

Divorce and Registered Partnerships in Private International Law **Revised Version of May 2002**

Members of the Commission : Helène GAUDEMET-TALLON, Trevor HARTLEY, Hans Ulrich JESSURUN D'OLIVEIRA, Hans VAN LOON, Kurt SIEHR, Helge THUE

Outline prepared by Kurt SIEHR

A. Divorce

I. Jurisdiction

1. Jurisdiction under Brussels II

The Regulation (EC) No. 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of both Spouses¹ has entered into force on 1 March 2001. According to Article 2 (1) of the Regulation a petition for divorce may be brought in Member States with which the spouses are connected either by their habitual residence or by common nationality or (for the U.K.) by common domicile. These heads of jurisdiction are very liberal insofar as there are hardly any obstacles to seise a tribunal of a divorce matter. According to Article 2 (1) last indent, e. g., an Italian woman, disappointed by her marriage in Germany can bring a petition for divorce in Italy half a year after she had left Germany.

All these heads of jurisdiction shall not be questioned. They rather serve as important facts which have to be taken into account when formulating a choice of law-rule for divorce. Experience shows that the more liberal you are in providing jurisdiction for legal matters the more unlikely it is that the *lex fori* will be a fair choice governing divorce.

2. Jurisdiction outside Brussels II

It is very unlikely that the EU will legislate on divorce jurisdiction not covered by Brussels II according to Article 2, 7 and 8. Therefore these national heads of jurisdiction will not be discussed.

II. Applicable Law

1. National Solutions

a) Most states prefer an actual common connecting factor which is

(1) the law chosen by the spouses with different degrees of party autonomy as, e. g., it is or will be provided by the law of Belgium (draft), Hungary and the Netherlands,

(2) If there is no choice by the spouses or if no such choice is permitted at all, most jurisdictions primarily apply

(a) either the common *lex domicilii* (in States supporting the principle of domicile or habitual residence) : e. g. Belgian draft, Estonia,

(b) or the common *lex patriae* (in States supporting the principle of nationality : Austria, Belgium, Czech Republic, France, Germany, Greece, Hungary, Italy, Liechtenstein, Luxemburg, Netherlands, Poland, Portugal, Rumania, Serbia, Slovenia, Spain, Turkey),

(c) or the *lex fori* of the competent domestic forum (the Scandinavian countries Denmark, Finland, Iceland, Norway and Sweden, Ireland, Switzerland, U.K.).

b) If there is no common *lex patriae* or *lex domicilii*, States using these connection factors subsidiarily refer to

(1) former common *lex patriae* or *lex domicilii* if at least one of the spouses still keeps the former common nationality or domicile

(Austria, Germany, Greece, Hungary, Liechtenstein)

(2) law of the common closest connection

(Germany, Greece, Italy, Portugal, Rumania)

(3) *lex fori* as the *lex patriae* of one of the parties

(Belgium, France, Hungary, Sweden)

Not mentioned are here those provisions which provide a forum and the *lex fori* as *lex patriae* for nationals of the forum state if they cannot obtain a divorce abroad

(cp., e. g., Germany, Iceland, Norway, Switzerland)

(4) *lex fori* as *lex ultimae spei*

(e. g. Hungary, Luxemburg, Poland, Spain, Turkey).

2. International Solutions

There are very few international instruments on the law applicable to divorce.

a) Hague Convention of 1902

The Hague Convention of 12 June 1902 on the Applicable Law and Jurisdiction with respect to Divorce and Separation is not in force any more. It provided a very difficult solution to be explained by the fact that in former times divorce was not possible in all countries. Therefore divorce could only be given in competent fora (Articles 5 and 6) if divorce was allowed by the *lex patriae* of the couple and the *lex fori* (Article 1 and 2). Under these conditions the divorce was governed by the *lex fori* (Article 3).

b) Código Bustamante of 1928

¹ Brussels II ; OJ. 2000 L 160/19.

