

European Recognition of Same-Sex Relationships: We Need Action Now!

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In 1989 a new institution, registered partnership, was born. During its infancy registered partnership developed slowly; its personality nurtured by those in the vicinity. Even during its early days registered partnership remained relatively unaffected by outside influence. Yet, with the onset of adolescence, things began to change and a period of progress dawned. New and exciting external influences demanded that registered partnership change and adapt. Confronted with new ideas and perspectives, registered partnership had to fight for its territory and determine where its boundaries lay. Yet as adolescence drew to a close, registered partnership began to mature, find its own path and recognise its core value system. Although its upbringing and roots had left indelible marks on its personality and character, registered partnership had, after painstaking development, managed to mould itself and become an individual. With a turbulent time behind it and the tests of maturity and old age yet to come, it seems clear that registered partnership has managed to carve a little piece of the world for itself.

Although the story appears to end happily with non-marital registered relationships woven into the fabric of family law in Europe, it is not true to say that all is well that ends registered. Although more than 50 jurisdictions worldwide have created non-marital registered relationship schemes, a couple registered in one country can still face problems as soon as they cross the border and leave the territory where their relationship was originally registered. The question arises how one can best solve this and many other private international law problems.

One could begin with the harmonisation or unification of substantive family law in this field. Although the battle lines have been drawn between those who believe in the desirability of harmonising or unifying substantive family law and those who believe otherwise, this debate has been circumvented in this article (for publications on the harmonisation and unification of substantive family law in Europe see: www.law.uu.nl/priv/cefl). It has been presupposed that irrespective of whether the harmonisation or unification of family law in this field is desirable, it is evidently not feasible. As is the case with matrimonial property law, it is possible to differentiate a number of models of relationship registration. Although one may prefer one model above and beyond the others, the eventual choice may simply be no more than an amalgamation of

socio-political and legal-structural factors. At this time it is therefore fully justifiable to assume that any attempt to harmonise or unify the substantive law rules in this field would be destined to fail.

Bearing this in mind, the search for answers to the aforementioned problems turns to the domain of private international law. Questions of jurisdiction, choice of law and the recognition and enforcement of judgments will inevitably arise with respect to non-marital registered relationships. With more than 6 million European citizens migrating yearly, coupled with the 1½ million third country nationals moving to the EU each year, the number of cross-border familial relationships is only set to rise. This rise leads in turn to an increase in the number of cases with an international element, and thus an increase in the resort made to private international law. As long as private international law rules remain national, application of these rules could lead to decisional discord and limping relationships. As a result, one could strive for the harmonisation or unification of private international law rules with respect to non-marital registered relationships.

After a brief summary of the present domestic institutions for non-marital registered relationships currently operating throughout Europe, attention will shift to how three countries deal with the recognition of foreign relationships. These three countries, namely Belgium, the Netherlands and the UK, have been selected to illustrate the differences in approach and result. It is not intended that these countries be representative of the registration systems available, nor representative of the possible private international law solutions. These three countries merely operate as illustrations of the problems facing registered partners wishing to travel from one state to the other. The final section of the article will deal with the organisations that could possibly tackle the issues surrounding registered relationships in Europe and thus promote the harmonisation of the private international law aspects of non-marital registered relationships.

Current substantive law

At present, 17 European countries have enacted some form of registered scheme for same-sex, and in certain cases different-sex couples. Those countries are: Andorra (2005), Belgium (2000), Czech Republic (2006), Denmark (1989), Finland (2001), France (1999), Germany (2001), Greenland (1996), Hungary (2009), Iceland (1996), Luxembourg (2004), the Netherlands (1998), Norway (1993), Slovenia (2007), Spain (1998–2007), Sweden (1995), Switzerland (2007) and the UK (2005 in all three jurisdictions, namely England and Wales, Scotland and Northern

Ireland). In examining those EU Member States, 13 of the current 27 Member States provide for some form of registration scheme. Despite the lack of uniformity, one can certainly identify commonalities or uniform trends in these registration schemes. Four common elements, namely (a) registration, (b) partnership, (c) solidarity and (d) stability are either explicitly or implicitly referred to in the legislation of all 17 jurisdictions.

