Recent Developments in Harmonizing 'European Private International Law' in Family Matters

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A. Introduction

The number of 'international couples' in the European Union – spouses of different nationalities or those living outside their country of origin – is on the increase as a consequence of the free movement of persons. An important part of private international law rules relating to matrimonial matters have been unified by the Council Regulation of 27 November 2003 (hereinafter: Brussels IIbis Regulation).[1] However, there are currently no uniform rules concerning the applicable law in matrimonial matters on the European Community level. In the view of the EU legislator, differences in substantive law, as well as in conflict of law rules in Member States result in legal uncertainty and unpredictability for the parties in matrimonial proceedings.[2]

The need to deal with this problem was already recognized in 1998, when the Justice and Home Affairs Council adopted the Action Plan on how to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice.[3] There it was suggested to "examine the possibilities to draw up a legal instrument of the law applicable to divorce" within five years.[4] In 2004 the Council reaffirmed that it attached great importance to judicial cooperation in family matters. The Commission was thereby invited to submit a Green Paper on, *inter alia*, conflict of laws in matters relating to divorce ('Rome III') in 2005.[5] In the Green Paper[6] the Commission emphasized the need to harmonize

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1 Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338/1 (hereinafter: Brussels IIbis Regulation).

2 Explanatory Memorandum, COM (2006) 399, at 2 (hereinafter: Explanatory Memorandum).

3 Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, adopted by the Justice and Home Affairs Council on 3 December 1998, OJ 1999 C 19.

4 *Id*., para. 41.

5 The Hague Programme Strengthening Freedom, Security and Justice in the European Union, Presidency Conclusions – Brussels, 4/5 November 2004, at 40.

6 Green Paper on Applicable Law and Jurisdiction in Divorce Matters presented by the Commission, 14 March 2005, COM (2005) 82 final.

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conflict of law rules and to amend the rules on jurisdiction. The purpose of such harmonization was to ensure legal certainty, as well as to find satisfactory solutions for 'international' parties in matrimonial proceedings.

The necessity to unify private international law rules in matrimonial matters is not unanimously shared among EU Member States. On the contrary, some strongly disapprove of the activities of EC law-makers in family law matters. In particular, the scope of competence of the European Community in private international family law has been a controversial issue. Moreover, the measures in the field of judicial cooperation in civil matters having cross-border elements adopted by the Community institutions are not binding in all Member States. Denmark, the United Kingdom and Ireland are not bound by such measures, according to the Protocols annexed to the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC). The United Kingdom and Ireland have used the possibility to opt in with regard to all Community instruments so far enacted, but both these Member States have stated that they do not wish to participate in the adoption and application of a regulation specifically dealing with matrimonial matters. As far as Denmark is concerned, a similar possibility to opt in does not apply. There is, however, the possibility to enter into so-called parallel agreements with the European Union in matters where cooperation already exists.[7] Accordingly, a future Regulation will probably not apply in these three EU Member States.

The Brussels IIbis Regulation is intended to be revised by the Proposal for a Council Regulation amending Regulation (EC) no. 2201/2003 as regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters (hereinafter Proposal).[8] The Proposal will amend jurisdictional rules and introduce conflict of law rules in matrimonial matters. Pursuant to Article 2 of the Proposal, if an agreement is reached on the final text of the Proposal, the Regulation containing changes suggested in the Proposal will be applicable from 1 March 2008 onwards. However, no particular date is mentioned in the text subsequently proposed. If such an instrument comes into force, all private international law aspects of divorce – jurisdiction, applicable law and the enforcement of decisions – will be dealt with in one instrument.[9] Provisions contained in the Proposal,

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[7] Such parallel agreements have been entered into between Denmark and the European Union with respect to Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) and Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. Accordingly, these two Regulations apply in Denmark as of 1 July 2007, OJ 2007 L 94/70.

[8] Proposal for a Council Regulation amending Regulation (EC) no. 2201/2003 as regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters, presented by the Commission, Brussels, COM (2006) 399 final, 2006/0135 (CNS) (hereinafter: Proposal).

[9] Private international law aspects of other issues pertaining to family law are expected to be the subject of legal regulation on the European Community level. E.g., Proposal for a Council Regulation of 15 December 2005 on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations COM (2005) 649 final, Green Paper on Succession and Wills, COM (2005) 65 final, Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction

alterations subsequently made thereto, as well as the recent discussion relating to the provisions of the Proposal and suggested changes will be addressed in this article. In particular, consideration will be given to the Draft of 28 June 2007.[10]

B. Legal Basis and Objectives of the Proposal

Articles 61(c) and 67(1) TEU form the legal basis for the Proposal.[11] In compliance with Article 65, the provisions of the Proposal on jurisdiction and conflict of laws deal only with matrimonial matters with cross-border implications.

The form of a regulation has been chosen to unify the rules on conflict of laws and proposed rules on jurisdiction, as this requires no implementation in national law. This legal instrument has been chosen in the interest of legal certainty and predictability.

In general, the aim of the Proposal is to deal with the problems that 'international couples' are encountering under the legal framework currently in force in the European Union. These problems, as identified by the Commission,[12] are hereby summarized.

In the view of the EU legislator, strengthening legal certainty and predictability is one of the objectives to be attained by the Proposal. The idea is to do away with the disparity between conflict of law rules that apply in different Member States and to provide for harmonized private international law rules. Whereas some jurisdictions apply domestic law in cases of cross-border divorce (*lex fori*), others use a set of different connecting factors. The primary applicable rule is the one considered to be the most closely connected to the case, and connecting factors that follow have subsidiary application. Besides, it is held that a possibility for the parties to choose the law governing the divorce is insufficiently accepted among the Member States.[13]

In order to deal with these problems identified by the Commission, the Proposal introduces a limited possibility to choose the applicable law in divorce

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and Mutual Recognition, COM (2006) 400. Issues of applicable law, as well as jurisdiction and recognition of decisions are to be dealt with in these legal instruments.

[10] Draft by the German Presidency and the incoming Portuguese Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome III) and of the comments of delegations (17021/06 and ADD 1 to 18), No. 11295/07 of 28 June 2007, at: http://register.consilium.europa.eu/pdf/en/07/st11/st11295.en07.pdf, (hereinafter: Draft 28 June 2007).

[11] According to Articles 61(c) and 65, the Commission may adopt measures in the field of judicial cooperation in civil matters with international elements, which are necessary for the proper functioning of the internal market. Article 67 determines the procedures according to which such measures may be adopted.

[12] Explanatory Memorandum, COM (2006) 399, at 3-4.