According to the Latin American Código di derecho internacional privado (Código Bustamente) divorce is governed by the law of the matrimonial domicile (Article 52).

c) Nordic Convention of 1931

The Scandinavian Convention of 6 February 1931 fixes jurisdiction and orders the *lex fori* as the applicable law for divorce (Article 7). Divorce jurisdiction is given to a Scandinavian country if the spouses are domiciled in this country or had their last domicile in this country and one of the spouses is still domiciled there. Ultimately divorce may be petitioned by Scandinavian citizens living abroad in a non-Scandinavian country.

III. Proposals for a EU-Regulation

Because of the liberal regulation of jurisdiction in the Regulation Brussels II it is not proper to have divorce governed by the *lex fori*. In addition it has to be kept in mind that some effects of divorce are governed by the law applied to a divorce petition. According to Article 8 (1) Hague Convention of 1973 on the Law Applicable to Maintenance Obligations the law applied to a divorce also governs the maintenance obligations between the divorced spouses. This Convention is in force in seven member states of the EU (France, Germany, Italy, Luxemburg, Netherlands, Portugal, Spain) and Japan, Poland, Switzerland and Turkey. Therefore the law governing divorce should be fixed carefully.

1. Proposal

My proposal to be discussed is :

- a) choice of law by the parties (they may choose one of their *leges patriae* or *leges domicilii* or the *lex fori*)
- b) if there is no choice by the parties
 - (1) the law at their actual common habitual residence in one State applies
 - (2) the law of their former habitual residence in a State applies if there is no more a common actual habitual in this State and if one spouse still is habitual resident in this State
 - (3) the law of their effective common nationality governs if (1) and (2) do not apply
 - (4) ultimately the law of the State applies with which the marital relationship had the closest connection.
- c) The post-nuptial obligation to pay maintenance to the divorced spouse is governed by the law chosen by the parties² or, if there is no choice of law, by the law governing divorce.
- d) Forum shopping for procedural reasons (costs, speed of procedure, rules of evidence) is legitimate.

Of course, these proposals can also be formulated differently. It could also be formulated that the *lex fori* governs divorce unless the *lex fori* is not identical with either

- a) the present or former common *lex domicilii*
- b) the common *lex patriae* or
- c) any other law of a common close connection.

2. Comments

There should be a limited choice by the parties. This is provided by the Belgian draft, by the Dutch law and by Hungary. Such a choice by the parties will relieve the court from the task to fix the law of the closest connection (either by common habitual residence or nationality or some other connecting factor).

If there is no choice, divorce should be governed by the law of the State in which both spouses have their common habitual residence or – to avoid a unilateral fixing of the law applicable – had their habitual residence if one spouse keeps his/her habitual residence in this State. Ultimately the law of the closest connection may govern. This law may be the common *lex patriae* or any other law with which the marital relationship had close connections.

The post-nuptial obligation to pay maintenance should be fixed as it is done in Article 8 (1) of the 1973 Hague Convention on the Law Governing Maintenance Obligations but subject to a different choice of law by the parties. Forum shopping for procedural reasons should not be banned.

B. Registered Partnerships

I. Creation of Registered Partnerships

1. National Law

a) Substantive Law

There are some jurisdictions in Europe which already introduced registered partnerships. These are Belgium, Denmark, Finland, France, Germany, Iceland, Netherlands, Norway, Portugal, Spanish regions and Sweden. In other countries there are projects to introduce registered partnerships (Switzerland).

Registered partnerships may be created by

- (1) partners of the same sex or also by partners of a different sex (e.g. Belgium, France, Netherlands, Spain : Aragon, Cataluña, Navarra, Valencia)
- (2) registered contract (France), ceremony (Netherlands) or by simple registration (e.g. Denmark, Finland, Germany, Norway, Sweden)
- (3) partner of whom at least one is a local citizen (Denmark) or also by foreign partners (e.g. France, Germany, Netherlands, Norway, Sweden)

Registration is forbidden if

- (1) there is a close family relationship between partners
- (2) at least one of them is still married

² Cp. Dutch Hoge Raad 21 February 1997, *NIPR* 1997 No. 70.

