Groupe européen de droit international privé
European Group for Private International Law

Divorce and Registered Partnership in Private International Law

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- Revised Version of August 2003 -
- Based on the Version of May 2002 -
Hamburg
25 August 2003

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A. Divorce

I. Jurisdiction: Brussels II

The Regulation (EC) No. 1347/2000 0f 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, the so-called Bussels II Regulation, 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 , or one of them, are connected 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 seize a tribunal of a divorce matter. According to Article 2 (1) last indent Brussels II , e.g., an Italian woman, disappointed by her marriage in Germany, may 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 shall be taken for granted. The only question is whether the liberal attitude of Brussels II has any impact on the formulation on conflicts rules on the law governing divorce.

Brussels II does not cover all petitions for divorce (cp. Articles 2, 7 and 8). It is very unlikely that the EU will amend Brussels II in this respect. Therefore these residuary national heads of jurisdiction should not be discussed. They should be left to the national parliaments.

II. Applicable Law

1. National Solutions

a) Most states fix the law governing divorce by 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 (cp. § 9) and the Netherlands,

(2) if there is no choice by the spouses or if such a choice is not 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, Liechenstein, Netherlands, Poland, Portugal, Rumania, Serbia, Slovenia, Spain, Turkey,
(c) or the lex fori of the competent domestic forum: Scandinavian countries Denmark, Finland, Iceland, Norway and Sweden, Ireland, Switzerland, U.K..

b) If there is no common lex domicilii or lex patriae, states using these connecting factors subsidiarily refer to

(1) the former common lex domicilii or former common lex patriae if at least either spouse still keeps the former common domicile or nationality: Austria, Germany, Greece, Hungary, Liechtenstein,

(2) the law of the common closest connection: Germany, Greece, Italy, Portugal, Rumania,

(3) the lex fori as the lex patriae of either spouse: 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) the lex fori as lex ultimae spei: Hungary, Luxemburg, Poland, Spain, Turkey.

2. International Instruments

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 anymore between the few states which ratified it (Austria, Hungary, Italy, Portugal, Rumania, Spain). It provided a very difficult solution to be explained by the fact that in former times a divorce could not be obtained in all countries. Therefore divorce could only be given in competent fora (Articles 5 and 6) if divorce was permitted by the lex patriae of the couple and the lex fori (Article 1 and 2). Under these conditions divorce was governed by the lex fori (Artice 3).

b) Código Bustamante of 1928
According to the Latin American Código di derecho internacional privado (Código Bustamante) 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 the lex fori as the law governing divorce (Article 7). Divorce jurisdiction lies with a Scandinavian country if the spouses are domiciled in this country or had their last domicile there and one of the spouses is still domiciled in this country. Ultimately divorce may be petitioned by Scandinavian citizens living abroad in a non-Scandinavian country.

III. Proposals for EU-Regulation

Since 1902, when the 1902 Hague Divorce Convention (supra II 2 a) was drafted, the law of divorce has changed in Europe dramatically. Divorce has been introduced in every member state of the European Union. The prevailing if not exclusive ground for divorce is the breakdown of marriage. In some countries speedy proceedings are permitted in cases of divorce by consent. The importance of divorce proceedings has shifted from the termination of marriage to the collateral problems concerning the effects of divorce, especially with respect to maintenance, custody for common children and issues of matrimonial property. This trend is not limited to Europe. It is a universal trend to be met everywhere. If substantive law is almost identical or very similar in most countries, the search for the law of the "closest connection" makes no sense.

We are only concerned with divorce and not with the collateral personal or patrimonial effects of divorce. Therefore we should stick to the task to fix the law governing divorce and should not take into account that the divorce forum may have also to decide on collateral effects of divorce governed by the law "closely connected" with the relevant collateral issue.

1. Proposal

The article on the law governing divorce should read:

Article D (ivorce)

(1) Divorce and legal separation shall be governed by the law chosen by the spouses.

(2) Where no applicable law has been chosen, divorce and legal separation shall be governed by the internal law of the authority seized.

(3) Collateral effects of divorce or legal separation are governed by the law applicable under the special conflicts rules for each of these collateral effects.