[13] Only in a few countries of the European Union there is a possibility for the parties to agree on the law that will apply in matrimonial proceedings. A limited choice of law for the spouses is provided in Belgium, Germany and the Netherlands. Commission Staff Working Document of 19 July 2006, Annex to the Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, SEC (2006) 949, at 5.

cases. In the absence of such a choice, the applicable law will be the law with which spouses have a close connection. According to the Commission, that would provide legal certainty and prevent forum shopping. The Draft of 28 June 2007 in principle follows this approach, although the applicability of the *lex fori* as being primarily applicable in the absence of a choice of law has still been considered. In the view of the Commission, a harmonization of choice of law rules in divorce matters will also reduce the risk of a "rush to the court" by one spouse.[14]

A further problem is the fact that the jurisdictional rules of the Brussels IIbis Regulation do not apply to couples of different nationalities living in a country outside the EU. Indeed, pursuant to Article 7 it is possible for the courts in the Member States to proceed on the basis of jurisdictional rules under their national laws (the so-called 'residual jurisdiction'). However, the fact that these national rules are based on different criteria and that some Member States, such as the Netherlands[15] and Belgium, do not have any national rules on residual jurisdiction, have been perceived as major problems. Consequently, in the view of the Commission, such couples can be deprived of access to a court in a Member State of the European Union or even of access to any court. Finally, it is emphasized that decisions rendered in third countries may not easily be enforceable in a particular EU country, as they cannot be recognized under the Brussels IIbis Regulation.

The Proposal introduces changes to the existing rules on jurisdiction. In particular, it provides for a limited possibility to choose the competent court, in order to ensure access to the courts for EU citizens. Besides, it lays down a harmonized rule on residual jurisdiction.

Although the majority of the responses to the Green Paper supported the idea of introducing limited party autonomy and recognized the need to prevent a "rush to the court",[16] the suggestions of the Green Paper did not meet unanimous approval in all Member States. For example, the Dutch government expressed the view that there was no need either to unify the rules on conflict of laws concerning divorce or to introduce the possibility for the spouses to agree on the competent court. In the view of the Dutch government, the source of the problem was not the diversity of conflict of law rules, but the differences in the substantive law on divorce among the EU Member States. Should the Commission decide to draft

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[14] A risk of a 'rush to the court' is the result of multiple grounds of jurisdiction under the Brussels IIbis Regulation enumerated in Article 3 and the *lis pendens* rule according to which a court first seised will have jurisdiction. The party initiates proceedings before a competent court in a particular country in order to ensure the application of a substantive law which is favourable to him/her. Such a "rush to the court" may be prevented by harmonised conflict of law rules provided in the Proposal.

[15] P. Vlas & F. Ibili, *Echtscheiding en ouderlijke verantwoordelijkheid volgens de nieuwe EG-Verordering Brussel IIbis*, 6616 Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 263-271, at 264, n. 12 (2005), stating, *inter alia*, that there is no residual jurisdiction under Dutch private international law within the meaning of Article 7 of Brussels IIbis, referring to Article 4(1) of the Dutch Code of Civil Procedure. According to these authors, the only possibility for residual jurisdiction can be found in very exceptional circumstances under Article 9(b) of the Code of Civil Procedure (*forum necessitatis*).

[16] Explanatory Memorandum, at 5.

the Rome III Regulation, the Dutch suggestion was to introduce a choice of law by the spouses as a primary conflict of law rule and the *lex fori* as a subsidiary rule.[17] Others were concerned about the idea of harmonizing conflict of law rules because it would result in an obligation for the courts to apply foreign law. That would cause delays and increased costs in matrimonial proceedings.[18]

As to the rules on jurisdiction, the Dutch government considered the possibility to choose the competent court to be unnecessary and expressed the view that Article 3 of the Brussels IIbis Regulation already provided sufficient choice so that no additional basis for jurisdiction was needed.[19] Besides, it is stated that, despite a very liberal legal regulation in divorce matters, there is no evidence of forum shopping.[20]

The provisions of the Proposal relating to jurisdiction and choice of law apply only to legal separation and divorce, whereas a marriage annulment remains outside their reach, with the exception of the new rule on residual jurisdiction in Article 7. The same is true under the Draft of 18 June 2007.[21]

C. Amendments to the Rules on Jurisdiction

In accordance with Article 1(1) of the Proposal, the title of the Brussels IIbis Regulation (Regulation (EC) No. 2201/2003) is to be changed into "Council Regulation (EC) No 2001/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility as well as applicable law in matrimonial matters."[22] In the subsequent text as drafted by the Presidency on the basis of the meetings of the Committee on Civil Law Matters and the comments made by delegates,[23] the words "applicable law in matrimonial matters" in the title were replaced by the wording "applicable law in matters of divorce and legal separation". This change has been retained in the Draft of 28 June 2007.

A number of amendments to the rules on jurisdiction are suggested in the Proposal and in the Draft. In particular, a limited possibility to choose the competent court in proceedings relating to divorce and legal separation is introduced. Furthermore, it is suggested that the provision on the exclusive nature of jurisdiction contained in Article 6 of the Brussels IIbis Regulation should be

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17 K. Boele-Woelki, *International privaatrecht*, 55 Ars Aequi 3 (2006), Katern 98, at 5441, stating further that Sweden also expressed some objections with respect to the Rome III Regulation.

18 Explanatory Memorandum, at 5.

19 Boele-Woelki, *supra* note 17, at 5441.

20 *Id.*

21 The words "marriage and legal separation" in the relevant provisions of the Proposal and the Draft of 28 June 2007 indicate that the future Regulation would apply only to separation of married couples, and not to dissolution of other forms of family relationship, such as registered partnerships. The same is true under the Brussels IIbis Regulation, which in Article 1 refers to "divorce, legal separation and marriage annulment."

22 Hereinafter: 'Rome III'.

23 Note of the Presidency of 12 January 2007, 5274/07, available at: http://register.consilium.europa.eu/pdf/en/07/st05/st05274.en07/pdf (hereinafter: "Draft 12 January 2007").

deleted. This provision has been the subject of extensive discussion in legal literature, particularly in connection with Article 7 and with the question of the scope of application of the Regulation. Finally, Article 7 on residual jurisdiction has been substantially altered.

I. Forum Selection in Proceedings Relating to Divorce and Legal Separation

Article 12 of the Brussels IIbis Regulation provides, under certain circumstance, the possibility to agree on the competent court in matters of parental responsibility,but not in the patrimonial matters.[24] The jurisdictional rules are to be amended so as to allow the parties to choose a competent court in proceedings relating to divorce and legal separation under certain conditions. Firstly, the choice is limited to the courts of the Member States with which there is a "substantial connection" (*infra* section 1). Secondly, both the Proposal and the Draft of 28 June 2007 require that a choice of court agreement must be concluded in writing and provide for a definition of the requirement of a 'written form' (*infra* section 2).

