Partnerships and same sex marriages – cross-border aspects

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Outline

• 1°) Setting the Scene
• 2°) Access to the Status
• 3°) The Life of the Relationship
• 4°) Outlook - A Few Words of Conclusion
I. A few words on the landscape

• Picture today in EU:
  – *Same sex marriage* – 6 (almost 7) countries
  – *Partnerships*: at least 19 countries – variety in eligibility and in effects:
    • Only same sex partners
    • Same-sex and different sex

A dream or a nightmare for conflict of laws?
I. A few words on the landscape

• *European* patchwork raises two questions:

  – How can we devise a workable conflict of law rule in the absence of a 'legal community' between States → issue of 'characterization' becomes more pressing

  – Can we have a system where marriages/partnerships circulate? Issue of 'recognition'
I. A few words on the method

• *Bottom up approach* :
  – Not looking for the ideal conflict of law rule
  – Analysis of the existing situation (mainly in EU countries) to see
    • Is there a (growing) consensus?
    • Does lack of consensus lead to serious problems?
I. A few words on the scope

• No mention of
  • Unions outside the law

• Impact of EU law

• Consequences of status (in particular parents-children relationships)

• Social security, tax, migration and nationality aspects of partnerships/same sex marriages
I. A few words on the menu

• Two stages of the analysis
  – I. Access to the status: is it possible for a same-sex couple to obtain a legal status with rights and obligations?
  – II. The life of the relationship – including recognition

• Looking at
  – Creation in State A
  – Circulation in State B
II. Access to the status
A. In general

• Where do we find the requirements imposed to access the status?

• Marriage – diversity :
  – Formal requirements : local law
  – Substantial requirements : national law / domicile

• Same-sex marriage / partnerships?
II. Access to the status
A. In general

• Consensus on the fact that this is *family law*
  – no application of rules of contract law by analogy

• No unanimity on the need for specific rules
  – 'copy-paste' of rules on marriage (e.g. Lxbg)
  – Most jurisdiction: specific rules or general rules with a few caveats
  – Some jurisdictions: no specific rules (France until 2009; Spain: DGNR)
II. Access to the status
B. Same sex marriage

• At 1st sight, consensus to apply same rules as for 'classic' marriages:

  – Formal requirements: local law – e.g. art. 47 Belgian PIL Code (bilateral rule); art. 4 Dutch WCH (unilateral rule); Norway

  – Substantial requirements: starting point is application mutatis mutandis of rules devised for 'marriage' – e.g. art. 2 Dutch WCH (dual system in favor matrimonii); art. 171 Civil Code Lxbg; Norway
II. Access to the status  
B. Same sex marriage

• On a closer analysis, nuances:
  – Safety net for couples who could not marry on the basis of 'normal' rules – e.g.
    • Art. 46-2 Belgian PIL Code (aggressive)
    • Art. 2 Dutch WCH (more subdued)
  – Sometimes specific rules limiting access to competent authorities – fear of 'matrimonial shopping' – e.g. art. 44 Belgian PIL Code
II. Access to the status
B. Same sex marriage

• Primary access to status in other countries?
• Probable that access is denied on public policy grounds (e.g. celebration of a same sex marriage in France between 2 Dutch citizens)
II. Access to the status
C. Partnerships

• Multi-layered rule:
  – 1°) Formal requirements: local law
    • Through application of rules drafted for marriage - *e.g.* Section 2(1) Danish Act
    • Through specific rules - *e.g.* § 11 Finnish Partnership Act; art. 1.3 Dutch *WCGP*
II. Access to the status
C. Partnerships

• Multi-layered rule:
  – Question: what connection between the partners and the State?
    • Nationality (e.g. Slovenia; Czech)
    • Residence (e.g. Spain; UK: 7 days... sec. 8(1)(b) Civil Partnership Act)
    • Alternative criteria: residence or nationality (art. 80a(4°) Dutch Civil Code)
    • No requirement: Germany
II. Access to the status  
C. Partnerships

• Multi-layered rule:
  – 2°) Substantial requirements: predominant: local law

• Specific rule - *lex loci registrationis* - FR, GER, NL, BE, etc.

