Fifth European Conference on Family Law[1]

Civil Law Aspects of Emerging Forms of Registered Partnerships. Private International Law Issues.

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Introduction

The introduction of the institution of the "registered partnership" or its equivalents in several European countries, and its contemplated introduction in some others, gives rise to a range of practical questions concerning the international implications and consequences. Registered partnerships may involve persons with different nationalities, residences or domiciles, and the partners concerned may, whether jointly or separately and for any number of reasons, move to live (or already be living) in a country other than that in which the partnership was registered. Apart from simply identifying some of the problems involved, this note addresses in a very preliminary way the question of whether it is possible, at this relatively early stage in the acceptance of the new institution, to contemplate the development of a uniform approach (which might be broadly acceptable both to States which do and to those which do not accept a form of registered partnership) to some of the private international law issues which are entailed by registered partnerships, and in particular to the question of their recognition in other countries.

The note concludes by describing the current work being undertaken by the Hague Conference on Private International Law on the private international law aspects of non-marital relationships in general.

Some of the issues

The private international law issues raised by registered partnerships include the following, which are set out in summary form:

(A) <u>Establishment of the partnership</u>

1 - *Which law applies to:*

- *the capacity of the parties to enter into the partnership* (including *e.g.* requirements concerning age, sex, prohibited relationships);
- *other aspects of its essential validity;*
- *its formal validity?*

[1] Organised by the Council of Europe and the Ministry of Justice of the Netherlands, in co-operation with the Hague Conference on Private International Law and the International Commission on Civil Status. To be held in The Hague, 15-16 March 1999.

2 -- *What connection between the individuals and the State concerned* (in terms of nationality and/or residential status of the parties or one of them) *should be required before the authorities of that State are permitted to register the partnership?*

(B) Recognition of the partnership

1 - *If there is to be at least some degree of recognition of the registered partnership in another State, what are the conditions of recognition to be?* For example, taking as a possible model the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, should the basic requirement be that the partnership has been validly entered into under the law of the State where it was registered? Or, taking the model of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, should recognition only be accorded to registered partnerships established in accordance with the correct applicable law principles?

2 - Taking the model of the 1978 Hague Convention, *should it be possible for the recognising State to add certain substantive conditions deriving from its own law, which relate to matters of capacity and consent?*

3 – *Should there be the usual public policy exception?*

4 – *Should recognition be by operation of law*, with a presumption in favour of the validity of the certificate of registration (see *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Art. 10*), or should there be some formal procedure (registration!) for recognition?*

(C) Effects of recognition

If some degree of recognition is permitted, and the partnership meets the basic requirements for recognition, what are the legal effects of that recognition to be? This is one of the most difficult questions, to which much of this paper is devoted. The range of potential effects is very broad. In those countries which have provided for registered partnerships, the effects are usually equated (with the exception of certain matters relating to children) with those of marriage.

The possible effects fall broadly into the following categories:

(1) An incapacity in each of the partners to enter into a partnership/marriage with a third party.

(2) An enforceable obligation on the partners to maintain one another. (For the recognising State this may pose one or both of two separate problems – whether to enforce in that State a maintenance order validly made abroad in respect of a recognised registered partner, and whether to recognise the status of registered partner as qualifying him/her to initiate maintenance proceedings in the State addressed.)

(3) Certain mutual/community property rights.

(4) Mutual rights of succession.

(5) Taxation privileges or burdens.

(6) Social security, housing and other possible public benefits.

(7) Criminal law. (Does the crime of bigamy apply? Do special evidential rules or privileges apply?)

(8) Effects in respect of rights of residence and/or the right to acquire a partners nationality.

(9) Special rules relating to contracts entered into by the partners.

(10) Various other entitlements such as the right to compensation for death of or injury to a partner, the right to succeed to a controlled tenancy, pension and insurance rights.

(11) Potentially (though not generally at present) rights in respect of children.

(D) Dissolution of the partnership

1 - *Which law determines the procedure by which a registered partnership may be dissolved?* (For example, may it be dissolved by consent and/or by the decision/decree of a court/authority?)