(3) at least one of them is already registered as a partner to another one.

b) Private International Law

(1) Jurisdiction of Registration

In many countries the registration of partnerships does not raise questions of jurisdiction. Everybody may register if the requirements of the law governing are given (e. g. France, Germany, Portugal). Insofar there is no difference to marriage in these countries. There is also no “marriage jurisdiction” in these countries. Some jurisdictions, afraid of becoming a partnership paradise, restricted registrations to partners of whom at least one of them is a local citizen (e. g. Belgian draft Article 59 al. 2) or domiciled in the registering State.

Some restrictions have been abandoned. For European purposes these restrictions may be allowed for persons not being citizens or residents of a Member State.

(2) Law Governing Registration

There are hardly any detailed written conflicts rules on the law governing the registration of partnerships.

(a) The Scandinavian countries make reference to the law of marriage which means that also the rules on the law governing the creation of a marital status apply to registered partnerships. This means that a partnership may be registered if the *lex patriae* (e. g. Finland, Sweden) or the *lex domicilii* (e. g. Denmark, Norway, Sweden) of the partners provide for a registration of partners.

(b) French law does not formulate a provision on the law governing a registration of partners. The partnership is registered at the “tribunal d’instance” of their common place of “résidence” (Article 513 – 3 al. 1 Code civil) according to the *lex loci registrationis*, i. e. French law. Also partners resident abroad and of whom one at least is a French citizen may register under French law. with French courts with the assistance of the French foreign services (Article 513-3 al. 8 Code civil).

(c) Under the Belgian draft the *lex patriae* of each of the partners [Article 60 § 1 (1)] governs the substantive requirements in Belgium for a valid registration in Belgium if at least one of the partners is a Belgian citizen. The Belgian draft reads :

Article 59. – Compétence internationale en matière de relations de vie commune

L’article 42 est applicable par analogie à toute demande concernant une relation de vie commune.

L’enregistrement de la conclusion ou de la cessation de la relation de vie commune peut avoir lieu en Belgique lorsque l’un des cohabitants est belge, est domicilié ou a sa résidence habituelle en Belgique lors de l’enregistrement. L’enregistrement de la cessation de la relation peut également avoir lieu en Belgique lorsque l’enregistrement de sa conclusion a eu lieu en Belgique.

Article 60. – Droit applicable à la relation de vie commune

§ 1^{er}. Les conditions de validité de la relation de vie commune sont régies, pour chacun des cohabitants, par le droit de l’État dont il a la nationalité au moment de l’enregistrement de la relation.

Toutefois, les formalités relatives à la conclusion de la relation de vie commune sont régies par le droit de l’État sur le territoire duquel la relation est enregistrée.

(d) The Dutch draft of certain conflicts rules on registered partnerships provides that partnerships are registered in the Netherlands according to Dutch law (sect. 2). This section reads :

Title 1. The conclusion of a registered partnership

Section 2

1. The conclusion of a registered partnership in the Netherlands is subject to the provisions of Section 1 :80a of the Netherlands Civil Code.

2. The capacity of each of the partners to enter into a registered partnership in the Netherlands is governed by Dutch law.

3. In respect of form, a registered partnership in the Netherlands can only be lawfully celebrated by a civil registrar with due observance of the provisions of Dutch law, without prejudice to the competence of foreign diplomatic and consular officials.

(e) According to the new German Article 17a (1) sent 1 EGBGB the substantive law of the State of registration governs the creation of a partnership. This provision reads :

Article 17a EGBGB : Registered Partnership

(1) The creation, the general and special property effects and the dissolution of a registered partnership are governed by the substantive law of the State of registration.

(f) As a short interim summary it can be shown that many jurisdictions apply the *lex loci* registration (Belgium, Germany, Netherlands) and that Scandinavian countries prefer a close parallelism with the law of celebration of marriage and therefore the respective personal laws (*lex patriae* or *lex domicilii*) apply.

(3) Recognition of Foreign Registrations

(a) In most jurisdictions there is no special conflicts rule on the recognition of foreign marriages or similar arrangements. A foreign registration will be recognised according to the law applicable to the creation of a status or, as a preliminary question, according to the law governing the main problem (e. g. succession of a deceased spouse). In most cases a registration in public records serves as *prima facie* evidence for the creation of a valid status.