Alongside these new registration forms, many European countries have also increasingly granted legal recognition to unmarried, cohabiting couples. In Portugal and Hungary, for example, the rights extended to unmarried different-sex cohabiting couples have been extended to unmarried same-sex cohabiting couples. This article, however, concentrates on those relationships in which registration is a condition for the existence of the relationship. It is therefore important to note that all of the institutions created in the aforementioned jurisdictions entail the public registration of the relationship. This condition brings one to the second notion common to all the registration schemes outlined above, namely the adherence to the principle of exclusivity or the principle of partnership. This principle consists of two individual facets. The first is the principle of monogamy. Each registered relationship may only consist of two individuals. No registration scheme allows for the registration of a relationship between more than two persons at any one time. The second facet is the principle of exclusiveness. Each registered partner may not be involved in another marriage or registered partnership with anyone else. Although in some jurisdictions, for example Belgium, France and Spain, the existence of a registered partnership does not form an obstacle for the celebration of a marriage, any existing registered partnership will automatically be terminated by virtue of a subsequent marriage. As a result, the principle of exclusiveness remains intact.

The concepts of solidarity and stability, although absent in the names of many of these relationship forms, are present in virtually all of the explanatory notes surrounding the implementation of the legislation in these jurisdictions. Many jurisdictions refer to the idea of relationship fidelity, or mutual care and protection. These notions, coupled with the idea of lifelong unions, serve to stress the importance of these relationships both in terms of stability, as well as in terms of solidarity. In bringing these vague notions together into a single 'definition', one could argue that all the registration schemes currently operating in Europe adhere to the following definition:

'A state-regulated registration scheme for two persons involved in an exclusive, intimate relationship. Opting into this system by means of registration of the relationship entails the attribution of rights and duties, and the assumption of obligations and responsibilities between the parties themselves, as well with third parties and the state.'

The search for commonality is, however, not an academic exercise. This is absolutely essential since it not only aids those registered partners who are unsure of their own legal rights, but also aids governments desiring to issue guidelines to their civil registrars and judges who are confronted with questions as regards the recognition of foreign registered relationships.

Current European recognition of registered relationships

In this section, a number of examples will be used to illustrate the recognition issues facing registered partners and same-sex spouses when they move from one European jurisdiction to another and seek recognition of their relationship. At this stage, it is, however, important to note that the recognition issues can arise in a wealth of very different situations. For example, a couple may only be in a country on holiday and require that their relationship be recognised for medical visitation purposes (the so-called 'holiday cases'). Alternatively, a couple may specifically travel to a particular country in order to register their relationship and then travel back to their home country, where such registration is not permitted (the so-called 'evasion cases'). A couple may be living in one country that recognises non-marital registered relationships. During their lawful residence in that country they may decide to register their relationship. A number of years later they may decide to move to a country that does not provide for such a registration scheme, or provides for a very different type of registration scheme. Will their relationship be recognised, and if so, what as (the so-called 'migratory cases')?

Recognition in Belgium

Prior to the codification of Belgian private international law, uncertainty surrounded the way in which foreign non-marital registered relationships would be recognised in Belgium. Although this ambiguity has recently been partially abated, uncertainty is far from having been totally dispelled. According to the provisions of the Belgian Code of Private International Law, a distinction has been drawn between those registered relationships that create a bond akin to marriage and those that do not.

The first group of relationships are simply subsumed in the legal category of marriage, signalling the loosening of the traditional straitjacket encasing this legal category. The question therefore arises: which registered relationship forms will be characterised as being equivalent to marriage? In the parliamentary discussions, reference was made to the historical trend, beginning in Scandinavia, of introducing forms of registered partnership. However, reference here was only made to a 'same-sex union', which is created by means of a short Act of Parliament stating that the legal effects of marriage are *mutatis mutandis* applied to registered partners. Moreover, it was also stated that the legal category of marriage is to be understood as including different-sex marriage, same-sex marriage and the Scandinavian-style