1. Requirement of a "Substantial Connection" with a Member State

According to Article 1(2) of the Proposal, Article 3a is to be inserted in the text of the Brussels IIbis Regulation. Article 3a is entitled "Choice of Court by the Parties in Proceedings Relating to Divorce and Legal Separation". According to this provision, the parties in these proceedings are allowed to choose the court or courts of a Member State with which "they have a substantial connection". The Proposal does not indicate which point in time is relevant for determining whether "a substantial connection" exists.[25] The Draft of 12 January 2007 specifies that the time of making the choice of court agreement is relevant in that respect. Besides, the Draft of 28 June 2007 further elaborates this issue and introduces some alterations to the text of the Proposal.

First, such a close connection is considered to exist in all cases mentioned in Article 3 of the Regulation as grounds for jurisdiction in matrimonial matters (Art. 3a para. 1(a) of the Proposal). The Draft of 28 June 2007 further specifies that such "a substantial connection" with a Member State is considered to exist if the court in that Member State has jurisdiction under Article 3 at the time the court is seised.

In addition, a close connection is deemed to exist with the "place of the spouses' common habitual residence for a minimum period of three years" (Art. 3a para. 1(b) of the Proposal). The Proposal did not specify whether it was decisive that the parties in a Member State had a common habitual residence there for three years immediately before the filing of the divorce petition or whether it was sufficient that the spouses once had a habitual residence for three years in a Member State.

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[24] *See infra*, section 2 Requirement of a Written Form for a Choice of Court Agreement.

[25] *Cf.* F. Ibili, *Van 'Brussel II' en 'Brussel IIbis' naar 'Brussel IIter'; voorstel tot introductie van forumkeuze in conflictenregels in het IPR-scheidingsprocesrecht*, 137(6685) WPNR 743, at 744 (2006).

In the Draft of 28 June 2007 an attempt has been made to clarify this point. Thus, it requires that "at the time the agreement is concluded, it is the Member State of the spouses' last […] habitual residence for at least a period of three years provided that this period did not end more than three years before the court was seised." This seems to imply that the parties may agree on the competence of the court in a Member State in which they had a common habitual residence for at least three years, provided that the choice of court agreement is concluded and divorce proceedings are commenced within three years from the moment that the spouses' common habitual residence ended.

Finally, the Proposal provided that a close connection was deemed to exist with a Member State whose nationality one of the spouses had or, in the case of the United Kingdom and Ireland, if one of the spouses had his/her domicile in one of the two countries (Art. 3a par. 1(c) of the Proposal). The Draft of 28 June 2007 further specifies that such a close connection exists if one of the spouses has the nationality of that Member State at the moment when the agreement, providing for jurisdiction of the court of that Member State, is concluded. The wording relating to domicile in the United Kingdom and Ireland is supposed to be addressed at a later stage.[26] This is due to the fact that these two states have opted not to take part in this EU instrument. Besides, the issue of multiple nationalities is not covered, but is left to national law.[27]

Thus, according to Article 3a of the Proposal and of the Draft of 28 June 2007, the parties in proceedings relating to divorce and legal separation may choose the court or the courts in the Member State if this state is:

(1) the state of habitual residence of the spouses; or

(2) the state of the last common habitual resident of the spouses, if one of them still resides there; or

(3) the state of habitual residence of the respondent; or

(4) the state of habitual residence of either of the spouses in the case of their joint application; or

(5) the state of habitual residence of the applicant if she or he resided there for at least a year immediately before the application was made; or

(6) the state of habitual residence of the applicant and if she or he resided there for at least six months immediately before the application was made and she or he is a national of this state;[28] or

(7) the state of common nationality of the spouses;[29] or

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[26] Draft 28 June 2007, at 3, note 4.

[27] This is intended to be referred to in the recital not only with respect to this provision, but with respect to other provisions where nationality is the relevant connecting factor, namely Articles 7(b), 20a(1)(b) and 20b(1)(c) and 1a. *Id*., n. 3.

[28] The reference to 'domicile' in the United Kingdom and Ireland in Article 3 of the Brussels IIbis Regulation is presumably of no relevance in this context.

[29] The reference to common 'domicile' in the case of the United Kingdom and Ireland in Article 3 of the Brussels IIbis Regulation is probably not relevant in this context.

(8) at the time the agreement is concluded it is the Member State of the spouses' last common habitual residence for a minimum period of three years, provided that this period did not end more than three years before the court was seised; or

(9) one of the spouses has the nationality of that Member State at the time of the conclusion of the choice of court agreement.[30]

The grounds indicated under (1)-(7) are the basis of jurisdiction in matrimonial matters under Article 3 of the Brussels IIbis Regulation. By introducing the last two grounds (under (8) and (9)), couples of different nationalities living outside the EU would be given the opportunity to petition for divorce in a Member State. Under the Brussels IIbis Regulation currently in force, there is no possibility for the courts in the Member States to ascertain jurisdiction regarding couples of different nationalities residing in a non-EU country. The new rules to be introduced under the Proposal are intended to diminish such difficulties for spouses of different nationalities living in a third country.[31]

However, it is indeed questionable whether problems of this kind are encountered on such a large scale to justify revising the Brussels IIbis Regulation so substantially. In particular, considering that only a few states within the EU do not have the rule on "residual jurisdiction" it is doubtful whether this gives rise to problems in a large number of cases. Similarly, the recognition of matrimonial decisions rendered abroad which do not fall within the scope of application of the Brussels IIbis Regulation may be based on the national law of a Member State. In other words, such decisions do not have to be generally unenforceable in a Member State. Accordingly, it is by no means certain that the lack of provisions on "residual jurisdiction" necessarily results in a denial of an access to court for spouses with a nationality of different Member States living outside the EU. It is not clear how often such spouses encounter the problem to file the petition for divorce before the competent court within or outside the EU and whether any problems are encountered in having such decisions rendered outside the EU be recognized in the Member States.

2. Requirement of a Written Form for a Choice of Court Agreement

According to Article 3a(2) of the Proposal, an agreement on the competent court is to be "expressed in writing and signed by both spouses at the latest at the time the court is seised." Regarding the moment of the conclusion of the forum-selection agreement, the Draft of 28 June 2007 slightly modifies the wording, but retains the same approach as the Proposal.[32]

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[30] The Proposal provided that in the case of the United Kingdom and Ireland, the choice of court agreement could have been made if one of the spouses has her or his 'domicile' in the territory of one of these Member States. Considering that the United Kingdom and Ireland have not opted into this instrument, it was concluded that the Committee should return to this provisions at the later stage of the drafting process. *See* Draft 28 June 2007, n 4.

[31] The difficulties that were identified by the EU legislator are addressed*, supra* in section 2.

[32] Article 3a para. 2 of the Draft provides that "[a]n agreement conferring jurisdiction may be concluded and modified at any time, by at the latest at the time the court is seised."