2 – *The courts/authorities of which State or States have jurisdiction to dissolve the partnership?*

3 – *Which law applies to the process of dissolution?* (For example, what grounds for dissolution are permitted, and, where dissolution by mutual consent is permitted, in what form must this be expressed?)

4 – *What are the criteria for the recognition of a foreign dissolution?*

Towards a uniform approach?

Why should one wish to develop a uniform approach to some of these private international law questions? First, because there is the need to fill the legal vacuum that currently exists in many national legal systems. The status (if any) to be accorded to registered partners who move from one jurisdiction to another needs to be clarified. Some generally accepted principles might help to do this. Second, it would be desirable, at least in respect of those States which are willing to afford some level of recognition to foreign registered partnerships, to develop some uniformity in the approach to recognition in order, as far as is possible, to provide some continuity in their status to the partners themselves. For example, it might be possible to achieve some agreement on certain minimum effects of recognition. This is discussed below.

The difficulties in achieving a uniform approach lie in two directions. First, in those States which have a system of registered partnership, there will be a tendency, when developing private international rules, to give a bias towards their own laws and procedures, or towards the laws and procedures of other States in which the institution exists. This is a natural tendency. It derives from the practical need to avoid the vacuum that might otherwise arise. Thus, for example, in a recent Netherlands proposal[2] for a number of private international law provisions on registered partnership, the following appear:

[2] Proposals for a number of private international law provisions as to registered partnership, May 1998, Netherlands Standing Government Committee for the Codification of Private International Law.

- the right of each of the partners to enter into a registered partnership in the Netherlands is governed by Dutch law (Article 2.2),

- if the partners have not designated, or have not designated lawfully, the applicable legal system before entering into or during the existence of their registered partnership, the property regime of a registered partnership which has been effected in the Netherlands shall be governed by Dutch law (Article 6),

- the question of whether a registered partnership which was entered into in the Netherlands may be terminated by mutual consent or by dissolution shall be governed by Dutch law (Article 16),

- the question whether a registered partnership which was effected outside the Netherlands may be terminated by mutual consent or may be dissolved, and on what grounds, shall be governed [subject to certain exceptions] by Dutch law (Article 31.1),

- with respect to the dissolution of the registered partnership the court has always jurisdiction if the registered partnership has been entered into in the Netherlands (Article 33.1).

These proposals are predicated on an existing law[3] which makes the Dutch registered partnership available to Dutch nationals and European Union nationals and nationals of the EFTA countries lawfully resident in the Netherlands, and to other persons having a valid right of residence in the form of a temporary or permanent residence permit. The very broad application, in the proposed rules, of Dutch laws and procedures, even to cases where the parties may have lost any real connection with the Netherlands, exceeds what would perhaps be regarded as acceptable in the case of marriage.

The second set of difficulties in achieving a uniform approach derives obviously from the fact that attitudes towards recognition, in those States which do not accept registered partnerships in their national laws, will vary. Some States may object to recognition in any shape or form; others may be prepared to accord some recognition, but they may differ both in respect of the basic conditions (and perhaps procedures) for recognition and in respect of the scope of the effects which flow from recognition. They may wish to exclude from recognition partnerships in which, at the time of registration, either of the partners lacked capacity under his/her personal law.[4] They may also wish to distinguish between different categories of registered partnership.[5]

Recognition and effects

To recognise or not to recognise

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[3] The Registered Partnership Act of 5 July 1997, which came into force on 1 January 1998.

[4] *Cf.* the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Article 7 "Contracting States may refuse to recognize a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State."

[5] This is already the case in some countries, for example, Germany.

The threshhold question for many States will be whether any recognition at all should be given to foreign registered partnerships. This is not the place to explore in any depth the social, moral or political dimensions of this question. Nor is it intended to explore here the fundamental rights considerations which must be taken into consideration in developing private international law solutions. It is enough, for the purposes of the present enquiry, to proceed on the hypothesis that there may be some States which are prepared to consider giving at least some limited degree of recognition to registered partnerships. However, before leaving the threshhold question, it is perhaps wise to recall certain general considerations which may affect the basic decision whether to recognise or not to recognise.