registered partnership. Until recently, it was therefore an open question as to how a Belgium would deal with different-sex registered partnerships: In referring only to the Scandinavian-style registered partnership, it could be argued that the Belgian legislature intended to exclude different-sex registered partnerships. Alternatively, it could also be seen as excluding all institutions, whereby the rights attributed to registered partners are identical to those granted to married couples, with only a few exceptions: the so-called enumeration method. This ambiguity was finally cleared up on 29 May 2007, with the publication of a circular in the Belgian Bulletin of Acts and Decrees. Only those institutions whereby the procedures for establishment and termination of the relationship, as well as the rights and duties of the non-marital registered relationship (with the exception of parentage and adoption) are identical to marriage, will be regarded in Belgium as akin to marriage. The Minister of Justice subsequently goes on to list those jurisdictions satisfying these criteria, namely Denmark, Finland, Iceland, Norway, Sweden, Germany and the UK. She goes on to mention that Dutch registered partnerships will not satisfy these criteria since the institution is open to different-sex couples and furthermore the termination procedures for registered partnership and marriage are different.

The second group of relationships are provided a separate category known as 'relationships of cohabitation'. It is also noted that there are many other forms of non-marital registered relationships that do not create a bond akin to marriage. These relationships, whether or not they affect the status of the person (*l'état de personne*) should also be granted some form of recognition, and hence the need for the creation of a separate category. Although the codification is devoid of specific criteria for the assignment of relationships to this category, explicit reference was made during the parliamentary debates to the Belgian statutory cohabitation and the French *pacte civil de solidarité*. According to art 58 of the Belgian Code of Private International Law, a relationship of cohabitation is:

'... visent une situation de vie commune donnant lieu à enregistrement par une autorité publique et ne créant pas entre les cohabitants de lien équivalent au mariage.'

Although relationships of cohabitation need not necessarily have an effect on a party's personal status in order to be assigned to this legal category, the rules governing such relationships are intrinsically connected to the principles espoused in the legal category of personal status. Furthermore, although reference is made in the circular of 28 September 2004 to a further circular that will provide more guidance as to the exact scope of this category, no such information has yet been issued. Although the circular of 29 May 2007 deals with those relationships to be regarded as marriage, no reference is made to the criteria to be used for determining

those relationships that should be regarded as 'relationships of cohabitation'. In summary:

- A British same-sex civil partnership will be recognised (and thus upgraded in name) in Belgium as a same-sex marriage.
- A Dutch same-sex marriage will be recognised (neither upgraded nor downgraded) as a same-sex marriage.
- A Dutch same-sex registered partnership will more than likely be recognised (and thus downgraded in terms of status) as a relationship of cohabitation.
- A Dutch opposite-sex registered partnership will more than likely be recognised (and thus downgraded in terms of status) as a relationship of cohabitation.

Recognition in The Netherlands

The starting point of both the Dutch Government and the Dutch Standing Committee on Private International Law is that the recognition rules on registered partnership should conform to the equivalent rules on marriage. Dutch Private International Law (Registered Partnerships) Act (abbreviated as WCGP), art 2(1) is thus a replica of art 5(1) of the Dutch Private International Law (Marriages) Act (abbreviated as WCH). Nevertheless, a substantial difference is evident in that art 2(5) WCGP provides for a list of criteria for the definition of a non-marital registered relationship. Article 2(5) of WCGP in conjunction with art 2(4), ordains the following criteria:

- the registration was completed before a competent authority in the place where it was entered into;
- the institution is exclusive, that is that a registered partnership cannot be concluded alongside another registered partnership or marriage;
- the partnership must only be concluded between two persons;
- the solemnisation of the registered partnership creates obligations between the partners that, in essence, correspond with those in connection to marriage;
- the partnership must be based on a legally regulated form of cohabitation.

The dearth of a characterisation provision in the original proposals by the Dutch Standing Committee on Private International Law and in the current work on the codification of Dutch private international law has not been followed in this field. Nonetheless, although these criteria appear clear and workable, a certain degree of confusion surrounds the precise application of art 2(5)(c) of WCGP. According to the wording of the article, the obligations that the partners owe to each other should correspond with those in connection to marriage. However, in the explanatory notes to the Act it is stated:

'The proposed rules also lend themselves to application on legal institutions which do not have the name "registered partnership", but still possess the key characteristics thereof, even if this is not complete. Examples are the Belgian statutory cohabitation, the PACS in France and the statutory regulated cohabitation forms in Catalonia and Aragon.'

