance, that the spouses were only temporarily in Ireland and that they thus retained

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40. *Supra*, note 19 and accompanying text.
41. Assuming that the respondent is opposed to divorce, he or she may have an interest in requesting the application of lex fori if it is less divorce-friendly than the law of the spouses' last habitual residence. For instance: a Swedish husband and an Irish wife have been living in Sweden for less than three years when their marriage breaks down and the wife returns to Ireland. If the husband brings suit in Ireland, the court would have to apply Swedish law as the law of the couple's last common habitual residence, unless the wife requests the application of Irish law. Since the escape clause was meant to further the *favor divortii*, I think the right to request the application of lex fori should only be granted to petitioners. In the Presidency's 'non-paper' of 21 March 2007, the text of the escape clause still refers to a request by 'the applicant'. In the draft of 28 June 2007, the proposed text refers to 'one of the spouses'. If this text were to be adopted, petitioners should be advised to look for a divorce-friendly forum: in that case, the escape clause would be of no use to the respondent.
42. If an escape clause were to be adopted as phrased in the draft of 28 June 2007 (*supra*, note 40 and accompanying text) and the couple had been living together in Ireland for less than three years, the wife could request the application of the Dutch lex fori instead of Irish law. To be on the safe side, I have let my hypothetical couple live in Ireland for three years. Without the escape clause, this period could be much shorter.

their habitual residence in the Netherlands. Or I could refuse point-blank to apply Irish law, finding some reason why it would violate Dutch public policy. At any rate, I would be greatly frustrated by being unable to grant a divorce to a Dutch petitioner living in the Netherlands, on the sole ground that her Dutch husband still lives in Ireland, the country of the spouses' last habitual residence. If the respondent had moved to Sweden, I could have applied Dutch law as their common national law, and if he had been Irish and moved to Sweden, Dutch law would be applicable as lex fori. Thus, the Brussels II-*ter* proposal turns divorce choice of law into a lottery.

My second example illustrates the reverse situation. A Polish man, living in the Netherlands, marries an Irish woman in 2005. In a prenuptial agreement, they have chosen Dutch law as the law applicable to their divorce.[43] After one year in Holland, the couple move to Poland, where the wife acquires Polish citizenship. Ten years later, just after their second child is born, the marriage breaks down as a result of the husband's adultery. The husband wants to marry his new girlfriend and sues for divorce in Poland, claiming that Dutch law applies as the law chosen by the spouses in 2005. Under Dutch law, a divorce will be granted if the marriage has irretrievably broken down, which is automatically the case if one of the spouses petitions for divorce. Under Polish law, the court should take account of the effect the divorce may have on the welfare of the couple's minor children, and besides, an adulterous spouse has no right to ask for divorce anyhow. What would a Polish court be inclined to do? Under Brussels II-*ter*, it would be bound to apply Dutch law, but I have a feeling that it would be very much tempted to resort to some kind of escape device. It could argue, for instance, that this it not an international case, as both parties are Polish citizens and living in Poland. Or it could argue that a choice of Dutch law is only allowed if it is the law of the forum, or that Dutch conflicts law does not permit choice-of-law agreements when they are part of a marriage contract.[44] Or it could declare the liberal Dutch law to be in violation of Polish public policy.

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43. Such a choice would be valid under Art. 20a(1)(a) Brussels II-*ter*. In a transitional provision – Article 1a of the draft of 28 June 2007, at p. 12 – agreements on choice of forum or choice of law in matters of divorce and legal separation are declared effective even when concluded before the Regulation enters into force, provided such an agreement fulfils the conditions of Art. 3a or, respectively, Art. 20a and is in accordance 'with the national law of a Member State'. The latter phrase apparently refers to the law of the member state whose court or, respectively, whose law was chosen by the parties. Under Dutch conflicts law, spouses have a right to choose Dutch law as the lex divortii: Art. 1(4) *Wet conflictenrecht echtscheiding*.

44. Actually, Dutch law does not expressly prohibit forum selection clauses or choice-of-law clauses laid down in prenuptial agreements. However, the Polish court might base its finding on the position the Dutch delegation has taken in the negotiations on Brussels II-*ter* with regard to the date when such agreements might be concluded at the earliest; see *supra*, note 23 and accompanying text.

7. ALTERNATIVE SOLUTIONS

In my view, the choice-of-law approach adopted in Article 20b of the Brussels II-*ter* proposal is methodologically unsound. Its main shortcoming is its focus on the closest connection as an overriding choice-of-law consideration in an area in which strong social policies determine the contents of the corresponding substantive law. The fact that those policies are largely incompatible does not justify a 'neutral' approach on the basis of the closest connection, as its results will prove to be unsatisfactory, not to say unacceptable, in cases in which the applicable foreign law is in direct conflict with lex fori. As a consequence, the courts will be tempted to resort to all kinds of escape devices for which modern conflicts law no longer has much use.