2. Comments

The spouses should be allowed to choose the law governing divorce. There is some need for such a choice. In an arrangement between the parties concerning divorce the spouses may agree that a suit for divorce shall be brought in a specific efficient forum but that the law governing divorce should be the law of their last habitual residence or should be their common lex patriae. The choice should not be limited to the law of those states with which the spouses are closely connected. They will in fact choose such a law but they should also be permitted to choose an accessible law, a law well

developed or the "mother law" which has been received by another state. Turkish spouses, e.g., with their last common habitual residence in Germany may agree that German courts should be seized of the petition for divorce [cp. Article 2 (1) lit. a Brussels II] but apply Swiss law as a substitute for the less accessible and less developed Turkish law of Swiss origin.

If there is no choice by the spouses, divorce and legal separation should be governed by the lex fori. Today the main differences in divorce law pertain to divorce proceedings (cp, inter alia short proceedings in divorces by consent, costs and length of proceedings) and not so much to the substantive law of divorce. Under these circumstances it would be rather artifical to look for the law with which the spouses are most closely connected. Of course, there may be some national differences in establishing a marriage breakdown, but this does not justify the application of foreign law. Also with respect to special grounds for divorce (adultery, criminal offenses, incapacity etc.) the lex fori should apply because a divorce may be obtained under these special grounds or under the general ground of breakdown of marriage.

The last sub-section of Article D is not necessary, rather declaratory in nature. It wants to make clear that Article D is limited to the termination of marriage and does not interfere with the conflicts rules designating the law governing the collateral effects of divorce. A special problem arises with regard to Article 8 (1) of the 1973 Hague Convention on the Law Governing Maintenance Obligations. According to this provision maintenance obligations between divorced spouses are governed by the law applied to the divorce. This combination may have unfair results. A spouse may seize a certain divorce forum in order to take advantage of the lex fori which favours the potential debtor of post-nuptial obligations. Article 8 of the 1973 Hague Maintenance Convention should be revised. Under the Brussels II Regulation this Article 8 is not any more up to date.

IV. Recognition of Foreign Divorces

Divorces obtained in a Member State of the European Union are recognized in the other Member States according to Articles 14 et seq. of the Brussels II Regulation. Divorces obtained outside the European Union will be recognized under multi- or bilateral treaties (e.g. the 1970 Hague Convention on the Recognition of Divorces and Legal Separations ratified by eight Member States of the European Union) and/or national rules on the recognition of foreign divorces. The European Union should not interfere with this residuary competence of the Member States.

B. Registered Partnerships

I. National Law on Registered Partnerships

1. Types of Family Unions

Today there are at least nine different types of family unions between two persons living together as partners of such a union:

- traditional marriages of opposite-sex partners (everywhere),
- "covenant marriages" according to the law of some states of the United States (e.g. Louisiana)
- same-sex marriages (e.g. Belgium, Netherlands)
- registered partnerships of same-sex partners (e.g. Scandinavian countries, Germany)
- registered partnerships of opposite-sex partners (e.g. some Spanish Autonomous Communities)
- contractual partnerships of same-sex partners (e.g. France)
- contractual partnerships of opposite-sex partners (e.g. France)
- factual partnerships of opposite-sex partners (e.g. Croatia, Slovenia, South America)
- factual partnerships of same-sex partners (e.g. France, some states of the United States).

We shall neither deal with traditional marriages of husband and wife nor with transsexual marriages or factual partnerships already existing since many decades. We shall concentrate on same-sex marriages and on partnerships formalized by registration either of a common declaration of the partners or of a contract drawn up by the partners.

2. Effects of Family Unions

The effects of family unions are quite different. Some same-sex marriages and partnerships have the same effects of a traditional marriage (e.g. in the Scandinavian countries, the Netherlands). The German partnership has almost the same effects of a marriage without daring to confess it and there are also partnerships with lesser effects (e.g.France).

National statutes on registered partnerships provide also several advantages of public law (e.g. tax law, employment with public authorities, social security, family allowances). We shall not deal with these effects of public law and rather emphasize the most important effects of private law nature, i.e. maintenance, partnership property and the law of succession.

3. International Dimensions of Family Unions

Most statutes on registered partnerships do not determine the international dimensions of these family unions. There are, however, some exceptions of three different types:

- explicit special conflicts rules as, e.g., in Finland (§§ 10 et seq. of the Statute of 2001), Germany (Article 17b EGBGB) and in the drafts of Belgium, the Netherlands and Switzerland,
- application of conflicts rules for marriages as,e.g., according to § 9 (3) of the Swedish Statute 1994:1117,
- special personal requirements (residence in the state of registration or nationality of that state) for the creation of partnerships as,e.g., fixed by Article 515-3 Code civil.