As to the requirement of a written form, in a newly introduced paragraph 3 in Article 3a the Draft provides that the agreement "shall at least be expressed in writing, dated and signed by both spouses." Furthermore, it introduces the possibility that stricter formal requirements for a choice of court agreement or a marriage contract containing such an agreement in the Member State of habitual residence of either of the spouses may prevail over the written form requirement under the future Regulation. Thus, the possibility to apply stricter formal requirements under national law is not relevant if the parties have a habitual residence outside the EU, in which case only the criterion to be provided under the Regulation would apply.[33] The Commission will be informed about formal requirements for choice of court or marriage contracts of a Member State and shall make this information publicly available. The Draft of 28 June 2007 introduces an express provision according to which a choice of court agreement shall be considered to confer exclusive jurisdiction, unless the spouses have agreed otherwise (Art. 3 para. 4).

When compared to Article 23(1)(a) of the Brussels I Regulation, the requirement of a written form under the Proposal, as well as under the Draft of 28 June 2007, is more stringent than the "definition" under the Brussels I Regulation.[34] Namely, there is no requirement under the Brussels I Regulation that the agreement must be "signed" by the parties.

There is no provision in the Proposal that corresponds to Article 24 of the Brussels I Regulation.[35] Consequently, a court in a Member State, the competence of which cannot be based on Articles 3, 3a, 4 or 5, cannot ascertain its jurisdiction in proceedings relating to divorce and legal separation merely because a respondent enters an appearance without contesting jurisdiction. The Draft of 28 June 2007 introduces changes in that respect. It does provide the possibility for a court of a Member State before which the respondent enters an appearance to ascertain jurisdiction, provided that this court would otherwise have jurisdiction under the Regulation. This rule will not apply if the respondent has entered an appearance in order to contest jurisdiction (Art. 3 para. 5).

Accordingly, the form requirement of the choice of law agreement in matrimonial matter in the Proposal and in the Draft of 28 June 2007 differs from the written form requirement in a choice of court agreement in matters of parental responsibility under Article 12 of the Brussels IIbis. The latter is also less stringent than the form requirement for forum selection clauses in matrimonial matters. This is true for the agreements on prorogation of jurisdiction under both paragraphs 1 and 3. Paragraph 1 determines the conditions under which

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[33] Draft 28 June 2007, at 3. n. 6.

[34] According to Article 23(1)(a) of the Brussels I Regulation, an agreement on prorogation of jurisdiction shall be "in writing or evidenced in writing." The written form is further defined as a form that is in accordance with the practice between the parties (Art. 23(1)(b)) or a form that is in accordance with a usage of which the parties were aware or should have been aware (Art. 23(1)(c)).

[35] Article 24 of the Brussels I Regulation reads as follows: "Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22."

the courts having jurisdiction in divorce, legal separation or marriage annulment will have jurisdiction in any matter relating to parental responsibility. This will be the case if one of the spouses has parental responsibility in relation to a child and "the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the best interest of the child." The same wording "accepted in an unequivocal manner" is also used in paragraph 3 of Article 12 Brussels IIbis Regulation, relating to the prorogation of the jurisdiction of courts other than those having jurisdiction in matrimonial matters. Thus, there is no requirement for signatures in such agreement, but only the requirement of an acceptance in an unequivocal manner. This can be explained by the fact that the prorogation of jurisdiction under Article 12 can only be made at the time the court is seised. In contrast, a choice of court agreement in the case of divorce can be concluded at any time, for example it can be included in the marriage contract. Besides, the 2007 Draft has introduced the possibility of a "tacit" acceptance of jurisdiction in matrimonial matters, as mentioned previously. In doing so the requirement of a written form has become more aligned with the approach taken in Article12 Brussels IIbis Regulation.

It is doubtful whether introducing the possibility of prorogation of jurisdiction is needed in order to effectively deal with the problems identified by the Commission. First of all, there is no evidence that there is indeed a problem of a "rush to the court." And even if this problem would exist, it is not clear whether the possibility of a choice of court is the best way to deal with the problem. In other words, prorogation of jurisdiction may have serious consequences, in particular if the court having jurisdiction in a divorce matter will be competent to decide on a division of matrimonial property and maintenance claims. Therefore, a weaker party should be protected in a similar manner as provided under the Brussels I Regulation.[36] This is particularly true with respect to choice of forum clauses inserted into marriage contracts. Besides, it may be doubted if such agreements should always be given effect considering that circumstances may have changed so significantly from the moment when the contract was concluded until the moment of the divorce petition.[37]

It is also questionable whether Article 3a of the Draft presents an appropriate manner to deal with the problem of a denial of access to court for some spouses. In particular, it remains unclear what purpose is intended to be achieved by providing the possibility for the spouses to agree on the jurisdiction of courts

[36] Similarly, considerations of protecting a weaker party may also justify limitations to the freedom to choose the law. See e.g., under the 1980 Rome Convention on the Law Applicable to Contractual Obligations, for certain types of contracts, such as consumer and labour contracts. *Cf.*, K. Boele-Woelki, *Vorschläge zur Unterhaltsverordnung und Scheidungsverordnung*, paper presented on 11 September 2007, Brussels, at 6 (available at: www.djb.de/Kommissionen/Kommission-zivil-familien-und-erbrecht/st07-19-EU-scheidung-unterhalt).

[37] *See also* the Report of the European Union Committee appointed by the House of Lords in the United Kingdom, 52nd Report of Session 2005-06 entitled Rome III-Choice of Law in Divorce, published 7 December 2006, at 10 (available at: http://www.parliament.uk/parliamentary_committees /lords_eu_select_committee.cfm.

which are already competent on the basis of the existing Brussels IIbis Regulation. In other words, the courts in these Member States will have jurisdiction anyway, either on the basis of a choice of court agreement or on the basis of general rules on jurisdiction under the Brussels IIbis Regulation. Spouses with different nationalities from different Member States would still not be able to agree on the jurisdiction of a court in a Member State, because there would be no jurisdiction under the existing rules of Article 3. The same is true for spouses who had their last common habitual residence in a Member State.

The possibility to choose a competent court is provided only in proceedings relating to divorce and legal separation, but not to marriage annulment. In the latter case, party autonomy is considered as an inappropriate criterion to determine jurisdiction.[38] The provision on residual jurisdiction in Article 7, discussed *infra* under II, applies to marriage annulment as well.[39]

II. Other Amendments Concerning the Rules on Jurisdiction

According to Article 1(3) of the Proposal, the reference to Article 3 in the provisions of Articles 4 and 5 of the Brussels IIbis Regulation is to be replaced by a reference to Articles 3 and 3a. In addition, the Draft of 28 June 2007 refers to Article 7 relating to "subsidiary jurisdiction". Thus, a court which has jurisdiction either on the basis of Article 3 or on the basis of prorogation of jurisdiction as provided for in Article 3a will also be competent to deal with a counterclaim which falls within the scope of the Regulation, in accordance with Article 4 of the Regulation. The same is true with respect to the issue of the conversion of legal separation into divorce under Article 5 of the Regulation.