(b) The Dutch and the Swiss draft for conflicts rules on registered partnerships provide some guidance.

Chapter 3. Registered partnerships concluded outside the Netherlands (May 1998)

Title 1. Recognition of a registered partnership

Section 18

1. A registered partnership validly entered into outside the Netherlands in accordance with the law of the State of celebration or which subsequently becomes legally valid, there shall be recognised as such.

2. For the application of the first and the second paragraphs, law shall be understood to include the rules of private international law.

3. A registered partnership shall be presumed to be legally valid where a certificate concerning the registered partnership has been issued by a competent authority.

Section 19

Notwithstanding Section 18, recognition of a registered partnership concluded outside the Netherlands shall be refused if such recognition is manifestly incompatible with public policy ("ordre public").

Article 65d Swiss draft for implementing the IPRG (November 2001)

III. Registrierung der Partnerschaft im Ausland

1 Eine im ausländischen Registerstaat gültige Partnerschaft wird in der Schweiz anerkannt.

2 Die Gültigkeit der Partnerschaft beurteilt sich nach dem auf die Registrierung anwendbaren Recht.

3 Ist eine der beiden Personen Schweizer Bürger oder haben beide ihren Wohnsitz in der Schweiz, so wird die im Ausland registrierte Partnerschaft anerkannt, wenn die Registrierung nicht in der offenbaren Absicht ins Ausland verlegt worden ist, die Vorschriften des schweizerischen Rechts über die Anfechtung der Partnerschaft zu umgehen.

4 Eine im Ausland geschlossene Ehe zweier Personen gleichen Geschlechts wird als registrierte Partnerschaft anerkannt.

The main difference between these two provisions is the different scope of application. Whereas the Dutch provision covers any registered partnership (whether homo- or heterosexual), the Swiss draft only deals with homosexual partnerships and does not say anything about heterosexual partnerships. Even if a Member State does not introduce the registration of heterosexual partnerships, there should be a rule on the recognition of heterosexual partnerships registered abroad.

2. Proposals for a EU-Regulation

a) Jurisdiction

Jurisdiction for registration or contracting need not be fixed by a regulation. Every Member State should be free to open a register for registration and to fix the conditions under which a partnership may be registered. If nonetheless jurisdiction were to be fixed, jurisdiction should be given to the authorities of a Member State in which at least one of the partners is habitually resident or of which at least one partner is a national (or, in the U.K., domiciliary). This rule could read :

National authorities have jurisdiction to register or create by other means any partnership if at least one of the partners is habitually resident in the State of the authority or if at least one of the partners is a citizen of this state [or, in the U.K. ; domiciled].

b) Applicable Law

The registration of partnership or any other creation of it should be governed by the law of State in which the partnership is created by registration or contracting. The law governing the requirements for registration or contracting may provide that only homosexual partners may be registered as partners. This conflicts rule may read :

The creation of a partnership is governed by the law of the State in which the partnership is created by registration or by any other evidence.

c) Recognition of Partnerships Created Abroad

Any partnership created under at least one of the partner's *lex patriae*, *lex domicili* or *lex habitationis* should be recognised. Such a recognition does not necessarily entail that the partnership should also be registered by a local registrar. It is sufficient that the partnership is recognised incidentally if any effect of a partnership is in dispute. Such a provision could read :

Any partnership validly created abroad according to the law of registration or creation is recognised.

II. Effects of Partnerships

1. National Law

a) Substantive Law

The effects of a partnership differ considerably from country to country. In many State partnerships have the same or almost the same effects as marriages whereas in other jurisdictions a partnership may have only specific effects as, e. g.

- maintenance obligations
- matrimonial property regime
- succession rights
- change of family name.

These differences have to be taken into account if effects of partnerships created abroad have to be determined by local courts.

b) Private International Law

There are two types of legislating on the law governing the effects of a partnership : a unitary model of comprehensive (allseitige) conflicts rules or a model which distinguishes between partnerships registered in the forum State or registered abroad. The latter approach is chosen by the Netherlands Standing Government Committee on Private international Law (sections 3-15, 20-30).