4. Conclusion

Needed are international conflicts rules for registered partnerships. These rules

- must liberally cover all types of formalized partnerships, also those which cannot be created in every Member State of the EU,
- must be limited to the new problems without touching the already existing rules on maintenance and succession,
- must be restricted to private law effects of these family unions.

An instrument on private international law aspects of registered partnerships should start with

Article P (artnership) 1

This instrument shall apply to formalized family unions created by

a) celebration of marriage between same-sex partners

b) registration of declarations made by opposite-sex or same-sex partners

c) registration of contracts drawn up by opposite-sex or same-sex partners.

II. Creation of Registered Partnerships

1. Jurisdiction

Most states do not provide any rules on international jurisdiction of national authorities to register the establishment of a non-traditional family union. Exceptions are Article 65b of the Swiss draft (one of the partners must be a Swiss national or be domiciled in Switzland) and Article 1 of the Dutch draft referring to domestic rules for a registration in the Netherlands. This Dutch rule is also followed by most of the Member States of the European Union which, for the purpose of venue, may require that

- one partner is a national of the state of registration (e.g. France for a PACS of partners living abroad) or
- one partner must be domiciled or have his or her habitual residence in the state of registration (e.g. Sweden) or in the circuit of the authority of registration (e.g. Germany).

For international cases we should either refrain from formulating any rule on international jurisdiction or, better for purposes of clarity, provide

Article P 2

A partnership shall be formalized by registration or by any other formality when these partners meet the jurisdictional requirements of the internal law of the state of formalization.

2. Law Governing Registration

There are only two basic approaches to the law governing the substantive validity of a registered partnership:

- application of the lex fori registrationis (e.g. Finland, Germany,Netherlands,Swiss draft),
- application of the personal law of each partner be it the nationality (e.g. Belgian draft) or the law of domicile or habitual residence (e.g. Sweden).

As long as not every registered partnership is recognized in most states, it seems to be the only solution to apply the lex fori registrationis to the sustantive law requirements of registration. The same is true for the formalities of registration.

Article P 3

The creation of a partnership is governed by the law of the State of Registration.

3. Recognition of Foreign Registrations

a) Problems and Potential Solutions

Under public international law or European law all Members of the EU are not obliged to introduce any type of registered partnership. They may, however, be compelled to recognize any type of registered parnership created abroad in a Member state of the EU. Be it as it may, the Member State of the EU should liberally recognize partnerships registered abroad.

If there are any national conflicts rules at all, these rules on recognition of foreign registations apply only to partnerships known in the state of recognition. This means that states with only one type of registered partnership (same-sex partnership as in Germany, the Scandinavian countries and in the Swiss draft) only these types of partnerships registered abroad will be recognized. In the Netherlands, however, where all types of partnerships may be established, all partnerships validly registered abroad will be recognized.

b) Meaning of "Recognition"

Before making any suggestions with respect to a provision on nrecognition of foreign registrations of partnerships some remarks on the meaning of "recognition" seem to be appropriate. This may be explained by a simple example of common daily experience. Almost any modern form and document about personal data (be it a tax declaration, social security card or application for these documents) asks for the personal status of the applicant or holder and wants to know whether this person is "singled", "married" or "divorced". What does this mean for the partners of a Dutch same-sex marriage living in Germany? Are they "married" according to a German form asking for information whethern the applicants are "ledig", "verheiratet" or "geschieden"? Similar questions arise with respect to private law matters of partners registered abroad.

(1) Forms

In the example given (German form asking for the personal status of partners of a Dutch same-sex marriage) a correct answer can only be given if you know what the question to be answered means. It is quite obvious that the question "married?" means "married to a partner of a different sex?" because there is only this type of marriage in German law.Therefore the partners of the Dutch same-sex marriage have to answer the question "married?" with "no". This may become different in future times when the question "married?" will be substituted by the two questions "married to a person of a different sex?" and "married to a person of the same sex?".