A further important change relates to Article 6 (exclusive nature of jurisdiction under Articles 3, 4 and 5) and 7 (residual jurisdiction) of the Brussels IIbis Regulation. Article 6 of the Brussels IIbis has been the subject of various interpretations and has caused confusion, in particular in connection with Article 7 of the Regulation.[40]

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38 Explanatory Memorandum, at 8.

39 *Id*., at 9.

40 These were the provisions of Articles 7 and 8 of the Council Regulation (EC) No.1347/2000 of 29 May 2000 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160, 30/06/2000, at 19-36 (hereinafter: Brussels II). On the uncertainties concerning the territorial scope of application of Brussels II and Brussels IIbis in divorce matters, *see* P. Vlas, *Nieuw internationaal scheidingsprocesrecht: de Verordening Brussel IIbis*, 132(6444) WPNR 440-448 (2001); K. Boele-Woelki, *Brüssel II: Die Verordnung über die Zuständigkeit und die Anerkennung von Entscheidungen in Ehesachen*, 42 Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht 212-230 (2001); Th. M. de Boer, *Jurisdiction and Enforcement in International Family Law: a Labyrinth of European and International Legislation*, 49 Netherlands International Law Review 307-351 (2002). On difficulties in defining the scope of application of the Brussels IIbis Regulation regarding jurisdiction in matters of parental responsibility *see* Th. M. de Boer, *Enkele knelpunten bij de toepassing van de Verordening Brussel II-bis*, 10 Tijdschrift voor Familie- en Jeugdrecht 222, at 226 (2005).

1. Scope of Application

It seems that a major reason for confusion was the fact that the Brussels II Regulation, and thus also the Brussels IIbis Regulation, which remained unchanged in that respect, contained no provisions corresponding to Articles 3[41] and 4 of the Brussels I Regulation.[42] In connection with the scope of application of the Brussels I Regulation, the following can be concluded from these provisions:

(a) The Brussels I Regulation only applies if a respondent is domiciled in a Member State, with the exception of exclusive jurisdiction under Article 22 and the case of a prorogation of jurisdiction under Article 23. In other words, the courts in the Member States may base their jurisdiction on these provisions even if a respondent does not have a domicile in a Member State.

(b) A respondent with a domicile in a Member State can be sued in the courts of another Member State only on the basis of the rules of jurisdiction provided in the Regulation.

(c) If a respondent has no domicile in a Member State, any person domiciled in a Member State shall, notwithstanding his/her nationality, be able to rely on the national rules of jurisdiction applicable in this state.

In contrast to the clearly defined scope of application of the Brussels I Regulation, the Brussels IIbis Regulation does not have such a clear provision defining its formal scope of application concerning jurisdiction in matters relating to divorce, legal separation and marriage annulment.[43] Instead, it provides in Article 6 that the rules on jurisdiction under Articles 3, 4 and 5 apply exclusively if a respondent is either habitually resident in a Member State or a national of a Member State or, in the case of the United Kingdom and Ireland, is domiciled in these two states.

The rule on residual jurisdiction, contained in Article 7 of the Brussels IIbis Regulation, determines when the national rules on jurisdiction may be applied by a court in the Member States. As already stated, this provision, in particular in connection with Article 6 on the exclusive nature of jurisdiction, has been the subject of different interpretations. Thus, some authors have concluded that these two provisions imply the applicability of the Brussels II Regulation in the following situations, referring to Article 7 and 8: (a) if both spouses are nationals of the same Member State; (b) if one of the petitioners is habitually resident in

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[41] Article 3(1) of the Brussels I Regulation reads as follows: "Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter."

[42] Article 4(1) of the Brussels I Regulation provides as follows: "If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State." Concerning a defendant who is not domiciled in this Member State, any person domiciled in a Member State, regardless of his nationality, can avail himself of the national rules of jurisdiction in force in that Member State just as nationals of that state (Article 4(2) of the Brussels I Regulation).

[43] However, the scope of application is more clearly defined with respect to jurisdiction in matters of parental responsibility under the Brussels IIbis Regulation. It follows from Article 8 that the scope of application regarding parental responsibility is reduced to cases when a child has its habitual residence in a Member State at the moment the court is seised.

one Member State in case of a joint application; (c) the respondent is habitually resident in a Member State; or (d) is a national of a Member State.[44] Others have held that the scope of application of Brussels II and Brussels IIbis regarding matters of divorce, legal separation and marriage annulment is not limited, but instead has "universal application".[45]

What the intention of the legislator may have been is indeed not entirely clear. Yet it seems appropriate to apply the following line of reasoning when interpreting Articles 6 and 7 of the Brussels IIbis Regulation:

A respondent who is habitually resident in or is a national of a Member State or, in the case of the United Kingdom and Ireland, is domiciled in these two states can only be sued before the courts of another Member State according to the rules on jurisdiction under Brussels IIbis.

Accordingly, the competence of the court by the application of national rules on jurisdiction is limited to the following situation:

(a) If one of the parties in the matrimonial matter is either a national of a Member State or, in the case of the United Kingdom and Ireland, is domiciled in these two states or is a habitual resident of a Member State, but no Member State court has jurisdiction under the relevant provisions of Articles 3, 4 and 5 of the Brussels IIbis Regulation (Article 7(1)).

(b) A national of one Member State with a habitual residence in another Member State may rely on the national rules of jurisdiction of the state of his/her habitual residence, just as a national of that state (Article 7(2)).

Thus, the provision of Article 7 refers to the situation where the parties have no common habitual residence in a Member State and no common nationality.

Although there is no express limitation on the formal scope of application, it seems difficult to maintain that both the Brussels II Regulation as well as Brussels IIbis have universal application.[46] An analogy with the Brussels I Regulation in that respect may be appropriate, although this suggestion is rejected by some.[47] There are no obvious reasons that would justify different approaches regarding limiting the scope of application in unifying jurisdictional rules in commercial matters from unifying jurisdictional rules in patrimonial matters.

The solutions provided under the Proposal, as well as under the Draft of 28 June 2007, seem to support this view. Thus, the provision in Article 6 is to be deleted as it has been a source of constant confusion and is also regarded as superfluous.[48] However, some concerns were expressed by a number of delegates because the

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44 De Boer, *Jurisdiction and Enforcement, supra* note 40, at 322.

45 *See e.g.*, Vlas, *supra* note 40, at 264, stating, *inter alia*, that "het formele toepassingsgebid van de in de Vo-Iibis opgenomen bevoedgheidsregels voor echtscheidingsprocedures is onbeperkt ("the rules on jurisdiction in matrimonial matters provided for in the Brussels IIbis Regulation is universal"). *See also*, P. M. M. Mostermans, Echtscheiding 13 (2006).

46 *Cf.*, Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegría Borrás, Professor of Private International Law, University of Barcelona, OJ 1998 C 221/04, at 42, para. 45.

47 *See e.g.*, Mostermans, *supra* note 45, at 12.