It is therefore not entirely clear how these criteria will be interpreted. Although the explanatory notes refer to the subsequent promulgation of information on these criteria, no such information has been released. However, it is reasonably foreseeable that the following will be true of the application of these criteria:

- a British same-sex civil partnership will be recognised in the Netherlands as a registered partnership;
- a Belgian same-sex marriage will be recognised in the Netherlands as a same-sex marriage;
- a Belgian same-sex statutory cohabitation will more than likely be recognised in the Netherlands as a registered partnership; and
- a Belgian different-sex statutory cohabitation will more than likely be recognised in the Netherlands as a registered partnership.

Recognition in the UK

Aware of the issue of characterisation, the UK has opted for a rather novel approach. Chapter 2, Part 5 of the Civil Partnership Act 2004 (CPA 2004) deals with the characterisation of foreign overseas relationships. Section 212 of the CPA 2004 states:

'For the purposes of this Act an overseas relationship is a relationship which:

- (a) is either a specified relationship or a relationship which meets the general conditions and
- (b) is registered (whether before or after the passing of the Act) with a responsible authority in a country or territory outside the UK, by two people—
 - (i) who under the relevant law are of the same sex at the time when they do so, and
 - (ii) neither of whom is already a civil partner or lawfully married.'

Two types of relationships are therefore recognised in accordance with these provisions: specified relationships and those relationships meeting the general conditions. Specified relationships are listed in Sch 20 to the Act and include stable unions (Andorra), significant relationships (Tasmania, Australia), statutory cohabitations (Belgium), domestic partnerships (Nova Scotia, Canada and California, Maine and New Jersey, US), civil unions (Quebec, Canada; Connecticut and Vermont, US and New Zealand), registered partnerships (Denmark, Finland, Luxembourg, the Netherlands, Norway and

Sweden), civil solidarity pacts (France), life partnerships (Germany), confirmed cohabitations (Iceland) and same-sex marriages (Belgium, Canada, the Netherlands, Spain and Massachusetts, US). If one of these designated relationships is to be recognised, no further investigation is necessary. Furthermore, this list may be amended by statutory instrument by the Secretary of State by adding, amending the description of, or omitting a relationship. If a foreign institution is not mentioned in this list, recognition may still be afforded if the relationship satisfies the general conditions in s 214 of the CPA 2004, namely:

- '(a) the relationship may not be entered into if either of the parties is already a party to a relationship of that kind or lawfully married,
- (b) the relationship is of indeterminate duration, and
- (c) the effect of entering into it is that the parties are—
 - (i) treated as a couple either generally or for specified purposes, or
 - (ii) treated as married.'

It is important to note that the recognition rules are restricted to same-sex couples only. Non-marital relationships registered between different-sex couples are thus not entitled to recognition according to the CPA 2004. That does not necessarily mean that different-sex non-marital registered relationships are denied recognition altogether. It could be argued that such relationships should be recognised in the UK by analogous application of the rules on marriage. According to the famous adage of Lord Penzance, marriage is 'the voluntary union of one man and one woman to the exclusion of all others' (*Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, at 133). Yet all four components of Lord Penzance's classic statement are satisfied by different-sex non-marital registered relationships. Furthermore, English courts have upheld the principle that each legal system must be free to determine the attributes of the consensual union. Furthermore, English judges are keen to espouse the functional approach to legislative interpretation, stressing the importance of interpreting legislation according to modern day standards (*Fitzpatrick v Sterling Housing Association Ltd* [2000] 1 FLR 271). If these assertions are placed side by side, it would appear that there is substantial weight to back the argument that non-marital registered relationships between different-sex couples should be recognised in accordance with the analogous application of the laws on marriage. The only possibility open to refuse recognition to such relationships rests in the notion of public policy. In summary:

- a Belgian or Dutch same-sex marriage will be recognised in the UK as a civil partnership;
- a Belgian same-sex statutory cohabitation will be recognised as a civil partnership;
- a Belgian different-sex statutory cohabitation is unclear with regards its recognition status;

- a Belgian statutory cohabitation between relatives will more than likely not be recognised as contrary to public policy;
- a Dutch same-sex registered partnership will be recognised as a civil partnership;
- a Dutch different-sex registered partnership may be recognised as a marriage (although this is unclear).