• Sometimes through application *mutatis mutandis* of marriage rules (e.g. Art. 65a Swiss PIL Act – reference to Art. 44(1) and not Art. 44(2))

• Sometimes expressed as unilateral rule, sometimes bilateral rule
II. Access to the status
C. Partnerships

• A few comments on the application of the law of the 'home country' for partnerships:
  – Simple rule
  – If expressed as a bilateral rule: makes recognition easy
  – Justified because of 'pioneer's problem'
  – Also: tool to contain foreign partnerships
  – Political decision to favor partnerships – who says conflict of laws must be neutral?
  - beware of consequences
II. Access to the status
C. Partnerships

• Law of the 'home country' for partnerships - consequences:
  – Claim for difference of treatment marriage - partnerships?
  – Peculiar: only possible to create a 'local' partnership – no possibility to create a 'foreign' partnership
  – Need for a specific rule to prevent creation of several successive partnerships – which one prevails?
III. Life of the Relationship

• Marriage: clear distinction between:
  – General rule (nationality or residence)
  – Specific rules for selected questions
    • Alimony
    • Assets
    • Divorce
    • etc.

• Distinction creation / effects and content works reasonably well because marriage is an (almost) universal concept
III. Life of the Relationship
A. Same sex marriage

• In countries where same sex marriage is allowed: application of same rules as for marriage
  – Disconnection between creation and effects
  – Effects: dispersion between various categories (alimony, property relationship, divorce, succession, etc.)
  – Difficulty: if applicable law does not recognize relationship (e.g. succession)
• What about in other countries? Two questions (more a question of recognition than primary access)

• 1st question: is this a marriage? Debate on characterization
  – Yes – e.g. France (but debated)
  – No – 'transmogrification' – e.g. UK – 'specified relationship' of section 213 (Schedule 20) – downgrade to 'civil partnership'
III. Life of the Relationship
A. Same sex marriage

• What about in other countries?
• 2nd question: if marriage is considered as such, public policy?
  – Yes – e.g. probable answer of Poland or Italy (mirror position of Belgium which provides public policy protection in favor of same sex marriages…)
  – No – e.g. France – but debated and recognition only if national law of spouses so allows
III. Life of the Relationship
A. Same sex marriage

• Side issue: application of Brussels IIbis to same sex relationships?
  – No application to non formalized unions
  – Application to formalized same-sex unions?
    • Letter and EU law: hesitation
    • Registered partnerships: no application
    • Same sex marriages: hesitation
• General trend : 3 directions:
  – Application of marriage rules - e.g. art. 48 Swiss PIL Act – law of domicile
  – Law of country of origin – *lex loci registrationis* - e.g. GER/FR /BE/NL
  – Law of 'host' country – e.g. sec. 215(1)(a) UK Civil Partnership Act - foreign registered partnership will generate the same effects as a Civil Partnership
III. Life of the Relationship
B. Partnerships

• General problems:

- 1°) Uniform treatment of all effects or separate rules for selected questions (e.g. assets, succession, dissolution)? - artt. 5-23 Dutch WCGP

- 2°) What if applicable law does not recognize relationship (safety rule – e.g. Swiss law as a minimum -art. 65c Swiss Act)

- 3°) Capping the effects of foreign partnerships to those of domestic one (e.g. Germany)
III. Life of the Relationship
B. Partnerships

• General problems:
  – 4°) Renvoi allowed or not – e.g. art. 5(2) Dutch WCGP
  – 5°) multiple registration? e.g. BEL : 1st; GER : last
IV. Outlook

• 1°) Current state of the law interesting as a conflict of laws 'laboratory' – unsatisfactory for persons concerned because 1°) highly complex, 2°) may lead to limping relationships

• 2°) Solution unlikely to come from evolution of substantive law – family law landscape will remain very diverse
IV. Outlook

• 3°) Do we need a global EU (Hague) instrument? Answer probably depends on how pressing the need is felt to be

• Issue of limping relationships: let's not forget that this is not new (religious marriages...) and far from unique (many family law relationships – marriages, adoptions, parents-children - are limping today)
IV. Outlook

- In fact, limping relationships are unavoidable in field where States have such heterogeneous preferences – and it is difficult to question the legitimacy of national preferences.

- Additional elements:
  - Limping relationships: not all black/white (e.g. same sex marriages in France)
  - Heightened consciousness of persons concerned?
IV. Outlook

• 4°) If no EU/Hague instrument: salvation though the 'recognition method'?

• Doctrinal debate on the disappearance of the 'bilateral' approach

• 1st building blocks:
  – ECJ *Grunkin Paul*; ECHR *Wagner*
  – Prevailing use of 'home country' approach
IV. Outlook

- Recognition method is useful but insufficient:
  - What about relationship in home country?
  - Rule based approach v. principle based approach
IV. Outlook

• 5°) Evolution in 2 directions:
  
  – Adaptation of (existing and future) EU instruments (e.g. Brussels IIbis)

  – Need for (national) private international law to regain its autonomy – at this stage, conflict of law rules are dominated by substantive concerns - need for more distance between substantive law and private international law