(2) Succession

Also in succession cases the question of recognition of foreign registrations may arise as the following example may show. A German man is married to a Dutch man in Amsterdam. The couple moves to Hamburg where the German partner passes away. German authorities having probate jurisdiction under German law apply German law to issues of succession and to the administration of the estate. Under German succession law the same-sex partner of the deceased has no statutory share in the estate of his partner. Therefore the surviving Dutch partner does not get anything of estate of his German partner unless the deceased had made a will in favour of him.

Also here the correct interpretation of German succession law reveals that only surviving spouses of a opposite-sex marriage have a fixed share in the estate of the deceased partner. Even if the foreign same-sex marriage were recognized in Germany, this would not change the German substantive law of succession.

(3) Maintenance

Whether partners have reciprocal maintenance obligations is governed by the law determined by the 1973 Hague Maintenance Convention [see infra B III 2 b (1)].

(4) Partnership Property

The national conflicts rules on matrimonial property apply only to relations created by a traditional marriage. For registered partnerships and same-sex marriages a separate conflicts rule has to be formulated.

(5) Effects of Public Law

We do not have to deal with public law (law of internal revenue or social security). It is up to every national provision of public law whether it will be applied only to traditional marriages or also to registered partnerships. A supranational instrument cannot interfere with national policies of public law.

(6) Summary

The term "recognition" in the context of recognition of partnerships registered abroad has the simple and normal meaning that these partnerships will be accepted in the recognizing state as family unions of a special type and will be treated the same way as domestic partnerships of the same type. "Recognition" does not mean that a foreign partnership will be treated as an equivalent to any other type of family union established at home. This is a matter of substantive law as can be clearly shown by national statutes on registered partnerships. They formulate a rule of substantive law as, e.g., section 3 (1) of the Norwegian Act of 1993 on Registered Partnership: "Registration of partnership has the same legal concequences as entering into marriage, with the exceptions mentioned in section 4." Provisions of private international law do not interfere with these problems of substantive law.
Every piece of legislation, whether an international instrument, a supranational regulation or a national statute on any subject matter be it on conflicts law or on substantive law, is free to determine its scope ratione personae and ratione materiae. Therefore it is up to every legislative text using the terms "marriage", "spouses" or "married persons" to determine whether these terms also cover non-traditional family unions of same-sex or opposite-sex partners. This principle of autonomous interpretation of domestic statutes is not affected by foreign legislation extending the notion and the effects of traditional marriages to non-traditional family unions. Such an extension has to be made for every jurisdiction by domestic authorities.

Based on these universally accepted principles of independant legislation and autonomous interpretation, the applicable substantive law of registered partnerships governing every single issue of the type of family union in question has to decide whether this partnership is treated as if it were a traditional marriage or whether it has different consequences. If, e.g., the Dutch law of registration applies as lex loci registrationis, the same-sex marriage will be treated the same way as a heterosexual marriage. If , however, German law governs a certain effect of the Dutch same-sex marriage, German law has to decide whether the terms used in German statutes also cover the foreign same-sex marriage.

It is a completely different question not to be solved by us whether national statutes on substantive law of partnerships discriminate certain couples excluded from the scope of partnership legislation. Such potential violations have to be corrected by competent international tribunals and by national legislators.

c) Conflicts Rule

For the recognition of partnerships established abroad the conflicts rule should read like this:

Article P 4

> (1) Every state recognizes every partnership which, according to the law of the state of marriage or registration, has been validly established abroad by persons of the same or of the opposite sex.
>
> (2) If a person has been registered as a partner in different states, the last registration prevails.
>
> (3) A certificate of registration issued by the authority ot the state of registration is prima facie evidence of a validly established partnership.

A short explanation of subsection (2) may be necessary. It may happen that the same person is registered several times as a partner to the same person or to different persons. In both cases the last registration should prevail without having to decide whether successive registrations of the same person in different states are compatible or not.

III. Effects of Partnership

1. Extent of International Legislation

Several consequences of registered partnerships are governed by special conflicts rules on succession or maintenance [supra B II 3 b (2) and (3)]. Insofar no legislation is needed.
Also the problem of domestic law whether same-sex partners are permitted to adopt children is a matter of the law governing adoption and is not governed by the law of registered partnerships.
Finally it is the task of every national legislator to extend national legislation of family law to different types of family unions as it has ,e.g., been done in some Canadian provinces. Such an extension, necessary under human rights legislation and court decisions, cannot be ordered by an international piece of legislation.