48 Explanatory Memorandum, at 8

exclusive nature of the provisions on jurisdiction could be questioned so that courts could apply their own national rules next to the Regulation. Therefore it is discussed whether a recital should clarify that the deletion of Article 6 does not change the exclusive nature of the provisions on jurisdiction. Besides, the Proposal introduced a new provision on residual jurisdiction in Article 7.[49] This provision, entitled 'Subsidiary jurisdiction' is basically retained in the Draft of 28 June 2007, with some minor adjustments and clarifications, as will be addressed *infra*.

2. Subsidiary Jurisdiction

The idea is to have a uniform rule on residual jurisdiction which is applicable in all Member States, in order to be able to ascertain jurisdiction in patrimonial cases when the spouses reside in a country outside the EU, but have close links either with the state of their nationality or with a state where they resided for a certain period of time. Thus, Article 7 applies when

(a) neither of the spouses lives in a Member State and

(b) the spouses do not have common nationality (domicile in the UK and Ireland).[50]

In such cases the courts of a country where they had a previous common residence for at least three years are competent as the courts of a country whose nationality one of the spouses possesses.

Accordingly, it seems obvious that the intention of the legislators was not to provide for the universal application of the Brussels IIbis Regulation. The provisions of Articles 3-5 will apply if one of the spouses is habitually resident in a Member State or if the parties have a common nationality (or domicile in the UK and Ireland)[51] in a Member State. The uniform rule on residual jurisdiction applies if one of the spouses has the nationality of a Member State (domicile in the UK/Ireland)[52] or if the spouses were habitually resident in a Member State for at least three years. The Draft of 28 June 2007 further elaborates this point so as to specify that the period of three years must not have ended more than three years before the court was seised. In other words, it provides the possibility for the courts of the Member States to ascertain jurisdiction in cases where the spouses had or still have some connection with a Member State, when this would not be possible on the basis of their national rules on jurisdiction.

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[49] The fact that national rules on jurisdiction are based on different criteria was the subject of major concern. In the view of the Commission, even more problematic is the consequence of the current situation that the spouses, despite having a close connection with a Member State, may have no access to the courts in this state or even to any court at all. A decision rendered by the courts in a third state would most probably not be readily recognised in a Member State. Such drawbacks of the existing regulation are intended to be rectified by the new provision on residual jurisdiction.

[50] As already mentioned, a reference to "domicile" in the United Kingdom and Ireland should be reconsidered, as a consequence of the fact that the UK and Ireland have not opted into this EU instrument.

[51] *Id.*

[52] *Id.*

Article 7 applies to divorce, legal separation as well as marriage annulment.

Article 12(1) is to be amended to include a reference to both Articles 3 and 3a (Article 1(6) of the Proposal). This ensures that the court which is competent under Article 3a on the basis of a choice of forum by the spouses will have jurisdiction also in matters of parental responsibility connected with the matrimonial proceedings, provided that the conditions under Article 12(1) are satisfied. Thus, the court which is competent on the basis of prorogation of jurisdiction in the proceedings for divorce or legal separation under Article 3a will be competent in matters of parental responsibility connected with the matrimonial proceedings if:

- at least one of the spouses has parental responsibility (Art. 12(1)(a)), and
- if jurisdiction is "accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised", and
- if such jurisdiction is in "the superior interest of a child" (Art. 12(1)(b)).[53]

According to the Draft of 28 June 2007, it is still to be discussed whether or not Article 12(1) should contain a reference to Article 7 as well. In other words, it is still the subject of discussion whether or not the courts having jurisdiction on the basis of the provision on subsidiary jurisdiction to be introduced, will be competent to decide in matters of parental responsibility.

The scope of application of the Regulation with respect to jurisdiction in divorce matters has been significantly widened by the text of the Proposal and the Draft of 28 June 2007. Yet, there would still be no possibility to ascertain jurisdiction on the basis of the future instrument in cases where there is no or an insufficient connection between the spouses and a Member State. Namely, the courts in a Member State may ascertain their jurisdiction only according to Article 3, on the basis of Article 3a when there is choice of court agreement or on the basis of the provision on residual jurisdiction as set out in Article 7. In other words, Member State courts may not base their jurisdiction on the Regulation if a choice of court agreement has been concluded between the spouses who do not have a connection with a Member State as provided in Article 3a. The same is true for jurisdiction based on Article 7.

Indeed, Member State courts can base their jurisdiction on their national law if no jurisdiction can be ascertained under the provisions of the Regulation. In particular, this may be the case when parties without a connection to a Member State conclude a choice of court agreement designating jurisdiction to the courts of that Member State. However, from a practical point of view, cases in which there would be no possibility to base jurisdiction on the future instrument would be very exceptional. This is particularly so considering the wide scope of the suggested provision on residual jurisdiction.

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[53] *See also* Practice Guide for the Application of the New Brussels II Regulation, updated version of 1 June 2005, at 18.

D. Applicable Law in Matters of Divorce and Legal Separation

According to the Proposal (Article 1(7)), Chapter IIa entitled "Applicable Law in Matters of Divorce and Legal Separation" is to be inserted in the Regulation (Articles 20a-20e). A number of policy options was considered in order to deal with the drawbacks under Brussels IIbis currently in force. Harmonizing conflict of law rules and introducing a limited possibility for the spouses to agree on the applicable law was considered as an option that "would to a high extent increase legal certainty, party autonomy and flexibility."[54] In addition, it was considered to be an efficient method to deal with the problem of a 'rush to court': if the parties cannot reach agreement on the applicable law, the same conflict of law rules, based on the closest connection approach, would apply in all Member States.

The major disadvantage of this approach is the need to apply foreign law, which would lead to lengthy proceedings and consequently increased costs. Also, there is the risk of an incorrect application of foreign law. These issues were a major concern for those Member States which traditionally apply *lex fori* in matrimonial matters.[55] However, from a practical point of view, it is to be expected that the possibility of applying foreign law would be significantly reduced, considering that the connecting factors determined under the Proposal would in many cases still lead to the applicability of the *lex fori*. Namely, the first connecting factor to be considered in the absence of parties' choice of law is the common habitual residence of the spouses or, subsidiarily, their last common habitual residence if one of them still lives there. However, the Draft of 28 June 2007 further elaborates the provisions on the applicable law and introduces a number of changes.

The Proposal introduced a limited possibility for the spouses to choose the applicable law (Article 20a). However, it provided for conflict of law rules that would be applied in all Member States if no agreement had been reached between the spouses regarding the applicable law (Article 20b). Moreover, it introduced a number of provisions relating to the application of foreign law and obtaining information on the contents of that law, the exclusion of *renvoi* and the public policy exception (Articles 20c-20e). These provisions are briefly addressed below, as well as the manner in which the provisions on the applicable law were subsequently altered in the Draft of 28 June 2007.