If the Commission's choice-of-law proposal should be rejected on these grounds, one might well ask: what are the alternatives? I think there are two, perhaps three. The first one is in line with the position the Dutch Parliament has taken in a letter to the European Commission[45], in which the proposed harmonization of divorce choice of law was rejected as being contrary to the principles of subsidiarity and proportionality, and on the ground that there was no evidence that the Commission's proposal would further the proper functioning of the internal market, as required by Article 65 of the EC Treaty.[46] The conclusion was that the provisions on choice of law should be deleted from the proposal. Since I fully agree with this point of view, that would be my first alternative. However, the Commission was quick to reply[47] that it was not impressed by these objections, and I am told that very few member states – apart from the United Kingdom and Ireland – agreed with the Dutch view. So, to be realistic, let me suggest a more constructive alternative. It has the attraction of being simple, completely in

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45. Letter to the European Commission dated 26 September 2006; *Kamerstukken* 2006-2007, 30671, E and no. 5.
46. *Cf.* JOHAN MEEUSEN, System Shopping in European Private International Law in Family Matters, in: *International Family Law for the European Union*, *supra*, note 24, p. 239-278, at p. 270: 'Unfortunately, no satisfactory legal basis for Community harmonisation of private international law in family matters seems available at this moment.' *Id.*, Op weg naar een communautair internationaal familie(vermogens)recht? Enkele Europeesrechtelijke beschouwingen (Report for the 2006 meeting of the Netherlands International Law Association), *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* no. 33 (2006), p. 1-73, at p. 15 ff., p. 33 ff., suggesting that the proper legal basis for the harmonization of conflicts law should be found in the EU's general objective of offering its citizens an 'area of freedom, security and justice' rather than in Article 65 (at p. 41).
47. Letter to the Dutch Parliament dated 7 December 2006, *Kamerstukken* 2006-2007, no. 30671, F and no. 6.

line with the objectives of choice-of-law harmonization, and allowing the member states to preserve their own ideological views on divorce. The only conflicts rule that meets all these conditions is the one referring to forum law. In other words, Article 20b(1) should be reduced to its final paragraph.

Let me explain why I think this is a reasonable alternative. First of all, no member state could have any objection to applying its own divorce law, so there would be no need for resorting to all kinds of twisted reasoning or the blunt axe of public policy to escape an unwelcome choice-of-law result. Second, the main objective of the harmonization of divorce choice of law, according to the Commission, is to further legal certainty and predictability. In international cases, spouses should know in advance which law will govern their separation or divorce. That kind of certainty and predictability, if you believe in it, can be achieved by a *lex fori in foro proprio* approach. No petitioner or respondent could be unduly surprised if a local court applies local law. In my own practice as a judge, I have noticed that foreign spouses naturally assumed I would apply Dutch law. The suggestion that their common national law might be applicable came as an unexpected and in many cases unwelcome surprise. A regulation requiring all member states to apply their own law in divorce cases unless the parties have chosen the applicable law themselves, puts an end to the discordance between the conflict-of-law rules of the member states. A choice-of-law rule referring to lex fori is no less a conflicts rule than the one referring to the (last) common residence or nationality of the spouses, and if the European Community is bent on harmonizing conflicts rules I do not see why its conflicts rule for divorce could not be modelled on a rule that, by a combination of jurisdiction and choice of law, is in effect more widespread in the member states than any other, and definitely more current than the rule under discussion.

Thirdly, in its reply to the Dutch Parliament the European Commission once more advanced the argument that harmonization of divorce choice of law would prevent a ‘rush to the court’. Obviously, a lex fori approach does not solve the problem of forum-shopping. On the other hand, it has been emphasized in several comments that there is no evidence to support the suggestion that forum shopping frequently occurs. If it does, it has probably nothing to do with the divorce as such, but only with the parties’ intention to swing the law applicable to

maintenance obligations or, perhaps, matrimonial property.[48] Furthermore, I submit that forum-shopping, if it is a real problem at all, had better be countered by a reduction of jurisdictional grounds than by a colorless uniform conflicts rule that invites judicial manipulation.

Finally, I should like to say something about the proposition that a uniform conflicts rule for divorce – or any other topic of family law for that matter – will promote the proper functioning of the internal market. In my view, the choice between lex fori and foreign law in matters of family law has no bearing on the internal market in general, or on the free movement of persons in particular. Whether or not a divorce will be granted, a maintenance claim upheld, an adoption allowed, a name changed, paternity established, etc., etc. – the application of law X or law Y *as such* does not affect the freedom of movement of the persons involved. That freedom can only be impeded if the status quo created in one member state, either by operation of law or by judicial decision, is not recognized in another. Choice of law has nothing to do with it. As long as all member states are obliged to recognize a divorce granted in an EU sister state, regardless of the applicable law and regardless of the substantive grounds for divorce, a uniform choice-of-law rule referring to the law of the forum cannot be an obstacle to the free movement of persons.

Even if I may have convinced most of my colleagues attending the CEFL Conference in Oslo[49], where I presented my views as stated above, I do not have the illusion that my contribution will slow down the momentum of the legislative process in Brussels, which has already gone far beyond the stage of fundamental criticism and methodological objections. My best hope, then, is that major support will still come for the French proposal to apply lex fori if neither party raises the choice-of-law issue and insists on the application of foreign law. If, in the absence of a choice by the parties, an outright reference to lex fori is considered a bridge too far, facultative choice of law is probably the next best thing.

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48. It is hard to see why a spouse who does *not* want to be divorced should 'rush' to a court to start divorce proceedings. On the other hand, if both spouses want a divorce one of them might benefit from seizing a court that will grant the divorce, under the applicable law, on the ground of the respondent's fault. As a result, the respondent may be prevented from claiming maintenance. Conversely, a petitioner may benefit from seizing the court of a state where maintenance between ex-spouses is governed by the lex divortii (as prescribed by Art. 8 of the Hague Maintenance Convention 1973) and that law is more favorable to maintenance creditors than the one that would be applied by the courts of another state. Such benefits might justify the harmonization of choice of law with regard to maintenance, or the abolition of fault-based divorce, but a rush to the courts, if any, will not be prevented by uniform conflicts rules for divorce as such.

49. During the debate following my presentation, no speaker came forward to defend the Commission's proposal against my criticism. Instead, there was widespread support for a lex fori approach.