There are mainly three effects which should be treated by supranational regulation: partnership property, maintenance not governed by the 1973 Hague Maintenance Convention and name of the partners.

2. Partnership Property

a) Jurisdiction

No heads of jurisdiction are necessary for cases of succession and for maintenance suits covered by the Brussels Convention. A kind of residuary head of jurisdiction is, however, needed for matters of

property because these matters are covered neither by the Brussels Convention nor by the Brussels II Regulation. As not all national courts may be able to decide upon issue of a partnership established abroad the courts ot the state of registration should have jurisdiction in this respect.

Article P 5

> The courts of the state where the partnership has been registered have jurisdiction to determine any effect of the partnership unless jurisdiction for these effects is exclusively governed by international instruments.

b) Applicable Law

(1) Maintenance

Every maintenance obligation arising from family relationship or affinity is covered by the Hague Convention of 1973 on the Law Applicable to Maintenance Obligations. Excluded are maintenance obligations created by contract or unilateral promise.

According to Article 515-4 (1) Code civil "les partenaires liés par un pacte civil de solidarité s'apportent une aide mutuelle et matérielle. Les modalités de cette aide sont fixées par le pacte." This seems to be a statutory duty for a certain kind of maintenance which, according to the Conseil constitutionnel (Décision no. 99-419 of 9 November 1999, J.O. 1999, 16962) cannot be excluded by contract and the details of which are only fixed by the PACS of the partners. For purely contractual maintenance obligations our draft should favour the law governing the contract.

Article P 6

> (1) Maintenance obligations arising from a partner relationship are covered by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (1973 Hague Convention).
>
> (2) If the creditor is unable, by virtue of the laws referred to in the 1973 Hague Convention, to obtain maintenance from the debtor, the law of state in which the partnership has been established shall apply.
>
> (3) Maintenance obligations not covered by the 1973 Hague Convention are governed by the law chosen by the partners or, if the applicable law has not been chosen, by the law of the state in which the partnership has been established.

The problem of Article P 6 (2) may arise when the partner is unable to obtain maintenance according to the law applicable under the 1973 Hague Maintenance Convention. Take this example:
A Dutch man and a German woman registered as an opposite-sex partnership in the Netherlands. Having moved to Germany the woman files a maintenance suit against her partner in a German court. German law applies under Articles 4 and 6 of the Hague Maintenance Convention but does not provide any statutory maintenance obligations between opposite-sex partners. According to Article 17b (1) sentence 2 EGBGB Dutch law as the lex loci registrationis applies subsidiarily if no maintenance is due under the 1973 Hague Convention. Such a provision is, in fact, permitted and does not violate the international obligations of the Contracting States of the 1973 Hague Convention because it simply amends the residuarily applicable lex fori (Article 6 Hague Convention) and because every Contracting State is free either to create maintenance obligations by domestic legislation or to refer to another law providing for such obligations. Therefore a provision as proposed in Article P 6 (2) should be included in our draft.

(2) Succession

Problems of succession are governed by the law designated by national or international conflicts rules. This should not be changed. The only question to be answered is whether a supranational instrument of the EU should take care of the situation that a national substantive law of succession does not give a fixed share of the estate to the surviving partner. Article 17b (1) sentence 2 EGBGB reads: "If the partnership does not provide .... [according to the law governing succession] a statutory share in the estate , sentence 1 [application of the law of the state in which the partnership has been registered] applies by analogy."

The problem may be illustrated by an example. A German man and French man are registered in Germany as a "eingetragene Lebensgemeinschaft". The partner move to France and the German partner passes away with his last domicile and habitual residence in France. Under French private international law French law governs succession but French substantive law does not provide a statutory share of the estate for the surviving partner. Under German law as the lex loci registrationes , however, the surviving partner qualifies as a statutory heir (§ 10 Lebenspartnerschaftsgesetz).Would it not be advisable to apply the law of the state of registration subsidiarily and not to rely exclusively on the partners' freedom to make a will in favour of the surviving partner? Also here, as in the case of maintenance, the lex loci registrationis should apply subsidiarily.

Article P 7

(1) Succession is governed by the law designated by the regular rules of private international law on succession.