It should be mentioned that a number of issues was indicated in the negotiations on the Regulation as needing further consideration. One such issue is the problem

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[54] Commission Staff Working Document, Annex to the proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, Impact assessment, Brussels, SEC(2006) 949, {COM(2006) 399 final} {SEC(2006) 950}, at 17.

[55] These are in particular the Scandinavian countries, the United Kingdom and Ireland. See in the United Kingdom the Report of the European Union Committee appointed by the House of Lords, 52nd Report of Session 2005-06 entitled "Rome III-choice of law in divorce, published 7 December 2006, at 6 (available at: http://www.parliament.uk/parliamentary_committees /lords_eu_select_committee.cfm.

resulting from the absence of divorce in the law of a state such as Malta. According to the Draft, it should clearly be stated that the courts in a Member State which lacks a substantive law on divorce will not be obliged to grant a divorce by virtue of applying this Regulation.[56] It still has to be decided whether there is a need to deal with cases where the only court that has jurisdiction is a court in a Member State which does not have a law on divorce.[57]

It should be emphasized that the scope of the applicable law governs only divorce and legal separation and does not have any consequences relating to property, maintenance and other issues. Besides, it also does not cover the law applicable to the definition and the conditions of the validity of marriage.

I. Choice of Law by the Parties

A limited possibility to choose the law applicable to divorce and legal separation is introduced in Article 20a(1). The parties' choice is limited to the following laws: (a) the law of the State where the spouses had their last common habitual residence, provided that one of them still lives there; (b) the national law of either of the spouses, or in the case of the United Kingdom and Ireland, if the 'domicile' of one of the spouses is in one of these countries; (c) the law of the state where they have resided for at least 5 years; or (d) the *lex fori*. Obviously, the parties who wish to initiate divorce proceedings on the basis of mutual consent will benefit the most from such a limited possibility to choose the applicable law. According to data for some Member States, it has been shown that a significant percentage of divorces are by mutual consent.[58]

In the Draft of 28 June 2007, the possibility for a limited choice of law by the spouses is retained. Thus, according to Article 20a the choice is limited to: (a) the law of the state which was the common habitual residence of the spouses at the time of concluding the choice of law agreement (Art. 20a(a1)); (b) the law of the state of their last habitual residence, if one of them still resides there at the time of concluding the agreement (Art. 20a(a)); (c) the national law of either spouse at the time the contract is concluded (Art. 20a(b)); or (d) the *lex fori.*

Regarding the requirements of formal validity, the wording in Article 20a(2) of the Proposal is virtually identical to the definition in Article 3a relating to the choice of court agreement. Thus, a choice of law agreement "shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised." Accordingly, the same approach is taken in the Proposal when defining the written form of both forum selection clauses and choice of law agreements with respect to divorce and legal separation.

The same is true under the Draft: the definition of the written form requirement remains the same for the choice of law and choice of court agreements. As already explained, the definition under the Draft differs slightly from the definition

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[56] Draft of 28 June 2007, at 6, n. 13.

[57] *Id.*, at 6, n. 16.

[58] Data for Italy, Luxembourg, Austria and Poland "show that between 70 and 90% of the divorces are made with mutual consent." *Id*.

under the Proposal. Similarly to the forum selection clause, it provides that an agreement on the choice of law "shall at least be expressed in writing, dated and signed by both spouses." The Draft also provides that this definition of written form may be overridden by more stringent requirements under the law of the habitual residence of either of the spouses or under the law which is applicable to a marriage contract in which a choice of law clause is included. If the spouses are habitually resident in different Member States, the choice of law agreement will be valid if it satisfies the requirements of either of the two laws providing for more stringent requirements.

As for the moment until which a choice of law agreement can validly be made, there seems to be no definite proposal in the Draft. It is not surprising that this issue has still not been discussed. Namely, it is difficult to justify the suggested provision under the Proposal according to which such choice could be concluded and modified at any time, but at the latest when the court is seised. In other words, there are no reasons why such a choice would not be permitted after the court has been seised. According to Article 20a paragraph 3 of the Draft, next to the moment when the court is seised, the conclusion a choice of law agreement should be possible "at the first hearing or, in the absence of a court hearing, in the course of the first exchange of writs, or in case of joint application, in the writ of application." In paragraph 4 it is suggested that such an agreement may be recorded in court, if a choice is made before the court in the course of proceedings.

In addition, an alternative to the text in paragraphs 2 and 4 is suggested: a choice of law agreement must be made at the latest at the moment the court is seised, but the spouses may also designate the applicable law during the proceedings before the court if the law of the form state so permits. In the latter case it is sufficient that such an agreement is recorded at the court. This seems to be a better approach, whereby there would still be a possibility for an agreement on the applicable law to be made at a later stage in the proceedings in a Member State, where the law provides for such a possibility. Other Member States would simply apply the provision of the Regulation.

As mentioned previously, the definitions in the Proposal, as well as in the Draft of 28 June 2007, differ from the approach taken in defining the written form of choice of court agreements under the Brussels I Regulation.[59] This is even more so with respect to the 1980 Rome Convention,[60] according to which there is no requirement of a written form for the validity of choice of law agreements. According to Article 3(1), "choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." A similar pattern has been retained in Article 3(1) of the Proposal for a Regulation on the law applicable to contractual obligations (Rome I).[61] Thus, the

[59] According to Article 23(1)(a) of the Brussels I Regulation, there is a written form requirement for the validity of a forum selection agreement or a written confirmation of an oral agreement in that respect.

[60] Convention on the Law Applicable to Contractual Obligations, Rome, 1980.

[61] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations, COM (2005) 650 final (hereinafter: Rome I).

choice must be expressed or demonstrated with reasonable certainty in the same manner as defined in the Convention, as only the words "behaviour of the parties" are added. Obviously, an implied choice is permitted, just as it is under the Rome Convention.

In contrast, the choice of law agreement under the Proposal, as well as under the Draft of 28 June 2007, must be "expressed in writing" and "signed by both spouses." Such a stringent requirement concerning a written form may also differ from corresponding provisions in the national law of some Member States. This would be the case, for example, in the Netherlands, which has a limited possibility for the spouses to choose the applicable law in divorce matters. Thus, the parties may choose the law of the Netherlands as the *lex fori*[62] or the law of the country of their common nationality.[63] Such a choice may be made either explicitly or if a choice by one party remains uncontested by the other. Thus, in these countries different 'criteria' for the written form may be applicable depending on which instrument applies, unless the Regulation would be of universal application. The Proposal contained no provision in that respect. However, the Draft of 28 June 2007 expressly provides that the Regulation would have universal application.[64] Indeed, if a provision of this kind would be inserted in the Regulation, the provisions in the national laws of the Member States in that respect would be overruled.[65]

As stated previously, the provisions on choice of law under the Proposal only apply to divorce and legal separation, but not to marriage annulment proceedings. The main reason for this is that the possibility to choose the applicable law under the Proposal would not be appropriate for questions of marriage annulment. These actions relate to the question of the validity of marriage, which is usually governed by the law of the country where the marriage was concluded (*lex loci celebrationis*) or the law of the spouses' nationality (*lex patriae*), as expressed by the majority of the respondents to the Green Paper.[66] The same approach is retained in the Draft of 28 June 2007.

