

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^o) 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)

III. Life of the Relationship

A. Same sex marriage

- 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 *Ibis* 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

III. Life of the Relationship

B. Partnerships

- 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