Summary

It is clear that the fate of same-sex couples travelling across international boundaries is somewhat precarious; the waters should be tread with extreme trepidation. Although same-sex marriages validly concluded in Belgium and the Netherlands will be recognised in both countries as marriages, they will be downgraded in the UK to 'civil partnerships'. Dutch registered partnerships and British civil partnerships, in contrast, will be upgraded to marriages in Belgium, whereas an English civil partnership will be regarded as a registered partnership in the Netherlands and not a marriage. Perhaps the most unusual fate is that of Dutch same-sex registered partners travelling to Belgium, whose relationships will merely be equated as equivalent to a 'relationship of cohabitation'.

Feasibility of harmonisation

As is therefore clear, the registration of a relationship in one jurisdiction does not ensure that this relationship will be granted the same status in other European jurisdictions, even if these jurisdictions have themselves introduced forms of non-marital registered relationships. Ensuring that a couple registered in one country will be regarded as registered elsewhere is a commendable goal that appropriately corresponds with the goals of respecting the parties' expectations and aiming to ensure increased co-operation in the field of mutual recognition in civil matters. In having established that the harmonisation or unification of private international law is desirable, the question that arises is whether it is also feasible to propose such legislation. In answering this question one must address the corollary matter of which institution/organisation is best suited to deal with these issues. This section will thus focus on the current and future activity undertaken by five supranational institutions and organisations.

European Group for Private International Law

The European Group for Private International Law was established in 1991 and consists primarily of members of universities of EU Member States or international organisations. As such, documents adopted by the group have no direct legislative force and are instead aimed at encouraging the dissemination of information. The topic of non-marital registered relationships has been discussed at every annual meeting since 2000. During

the 2004 meeting, a proposal was submitted dealing with the issue of non-marital registered relationships. Disagreement as to the terminology to be used, the scope of the proposed rules and many other issues led the group to postpone the discussion until 2005. One of the greatest obstacles facing the European Group lay in trying to reach a consensus acceptable to all the representatives, regardless of whether they have enacted domestic substantive legislation creating a non-marital relationship registration scheme. Moreover, although such attempts should be welcomed, any result achieved by the Group will ultimately need to be implemented by a legislative body and thus the question remains as to which institution is most suited to the task.

International Commission on Civil Status

There are currently 16 Member States to the International Commission on Civil Status (ICCS) and six states with observer status. The Madrid General Assembly approved the proposal that the ICCS should examine the question of registered partnerships. It decided to set up a working party to conduct a general review of the subject, notably as regards the recognition of such relationships. To prepare for the working party's meeting in February 2004, a note summarising the provisions in force in the various Member States was prepared, together with a questionnaire designed to gather additional details. Discussions were pursued during the Strasbourg and Edinburgh General Assemblies in March and September 2004 respectively, where outline drafts of a Convention were reviewed. It was ultimately decided that work should continue with an eye to the preparation of a Convention on the recognition of the civil status effects of all non-marital registered relationships. A draft Convention was issued in December 2004 and the final version was opened for signature on 5 September 2007. Until now, no country has yet signed this Convention.

Although it is clear that the ICCS has thus acknowledged the need to develop international rules in this field, it is perhaps not the most suitable forum for dealing with all the issues raised by non-marital registered relationships. The forms of non-marital registered relationship in Belgium and France do not have an impact upon the parties' civil status. This express exclusion would therefore make it difficult for any agreement drafted by the ICCS to be ratified by France or Belgium. Furthermore, none of the Nordic countries are privy to the restricted membership of the ICCS. It is vital that any system of harmonised rules covers the widest possible number of European (and global) jurisdictions in order to fully attain the goals sought. Furthermore, although the draft Convention deals with the recognition of non-marital registered relationships and the dissolution thereof, it is restricted in its scope to legal effects in the field of civil status, as a result of the ICCS's mandate. Therefore, although progress in this field is laudable, the absence of jurisdiction and choice of law rules is an unfortunate consequence. Whatever the outcome of

these discussions, further harmonising or unifying measures will be required.