(2) If the law governing intestate succession does not provide a statutory share of the estate for the surviving partner, the law of the state in which the partnership has been established shall apply.

(3) Property

In matrimonial property law we are used to four different types of conflicts rules:

- choice of law by the spouses,
- common lex patriae or common lex domicilii of the spouses
  - at the time when an issue of matrimonial property has to be decided and no law governing the matrimonial property regime had been chosen,
  - at the time of marriage if no law governing the matrimonial property regime had been chosen,
- distinction between movable property governed by the personal law (statut personel) of the spouses and immovable property governed by the lex rei sitae.

Can one of these conflicts rules be applied by analogy to the property law of registered partners? The main problem with the law of registered partnerships is that only some national laws provide partnership property regimes. These are those countries which refer to the law of matrimonial property regimes (e.g. Sweden) or which adapt the partnership property regime to matrimonial property regimes (e.g. German "Ausgleichsgemeinschaft" as the equivalent to the matrimonial "Zugewinngemeinschaft"). What is missing in the field of partnership property is the universal recognition of such a regime which may be freely chosen or be applied objectively in cases of any "conflit mobile". Therefore the law of the state of registration is a stable factor providing the necessary information about any property regime.

Article P 8

(1) The partnership property regime is governed by the internal law designated by the partners.
The law thus designated applies to the whole ot their property. Nontheless, the partners may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide taht any immovable which may subsequently be aquired shall be governed by the law of the place where the immovables are situated.

(2) If the partners have not designated the applicable law, their partnership property regime is governed by the internal law of the state in which the partnership has been established.

Article P 8 (1) sentence 1 requires a short explanation. The provision as it stands now favours unlimited party auonomy. The partners may choose the law of every state. There seems to be only one jurisdiction which can be presented as an example with a statutory provision granting such a freedom: Austria. Under § 19 of the Austrian Federal Act of 1978 on Private International Law "matrimonial property is governed by the law expressly designated by the parties..." The Hague Convention of 1978 on the Law Applicable to Matrimonial Property Regimes (in force in France, Luxemburg and the Netherlands) and most national codifications restrict party autonomy. And yet, there does not seem to be any reason to retsrict party autonomy the same way for partnership property regimes. Up to now there are very few specific regimes for partnerships, but many matrimonial property regimes. If partners choose the law governing their property relations (e.g.: "Applicable is the law of Germany.") , they will make sure that the law chosen has a specific partnership property regime for their type of partnership (in my example the "Ausgleichsgemeinschaft" for same-sex partnerships). They would not designate Italian law because there is no Italian property regime for partnerships. If the partners do not select the law governing but rather stipulate a specific national matrimonial property regime (e.g. choice of the Swiss "Errungenschaftsbeteiligung"), they designated the national law of the chosen regime and that national law has to determine whether the chosen matrimonial property regime can also be applied to the regime of registered partners. So long as not everywhere property there are regimes for partnerships, the partners should be given complete freedom and should not be limited to the law of specific states which might not provide any solution for the partners. Such a limitation of party autonomy would be very misleading.

Another solution of the problem of party autonomy would be to limit autonomy to those laws which provide for partnership property regimes, either specifically for partnerships or generally for all or many types of family unions (e.g. in those states which treat partnerships and marriages alike and extend matrimonial property regimes to partnerships). This kind of restriction can be found in Article 6 of the Hague Trust Convention of 1985.We should be more generous and propose Article P 8 (1) sentence 1 as formulated supra.

The second sentence of Article P 8 (1) is taken from Article 3 (3) and (4) of the 1978 Hague Matrimonial Property Convention. It is of minor importance but should be discussed. If we propose

unlimited party autonomy it would be strange if we did not give permission to adjust the partnership regime to the respective leges rei sitae of immovables.

(4) Name

Some jurisdictions have special conflicts rules for the name of natural persons. These rules also apply to the partners of a partnership. The partners Michael Schmidt and François Boyer may, under the German law of their "Lebenspartnerschaft" choose as common name the name Boyer and Michael could decide to put his name ahead of the common name Boyer (§ 3 of the German Lebenspartnerschaftsgesetz). The national conflicts rules on names of natural persons should be amended by national legislators in order to deal explicitly with the international dimensions of the partnership name and to make special provions for partners who established their partnership abroad and want to adjust to local conditions.