II. The Applicable Law in the Absence of the Parties' Choice

According to Article 20b of the Proposal, in the absence of a choice of law by the parties, the law applicable in the case of divorce or legal separation will be governed by the law of the state where the spouses have their common habitual

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[62] Article 1 para. 4 of the Netherlands Act on conflicts of law in matters of divorce and legal separation of 25 March 1981.

[63] Article 4 para. 2 second sentence of the Netherlands Act on conflicts of law in matters of divorce and legal separation of 25 March 1981.

[64] Article 20c1 of the Draft of 28 June 2007 provides that "[t]he law designated by the Regulation shall be applied whether or not it is the law of a Member State."

[65] However, if another provision is to be accepted, as suggested by the French delegation, there would be no such strict requirement of a written form in the case of the applicability of the *lex fori*. *See infra* section D.II. For the author's view on the scope of application regarding jurisdiction in divorce matters, *see supra* section C.II.

[66] Explanatory Memorandum, at 9.

residence (Art. 20b(a)). If the parties have no common habitual residence, the applicable law will be that of the country of the last common habitual residence of the spouses if one of them still lives there (Art. 20b(b)) of the Proposal). If none of the spouses still resides in the country of their last common habitual residence, the law of the country of parties' common nationality will be applicable. Under the same provision, in the case of the United Kingdom and Ireland, the relevant connecting factor will be a common 'domicile' of the spouses. If under these private international law rules no applicable law can be determined, a case concerning divorce or legal separation will be governed by the *lex fori* (Art. 20b(d) of the Proposal).

The Draft of 28 June 2007 maintains, in principle, the same approach in determining the applicable law in the absence of a choice by the spouses, with minor alterations in the wording. However, it specifies that the time "the court is seised" is relevant for all connecting factors contained in paragraphs (a) to (c): habitual residence of the spouses, last habitual residence and common nationality. Presumably, "*lex fori* would only apply if the court seised has jurisdiction under the Regulation."[67]

Obviously, the Draft does not provide that the *lex fori* is primarily applicable in the absence of a choice of law by the spouses. The necessity of applying foreign law in matrimonial matters has been a point of major concern for a number of EU Member States. Probably as a result of the objections of these countries, the Draft has introduced the possibility to derogate from applying the law of the spouses' last habitual residence provided under Art. 20b1(b) in favour of the law of the forum, if certain requirements are met.[68] It is expected that this provision will be the subject of further discussion, in particular considering that the French delegation has proposed another provision. Thereby, it is suggested that the *lex fori* should apply as a primary rule in the absence of a choice of law under Article 20a, "where both parties enter an appearance and neither requests the application of another law." In other cases the following connecting factors are suggested: common habitual residence, common nationality, last common habitual residence, *lex fori*. If this provision becomes a part of the Regulation, the strict requirement of a written form would be derogated from when the *lex fori* is applicable.

Finally, the Draft of 28 June 2007 introduces the provision according to which the *lex fori* applies where the law which is applicable according to other criteria

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67 *See* the Draft of 28 June 2007, p. 9, n. 28.

68 The suggested provision reads as follows:

> [By derogation to paragraph 1(b), the law of the forum shall apply where:
> (a) one of the spouses so requests; and
> (b) during their marriage, spouses had their last habitual residence in the State referred to in paragraph 1(b) for less than [three] years; and
> (c) the requesting spouse has a substantial connection with the Member State of the court seised by virtue of the fact that he or she
> (i) has been habitually resident in that Member State for at least [ten] years, provided
> (ii) that that period did not end more than [three] years before the court is seised; or is a national of that Member State.]

does not provide for divorce. It is stated that a recital should clarify that this provision relates to situations when the applicable law does not recognize the concept of divorce or when one of the spouses is not permitted to file a request for divorce under the applicable law.[69]

E. Other Provisions

Pursuant to Article 20c of the Proposal, the court can make use of the European Judicial Network in civil and commercial matters if the law of another Member State is applicable. This provision is deleted under the Draft of 28 June 2007 and it is suggested that it be moved to a recital. A designation of the applicable law under the rules of the Regulation means the application of the rules of law excluding the private international law rules (exclusion of *renvoi* under Article 20 d). The provision in Article 20e relates to the exception of public policy: the application of law "designated under this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum." These provisions are retained in the Draft of 28 June 2007, with minor changes in the wording.

As mentioned previously, the Draft introduces an express provision on the universal application of the Regulation in Article 20c1.There are a number of newly introduced provisions in the Draft, in particular transitional provisions and a provision concerning states with more than one legal system. According to Article 2 of the Proposal, this Regulation would apply from 1 March 2008. It will enter into force on the 20th day of its publication in the *Official Journal of the European Union*. No date is indicated in the Draft of 28 June 2007.

F. Conclusions

The rules suggested to be introduced by the new Regulation present a very comprehensive and far-reaching reform of the conflict of law rules relating to divorce and legal separation in the EU Member States. As already mentioned, it is questionable whether the problems identified by the Commission occur so frequently as to justify such substantial changes. In other words, there is no obvious evidence that all the problems occur on a large scale. Besides, it is not obvious that all the problems identified would indeed be successfully dealt with by all the changes suggested. Finally, it remains unclear in which way the problems identified influence the functioning of the internal market within the European Union.

The purpose of a number of changes is not obvious. This is particularly so with respect to the provision on choice of court agreements. Namely, although the possibility for the spouses to agree on jurisdiction is generally welcome, it

[69] The Draft of 28 June 2007, at 10, n. 29.

is not clear what can be achieved by providing the possibility to agree on the jurisdiction of courts which already have jurisdiction according to the existing Regulation.

The text suggested in the Proposal, and in particular the changes in the Draft of 28 June 2007, are very complex and it is quite likely that the courts would encounter difficulties when applying them. Besides, it is obvious that the spouses would need legal assistance in order to be fully aware of the legal consequences of their agreements on a choice of court, as well as a choice of law.

In general, it would have been more appropriate to deal with all the consequences of divorce, including the financial ones, in one instrument,[70] instead of opting for a separate legal regulation of private international law rules. In any case, the rules on a choice of court, as well as choice of law should be drafted in the future EU instruments so as to ensure sufficient protection of the interests of a weaker party. It is particularly so if the court having jurisdiction in a divorce matter on the basis of a choice of court agreement would be competent to decide on a division of matrimonial property. The same is true if the law agreed upon as applicable to divorce would also govern the financial consequences of a dissolution of marriage.

[70] Such an approach was also suggested by the European Economic and Social Committee in its Opinion on the Proposal of 13 December 2006, SOC/253, n. 4.4.