Under German law [*supra* at 2 a (1)] the effects of a registered partnership are governed

- either by the general rules on maintenance and succession
- or by the law of the registering State with respect to other effects.

– In any case the effects governed by foreign law are only recognised to the extent that they are not stronger than provided by the BGB and the Partnership Act.

In the Dutch draft there are detailed rules on the law applicable to the effects of a registration. The effects of a partnership registered in the Netherlands are the most important problem of such a relation. These rules may be summarised as follows :

- personal legal relationships are governed by Dutch law (Article 3) ;
- property regime is governed by the law designated by the partners before entering into their registered partnership (Articles 4-15) ; such a designation is mandatory ;
- maintenance is governed by the Hague Convention of 1973 (Article 17) ;
- there is no special rule on the law governing succession. If the law governing succession in general provides succession rights for registered partners (as, e. g., in Article 4 : 879a BW) the partner will be treated accordingly.

The Belgian draft refers to the law of the effects of marriage (Article 58 § 1).

2. Proposal for a EU-Regulation

a) Jurisdiction

Do we need a special head of jurisdiction for the effects of a registered partnership ? Jurisdiction for maintenance suits and succession claims are already provided by treaties or provisions on maintenance and succession. Law suits on any property regime of the partners will be decided by the authorities competent for the termination of the partnership. There should however be a residuary head of jurisdiction at the habitual residence of the defendant and at the place of registration. These proposals can be summarised as follows :

- (1) Jurisdiction for maintenance claims lies with the court competent according to treaties,
- (2) Jurisdiction for
 - a) partnership property and
 - b) succession rights at the termination of a partnership lies with the authorities competent for such a termination.
- (3) The authorities at the defendant's place of habitual residence and at the place of registration have jurisdiction to decide any dispute between the partners unless a special head of jurisdiction prevails.

b) Applicable Law

There are at least three methods to solve the problem of the law governing the effects of a partnership of a partnership :

1. detailed provisions according to the Dutch model,
2. short provision according to the German model,
3. simple model suitable for international regulation.

The main problem of the effects of a partnership may be metaphorically described as a problem of a newly created species for which every department store has not yet suitable clothings. Therefore a "conflit mobile" creates problems if the effect, as, e. g., in matters of maintenance is governed by the law of the respective place of habitual residence : The law of a new place of habitual residence may not recognise any support duties of registered partnerships. Therefore the easiest way to solve the problem could be phrased like this :

- (1) The effects of a partnership are governed by the law of the State in which it has been registered or contracted.
- (2) Effects [especially succession] governed by any other conflicts rule are recognised only if the law of registration provides for such an effect.
- (3) If, after a change of habitual residence, the partners want to adjust their partnership to the law of their new habitual residence they may do so by registration at their new habitual residence.

If such a simple model is not chosen, a different could be :

- (1) The effects of a partnership, unless provided in special rule on maintenance or succession, are governed by the law of State in which the spouses are habitually resident or in which they had their last habitual residence.
- (2) If the law governing under (1) does not provide any effect, the law of the State of registration governs.
- c) Recognition of Foreign Judgements

The easiest way to deal with the problem of recognition of foreign judgements on effects of partnership would be to extend the Brussels Regulation No. 1 (Articles 25 et seq.) to these matters of partnership under the condition that for extra-community decisions the indirect jurisdiction of the foreign authorities should be a requirement for recognition.

III. Termination of a Partnership

1. National Law

a) Substantive Law

Registered partnerships may be terminated *inter vivos* by

- (1) common declaration of the partners and registration (e. g. France, Netherlands)
- (2) unilateral declaration (e. g. France, Netherlands)
- (3) marriage of a partner (e. g. France, Netherlands)
- (4) court order (e. g. Denmark, Germany, Netherlands, Norway, Sweden)
- (5) living separately during a certain time (Spanish regions).

b) Private International Law

- (1) Jurisdiction

According to the newly enacted § 661 (3) German Code of Civil Procedure (ZPO) German courts have jurisdiction to deal with the termination of a partnership by court decree if

1. one partner is German or was German at the time of registration or
2. both partners are habitually resident in Germany or
3. one partner is a stateless person with habitual residence in Germany or
4. one partner is habitually resident in Germany or
5. the partnership has been created by registration in Germany.