(5) Summary

A new conflicts rule has to formulated for matters of partnership property (Article P 8). With respect to maintenance and to succession special provisions are necessary for those cases in which the normal law governing does not provide a maintenance obligation or does not provide a statutory share of the estate for the surviving partner. In both cases the law of the state in which the partnership has been established should govern subsidiarily (Articles P 6 and P 7).

IV. Termination of Partnership

1. National Substantive Law

There are three different types of termination of partnerships with certain variations within each type:

- court order (e.g. Germany, Netherlands, Scandinavian countries)
- declaration of the partners either
  - common declarartion (e.g. France, Netherlands) or
  - unilateral declaration (e.g. France, Netherlands)
- factual events as, e.g.,
  - marriage of a partner (France, Netherlands)
  - living separately during a certain time (some Spanish Autonomous Communities)
  - death of a partner.

Jurisdiction of national authorities must be fixed for court orders and for the registration of declarations terminating the partnership.

2. Jurisdiction

Some national statutes and drafts of statutes on registered partnerships assume jurisdiction of national courts to terminate the partnership if the partnership by registration or the partners by nationality, domicile or habitual residence of one of them have close contacts with the domestic legal system. A similar approach can be found in Article 2 of the Brussels II Regulation. The same should be proposed for registered partnerships.

Article P 9

> (1) This Article applies only to jurisdiction of national authorities to terminate family unions by a decision of the competent authority.
>
> (2) For decisions concerning the termination of family unions the courts of the Member states have jurisdiction according to Article 2 of the EC Divorce Regulation 1347/2000 of 29 May 2000.
>
> (3) The courts of the Member States have juridiction to terminate a family union which has been established within their territory.

The first paragraph of this Article wants to make sure that only decisions of public authorities or courts are covered and not the registration of a delaration of termination required, e.g., by French law (Article 515-7 Code civil). Such requirements are governed by the law applicable to the termination of partnership.

Article P 9 (2) refers to the Brussels II Regulation. What has been regulated for divorce should also be valid for the termination of partnership. To these heads of jurisdiction should be added the jurisdiction of the fora loci registrationis as laid down in Article P 9 (3).

3. Applicable Law

There are only very few national examples for conflicts rules on the law governing the termination of partnership. There seem to be four different solutions for this problem:

- application of the lex fori (e.g. Dutch draft)

- application of the lex loci registrationis (e.g. Germany, Dutch draft)
- application of the law governing divorce (e.g. Finland)
- application of the law chosen by the partners (e.g. choice of the lex loci registrationis under the Dutch draft).

The lex fori may be determined as the law governing the termination of partnership by a nation which has alraedy introduced the registered partnership and its termination but cannot be used for a multilateral supranational instrument to be introduced also in Member States which have not yet any statute on registered partnerships.

The law of the state in which the partnership has been established and which governs the creation and certain effects of the family union should also govern the termination of partenership. This is especially true for those grounds of termination which do not require any court decision. But also the termination by court order should be governed by the lex loci registrationis.

The partners should be permitted to choose the law governing the termination of partnership.This should be a free choice of any law as in the case of divorce [supra Article D (1) at A III 1]. If we decide to limit the choice, this choice should be limited to the law of those states with which the partners or at least one of them has close contacts or in which the termination proceedings will or have been initiated.

The law governing divorce cannot be used as the applicable law if reference is made to national conflicts rules. The separate Article P 10, based on the similar policies as laid down in Article D, should read like this:

Article P 10

(1) The termination of a partnership shall be governed by the law chosen by the partners. [The partners may choose the law of a state with which at least one of the partners has close contacts by nationality, domicile or habitual residence or in which the termination proceedings will be or are initiated.]

(2) Where no applicable law has been chosen, the termination of a partnership shall be governed by the internal law of the state in which the partnership has been established.

4. Recognition of Terminations Accomplished Abroad

If a partnership has been terminated by declaration of the partners or by factual events, the law governing the termination according to Article P 10 determines whether the partnership has been validly terminated. If a partnership has been terminated by a foreign court, a distinction has to be made between decisions of a Member State of the EU and of states outside the EU. We should propose Article P 11:

Article P 11

(1) Decisions of a Member State of the EU terminating a partnership shall be recognized by analogous application of Articles 14 et seq. of the Brussels II Regulation No, 1347/2000 of 29 May 2000.

