

Groupe européen de droit international privé

Divorce and Registered Partnership in Private International Law

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Registered Partnership in Private International Law

Article 1

This instrument shall apply to formalized family unions (partnerships) evidenced by

[a) celebration of marriage between same-sex partners]

b) registration of declarations of a non-marital relationship made by opposite-sex or same-sex partners

c) registration of contracts on a non-marital relationship drawn up by opposite-sex or same-sex partners.

Article 2

A partnership validly established in another Member State shall be recognized as such [provided that, at the time of establishment,

a) at least one partner was habitually resident in this Member State or

b) at least one partner was a national (in the United Kingdom and Ireland a domiciliary) of this Member State.]

Article 3

[(1) Maintenance obligations arising from a partner relationship are covered by the rules of 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 Member 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 Member State in which the partnership has been established.]

Article 4

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

(2) If the law governing intestate succession does not provide a statutory share of the estate for the surviving partner [or their children], the law of the Member State in which the partnership has been established shall apply.

Article 5

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

The law thus designated applies to the whole of their property. Nonetheless, the partners may designate with respect to all or some of the immovable property, the law of the place where such immovable property are located. They may also provide that any piece of immovable property which may subsequently be acquired shall be governed by the law of the place where the immovable property is located.

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

Article 6

(1) Decisions of a Member State of the EU terminating a partnership shall be recognized by analogous application of Articles 21 *et seq.* of the Brussels II Regulation No. 2201/2003 of 27 November 2003.

(2) If a partnership has been terminated in a Member State without any court decision, the termination is recognized if it is valid under the law of the Member State in which the partnership has been established. This also applies to the termination of a partnership by marriage.

Article 7

(1) If the same partners established different types of partnerships in different Member States, the partnership established last prevails.

(2) A partnership validly established in a Member State will not be recognized if such recognition is manifestly contrary to public policy of the forum state.

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Comments

I. Basic Decision

The committee proposes an instrument which is based on the “Alternative” submitted last year in Vienna. There are several reasons for such a proposal according to the “recognition theory”:

1. Registered partnerships are not yet accepted in all Member States. Several types of family unions with different effects have been established in several member states. These legislative activities have not yet come to an end.
2. The European Union passed the Council Regulation No. 723/2004 of March 2004 amending the Staff Regulations of officials of the European Communities (O.J. 2004, L 124/1) and in no. 97) amended Art. 1 of the Annex VII with respect to “stable non-marital partners”. Even here the development has not yet finished,
3. The European Union legislation in this field should be limited to the necessary recognition of partnerships established in a Member State and should leave as many details with respect to the establishment, effects and the termination of a partnership to the Member States. Therefore the regulation does not deal with partnerships established in non-member states. Every Member State is free to create own rules or to apply the EU regulation accordingly.

II. General Outline

The proposal of the committee is based on four basic policies:

1. Every partnership legally established in a Member State has to be recognized in the other member states.
2. As there is no European regulation on the law governing marriage and the effects of marriage, the law of partnership cannot be reduced to the corresponding application of such unified conflicts rules.
3. Every type of partnership should be recognized “as such”, i.e. with the same or similar effects provided by the law according to which it has been established. This policy is achieved by two types of rules:
 - a) The effects of a partnership are primarily governed by the law governing the effects of any kind of relationship between living persons or with a deceased person. Therefore, e.g., the normal rules governing maintenance

or succession also apply to maintenance and succession problems between partners. These rules are declaratory insofar as they confirm the already existing law in the Member States.

- b) If the law governing according to these normal conflicts rules does not provide an effect provided by the law governing the establishment of the partnership, the latter law governs subsidiarily.
4. The valid termination of a partnership in a Member State is also recognized in the other Member States.

III. Commentary

1. Article 1

The proposal should cover all types of partnership and family unions. In some Member States, however, same-sex marriages and traditional marriages are treated alike. Therefore some committee members suggested that such same-sex marriages should not be regulated together with family unions of an inferior status. Other committee members advocate for the inclusion of same-sex marriages because, under the European perspective, all family unions not being traditional opposite-sex marriages should be treated in the same regulation as long as there is no common attitude with respect to the status of same-sex marriages.

2. Article 2

This is the basic provision on the recognition of partnerships validly established in another Member State. The only serious problem is whether to apply the *lex loci actus* unconditionally or whether it should be required that the partners had some minimum contacts with the state in which the partnership has been established. If such a restrictive policy is favoured the habitual residence, nationality or domicile of one partner may be taken as such a minimum contact.

3. Article 3

Article 3 applies policy no. 3 to maintenance. The Hague Maintenance Convention of 1973 applies in many Member States and should not be denounced in these states. It should rather be extended to the other Member States and applied in the European Union primarily.

If the *lex fori* (Article 6 of the Hague Convention) does not provide for the maintenance of partners the law of the Member State in which the partnership has been established should apply.

Article 3 (3) adds a provision for maintenance obligations not covered by the Hague Convention, for example for maintenance obligations stipulated in a partnership contract.

4. Article 4

Article 4 applies policy no. 3 to succession. The subsidiarily applicable *lex loci actus* should also be extended to children of the partners.

5. Article 5

With respect to the law of partnership property policy no. 3 had to be varied. As there is no partnership property law in most Member States, party autonomy should prevail (subsection 1) and the *lex loci actus* should apply subsidiarily (subsection 3).

Subsection 2 is a copy of Article 3 paragraph 3 of the Hague Matrimonial Property Convention of 1978.

6. Article 6

Article 6 deals with the termination of a partnership. Primarily the Brussels Regulation No. 2201/2003 should be applied accordingly to court decisions of a Member State terminating a partnership.

If the partnership has been terminated in the European Union without a court decision the *lex loci actus* shall decide whether the termination is valid.

7. Article 7

Article 7 takes care of public policy issues. Before formulating a general ordre public clause in subsection 2 the first subsection deals with conflicting partnerships. For partnerships established abroad this subsection gives a substantive rule in favour of the ultimate partnership.