The Dutch Draft provides for jurisdiction in Article 33 :

1. En ce qui concerne la dissolution du partenariat enregistré, le juge est compétent quand le partenariat enregistré a été conclu aux Pays-Bas.
2. Pour ce qui est de la dissolution du partenariat enregistré conclu à l'étranger, le juge est compétent si au moment du dépôt de la demande :
 - a. les deux partenaires ont la nationalité néerlandaise ou
 - b. l'un des deux partenaires enregistrés est domicilié aux Pays-Bas depuis douze mois ou, s'il est néerlandais, depuis six mois.
3. L'article 429c, alinéa 15 du Code de procédure civile n'est pas applicable.

The Belgian draft adds to Article 57 § 2 mentioned *supra* that dissolution may also be granted if the partnership has been concluded in Belgium (Article 57 § 2 sent. 2) and Belgian law applies to the registered partnership (Article 57 § 3).

(2) Applicable Law

According to Article 17a (1) German EGBGB and to Article 16 of the Dutch draft [*supra* I 2 a (2)] the termination of a partnership registered in Germany or the Netherlands is governed by the respective *lex registrationis*.

The dissolution of a partnership, registered abroad is provided for in Article 31 of the Dutch draft :

1. La question de savoir si l'on peut mettre fin à un partenariat enregistré conclu à l'étranger par consentement mutuel ou par dissolution et pour quels motifs, est régie par le droit néerlandais.
2. En dérogation à l'alinéa 1, le droit de l'État où le partenariat enregistré a été conclu est applicable si les deux partenaires ont élu ce droit dans leur accord relatif à la cessation du partenariat enregistré par consentement mutuel.
3. En dérogation à l'alinéa 1, le droit de l'État où le partenariat enregistré a été conclu est applicable en cas de cessation par dissolution si lors du procès :
 - a. les deux partenaires ont élu ce droit ou si l'un des partenaires ne s'est pas opposé à ce choix ou
 - b. l'un des partenaires a élu ce droit et les deux partenaires ont un lien social effectif avec l'État où le partenariat a été conclu.
4. Le droit néerlandais détermine les modalités de la dissolution du partenariat enregistré conclu à l'étranger.

The Belgian draft refers to the rules for divorce (Article 58 § 1 and Article 53, 54).

2. Proposal for a EU-Regulation

a) Jurisdiction

Jurisdiction should be fixed along the lines of the Brussels II Regulation. There is no reason why registered partnerships should be treated differently.

b) Applicable Law

Because the grounds for termination differ considerably the law governing the effects of a partnership should also govern the termination of a registered partnership.

A special problem has arisen in the Netherlands. According to Article 1 :77a B.W. a marriage can be converted into a registered partnership. Such a conversion, to be registered by a Dutch civil registrar, has the effect that the relation between the former spouses/present partners can be terminated very easily according to the law on termination of partnerships. Of course, Dutch law has also to deal with the international aspects of such a conversion and may choose to give an answer by a rule of substantive law. Such an answer cannot be given by a supranational regulation because not every country can apply a rule of substantive law to a problem unknown to domestic law. In a regulation it should be provided that such a conversion is valid if

- a) both spouses agree and
 - b) the law governing the personal effects of marriage provides such a conversion and
 - c) the registration requirements of the law governing the registration of partnerships are met.
- ### c) Recognition of Foreign Terminations

There are three different set of facts :

- termination without any decision of any State authority
- termination by a decision of a Member State of the EU
- termination by a decision of a third State.

(1) Termination without Decision

Such a termination should be recognised if the law governing the effects of the partnership or provides.

(2) Termination by a Decision of a Member State of the EU

The principles of Brussels III Regulation apply.

(3) Termination by a Decision of a Third State

If a Non-Member State of the European Union has decided to a partnership, this decision should be recognised under three conditions.

- (a) indirect jurisdiction (according to the provisions on direct jurisdiction of the Brussels Regulation II ;
- (b) correct proceedings (hearing, etc.) ;
- (c) no violation of *ordre public*.