(2) Decisions of States not being members ot the EU shall be recognized if

a) the foreign courts had jurisdiction according to the principles of Article 2 Brussels II Regulaton,

b) there is no ground for declining recognition as enumerated in Article 15 (1) Brussels II Regulation.

(3) If a partnership has been terminated abroad without any court decision, the termination is recognized if it is valid under the law governing the termination unter Article P 10.

Under Article P 11 (2) the recognition may be refused if the foreign authority had no indirect jurisdiction. This indirect jurisdiction is given if the foreign authority would have been competent under Article 2 of the Brussels II Regulation.

C. Summary

The following Articles formulated in the outline should be proposed for a regulationm ofb the EU:

Article D (ivorce)

(1) Divorce and legal separation shall be governed by the law chosen by the spouses.

(2) Where no applicable law has been chosen, divorce and legal separation shall be governed by the internal law of the authority seized.

(3) Collateral effects of divorce or legal separation are governed by the law applicable under the special conflicts rules for each of these collateral effects.

Article P (artnership) 1

This instrument shall apply to formalized family unions created by

a) celebration of marriage between same-sex partners

b) registration of declarations made by opposite-sex or same-sex partners

c) registration of contracts drawn up by opposite-sex or same-sex partners.

Article P 2

A partnership shall be formalized by registration or by any other formality when these partners meet the jurisdictional requirements of the internal law of the state of formalization.

Article P 3

The creation of a partnership is governed by the law of the State of Registration.

Article P 4

(1) Every state recognizes every partnership which, according to the law of the state of marriage or registration, has been validly established abroad by persons of the same or of the opposite sex.

(2) If a person has been registered as a partner in different states, the last registration prevails.

(3) A certificate of registration issued by the authority ot the state of registration is prima facie evidence of a validly established partnership.

Article P 5

The courts of the state where the partnership has been registered have jurisdiction to determine any effect of the partnership unless jurisdiction for these effects is exclusively governed by international instruments.

Article P 6

(1) Maintenance obligations arising from a partner relationship are covered by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (1973 Hague Convention).

(2) If the creditor is unable, by virtue of the laws referred to in the 1973 Hague Convention, to obtain maintenance from the debtor, the law of state in which the partnership has been established shall apply.

(3) Maintenance obligations not covered by the 1973 Hague Convention are governed by the law chosen by the partners or, if the applicable law has not been chosen, by the law of the state in which the partnership has been established.

Article P 7

(1) Succession is governed by the law designated by the regular rules of private international law on succession.

(2) If the law governing intestate succession does not provide a statutory share of the estate for the surviving partner, the law of the state in which the partnership has been established shall apply.

Article P 8

(1) The partnership property regime is governed by the internal law designated by the partners.

The law thus designated applies to the whole ot their property. Nontheless, the partners may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide taht any immovable which may subsequently be aquired shall be governed by the law of the place where the immovables are situated.

(2) If the partners have not designated the applicable law, their partnership property regime is governed by the internal law of the state in which the partnership has been established.

Article P 9

(1) This Article applies only to jurisdiction of national authorities to terminate family unions by a decision of the competent authority.

(2) For decisions concerning the termination of family unions the courts of the Member states have jurisdiction according to Article 2 of the EC Divorce Regulation 1347/2000 of 29 May 2000.

(3) The courts of the Member States have juridiction to terminate a family union which has been established within their territory.

Article P 10

(1) The termination of a partnership shall be governed by the law chosen by the partners. [The partners may choose the law of a state with which at least one of the partners has close contacts by nationality, domicile or habitual residence or in which the termination proceedings will be or are initiated.]

(2) Where no applicable law has been chosen, the termination of a partnership shall be governed by the internal law of the state in which the partnership has been established.

Article P 11

(1) Decisions of a Member State of the EU terminating a partnership shall be recognized by analogous application of Articles 14 et seq. of the Brussels II Regulation No, 1347/2000 of 29 May 2000.

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a) the foreign courts had jurisdiction according to the principles of Article 2 Brussels II Regulaton,

b) there is no ground for declining recognition as enumerated in Article 15 (1) Brussels II Regulation.

(3) If a partnership has been terminated abroad without any court decision, the termination is recognized if it is valid under the law governing the termination unter Article P 10.

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Dernière mise à jour le 29-09-2009