(1) Registered partnerships serve a variety of purposes and may be entered into by persons whose mutual relationships differ widely. A public policy which opposes recognition of one category of registered partnership may not necessarily be inimical to all categories. For example, if the fundamental objection of a particular State is to the recognition of homosexual partnerships, there may be no similarly strong objection to a heterosexual registered partnership. Nor is there any technical reason (leaving aside any questions of fundamental rights and discrimination) why the recognition principles adopted by that State cannot distinguish between different categories of partnership, even though they may not be subject to discrimination in the State where they are established.[6]

(2) The question of recognition is not a matter of all or nothing. Recognition may be accorded for different purposes, and these different purposes may well involve differing public policy considerations. From the standpoint of public policy, the question of whether a registered partnership should be recognised for the purpose of conferring certain state benefits (which normally attach to marriage), or a preferential tax regime, on the partners raises a differing set of considerations from those which are relevant to the question whether it should be recognised for the purpose of giving effect to private obligations or property relations between the parties. Recognition for the purpose of determining whether the status of registered partnership affords any special position with regard to parent/child relations (such as the capacity to adopt), is different from recognition for the purpose of deciding whether one partner is or is not free to enter into a second partnership or marriage.

Different degrees of recognition

On the above-mentioned hypothesis that some States, including some of those whose national laws do not provide for registered partnerships, may be prepared to consider according some perhaps limited degree of recognition to foreign registered partnerships,[7] is it possible to begin to develop a uniform approach? Is the fact that different States will want different levels of recognition an insuperable obstacle?

For example, where the recognising State is one which itself provides for registered partnerships, the desired effects of recognition may be very broad. The analogy of marriage is likely to be applied. The preferred policy may be to give to registered

[6] Replies to a questionnaire concerning recognition of Dutch registered partnerships, prepared by a committee established by the Dutch State Secretary of Justice, reveal that many countries already draw a distinction between same-sex and other registered partnerships, regarding recognition only of the former as being contrary to public policy.

[7] As is apparent from the responses to the questionnaire mentioned in the previous footnote.

partnerships broadly the same effects in the recognising State as a partnership concluded there.[8] (Though it should be remembered that the precise nature of certain effects (*e.g.* in relation to maintenance and property rights) may, under the law of the recognising State, be subject to specific applicable law rules, as is the case with marriage.)

On the other hand, where the recognising State is one which does not itself provide for registered partnerships, the matter is more complicated. The complications have two sources. First, as already stated, the recognising State may wish to limit the effects of recognition, in order, for example, to prevent the partnership enjoying a similar status and similar privileges to marriage. Second, in respect of those areas in which the recognising State is prepared to accept that the foreign partnership has effects, there may be a complete absence of appropriate domestic provisions. As a result, either (a) an applicable law will have to be specified which does provide for the effects in question (*e.g.* the law of the State where the partnership was registered), or (b) in so far as the effects are to be governed by the law of the recognising State, the laws of that State will need to be adapted.

One may next ask whether, in the case of States which opt for a system of partial recognition, it is possible to find some broadly agreed basis for distinguishing between effects which are and those which are not acceptable. The difficulty here is in identifying the reasons underlying the policy of partial recognition, and these may differ, at least in part, from State to State.

One might, for example, speculate that certain States may wish to draw the line at the point where recognition would be seen as facilitating the establishment of registered partnerships (or certain categories of registered partnership), or otherwise giving support within the recognising State to the ongoing relationship. This would not preclude recognition of all effects.

Take, for example, a case in which A and B register their partnership in the Netherlands and five years later move to live in State X which makes no provision for registered partnerships. State X does not wish to recognise the partnership as having effects in relation to matters such as taxation or social welfare, or in relation to the continuing rights and obligations of the partners *inter se* to the extent that recognition involves state support for the continuing relationship within State X. This would not seem to preclude recognition of, for example, property rights as between the partners arising from the partnership, at least in so far as they have vested in the parties before their move to State X. In the event of a breakdown in the partnership, State X may be unwilling to make available its maintenance procedures for an original application by one of the partners; there might perhaps be less objection to enforcing an order which had already been made abroad before the partners, or one of them, moved to State X. There may also be less objection to recognition of the partnership as affecting the capacity of either of the registered partners to enter into a marriage with another person in State X.

No doubt some of these distinctions are controversial. Also, the distinctions may be drawn differently according to the category of registered partnership involved. For example, the threshold for recognition will, in many States, be lower for heterosexual than for homosexual partnerships.

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[8] This is already the case, for example, in Norway.

A minimum effects approach

If there is to be any movement towards a uniform set of rules regulating the recognition of registered partnerships, it is clear from what has been said above that the approach would have to be flexible enough to accommodate the different degrees to which States are likely to be prepared to offer recognition. At the same time, the exercise would be pointless in the absence of some common ground. This points to a system in which certain minimum effects of recognition are agreed, with the possibility of individual States affording recognition above that minimum.

The following are possible elements in a uniform approach, which is offered for discussion purposes only:

(1) A rule specifying, as the basic conditions for recognition of a foreign registered partnership,
- that the partnership has been validly entered into in the State where it was registered,[9]
- that it was established in accordance with certain specified applicable law principles (relating to matters such as capacity),[10]

(2) A rule that recognition may be refused, *inter alia*, on the ground that certain specified substantive requirements of the recognising State (in relation, for example, to matters of age and prohibited relationships) have not been met.[11]

(3) A rule specifying certain minimum effects of recognition,[12] and the law applicable to those effects.

(4) A rule permitting States to accord recognition on a wider basis than that specified in (1), and to recognise effects beyond those specified in (3).

The crucial question, is whether a sufficient number of States would be prepared to agree upon a sufficient number of minimum effects of recognition to make the exercise of establishing uniform rules worth undertaking.

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[9] *Cf. Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Article 9.

[10] *Cf. Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, Article 11.

[11] *Cf. Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriage,* Article 8.

[12] *Cf. Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, Article 11, *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Article 26.

The role of the Hague Conference on Private International Law

The interest of the Hague Conference on Private International Law in the private international law dimensions of non-marital cohabitation goes back some years. A Note on the law applicable to unmarried couples was drawn up by the Permanent Bureau in December 1987.[13] When the topic was discussed in the First Commission at the Sixteenth Session,[14] the Secretary General's view was that , although this was a significant social phenomenon which is increasingly giving rise to conflict of laws problems, there was no immediate need to draft a Convention on the subject. The matter was retained on the Agenda, and in subsequent years the Permanent Bureau continued to monitor the development of the subject in comparative law.

A second note on the law applicable to unmarried couples was drawn up by the Permanent Bureau in 1992,[15] including in an Annex a detailed study, Part I of which dealt with the unmarried couple in comparative law, and Part II of which dealt with free unions in private international law. The note drew attention to the established nature in Western Europe of the phenomenon of the "international cohabiting couple", and predicted that, with the guarantee of free movement for individuals and the opening up of the frontiers of Eastern Europe, the phenomenon would gather momentum. It also pointed out that a similar situation was found in Latin America where free unions, which are often involuntary because they are due mainly to administrative and economic obstacles to marriage, are extremely common.

The Eighteenth Session of the Hague Conference on Private International Law decided in 1996 to retain on the Agenda of the Conference the subjects of "jurisdiction, applicable law, and recognition and enforcement of judgements in respect of unmarried couples."[16] The Permanent Bureau is currently continuing its work on these subjects, embracing also the emerging forms of registered partnership, which have been the subject matter of this paper. These matters will again be discussed at a special Commission of the Hague Conference on general affairs which is due to take place at The Hague early in the year 2000. A further study for the attention of that Special Commission is under preparation by the Permanent Bureau.

The Council of Europe Fifth European Conference on Family Law on the *Civil Law Aspects of Emerging Forms of Registered Partnerships* is being held at a particularly opportune moment, and the papers, discussions and conclusions to which the Conference gives rise, will be of great importance in helping to reach a decision on whether it is now time to begin work on a Convention on the private international law aspects of non-marital cohabitation in general, or of any of its particular forms.

The Hague, January 1999.

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[13] *Proceedings of the Sixteenth Session (1988)*, Tome I, *Miscellaneous matters*, pp. 159-161.
[14] *Ibid.*, Minutes No 3.
[15] *Proceedings of the Seventeenth Session (1995)*, Tome I, First Part, *Miscellaneous matters*, pp. 109-147.
[16] *Final Act of the Eighteenth Session*, Part B, at 4 c.