Council of Europe

Legislative instruments in the field of family law are not new to the Council of Europe. The Parliamentary Assembly of the Council of Europe has adopted no less than 15 Recommendations on topics as wide-ranging as the rights of the child, family policy and international adoption. The Committee of Ministers has also seen its fair share of activity, with eight Conventions, five Resolutions and 19 Recommendations in the field of family law alone. However, even within the more specific field of cross-border familial relationships, the Council of Europe has been effective in drafting a number of important documents. Furthermore, the Fifth European Conference on Family Law, held in The Hague on 15 and 16 March 1999, focused on the civil law aspects of the emerging forms of registered partnerships. It is, therefore, clear that as well as being active in the broader issues of cross-border familial relationships, the Council of Europe has already addressed the specific issues raised by non-marital registered relationships. If one assumes that the Council of Europe is willing to address the private international law issues surrounding non-marital registered relationships, the question remains exactly how such an instrument would be drafted and what force any resulting text would have.

Under the authority of the European Committee on Legal Co-operation (CDCJ), the Committee of Experts on Family Law (CJFA) has been instructed to promote an area of common legal standards in the field of family law in Europe. It would, therefore, be possible for the CJFA to propose for action to be taken in this field. However, although a simple majority is sufficient for the Consultative Assembly to adopt a resolution, reply or opinion, a two-thirds majority is necessary for the adoption of a recommendation. Although instruments emanating from the Council of Europe are not seen 'like an incoming tide [which] flows into the estuaries and up the rivers', in a highly technical and politically sensitive field such as the one under discussion it seems unlikely that anything less than a recommendation would be constructive. Yet even if all those countries that have enacted or are in the process of enacting legislation in the field of non-marital registered relationships were in favour of adopting a resolution, reply or opinion, only a simple majority would be achieved.

A further disadvantage of instruments from the Council of Europe is that they lack direct legislative effect, first requiring ratification and sometimes even subsequent transposition into domestic law before they are effective and enforceable. In summary, although the Council of Europe appears to be in a position to commence work in this field, the sensitivity of the topic and the highly technical nature of the rules that need to be discussed do not fit squarely with either the legislative instruments at the

Council's disposal or the methods by which such instruments are adopted.

European Union

It has become abundantly clear in recent years that the EU has, and is willing to exercise, its competency in the field of cross-border familial relationships. Despite not having competency in issues of substantive family law, the EU does have competency on grounds of Art 61(c) of the EC Treaty to progressively establish an area of freedom, security and justice, by introducing measures in the field of judicial co-operation in civil matters, as provided for in Art 65 of the EC Treaty. In turn, Art 65 of the EC Treaty refers to civil matters having 'cross-border implications' and the implementation of measures 'insofar as necessary for the proper functioning of the internal market'. With the EU having already embraced the developments taking place with respect to non-marital registered relationships in two recently enacted directives and having amended the EC staff regulations in light of the European Court of Justice decision in *D and Sweden v Council* [2001] ECR I-4319, the question is not whether the EU is competent to act in this field, but whether it is willing to, and if so, by what means.

The approach taken in the two above-mentioned directives is, however, disappointing. With regard to registered partnerships, no definition of the term is provided. It is therefore unclear which registration schemes fall within the ambit of these provisions. Secondly, the extent of the protection is restricted to those countries that provide for such protection to its own registration scheme. It does not impose an obligation for countries without registration schemes to recognise registered relationships from other jurisdictions. With regards to marriage, neither directive has dealt with the issue of same-sex marriages. Both directives leave open the question whether a same-sex marriage validly celebrated in Belgium, Spain or the Netherlands falls within the ambit of these provisions: once again, a missed opportunity.

Assuming that such political will is present, the EU disposes of a complex array of legislative arsenal. If the EU were to enact a regulation in this field, the Member States would be prohibited from adopting any method of implementation that would jeopardise its application and that would result in different or discriminatory treatment of EU citizens according to national criteria. While a regulation aims at unifying the law of the Member States in any given field, a directive calls upon the Member States to exercise their own legislative powers, either for the purpose of adapting their laws to common standards laid down by the European institutions, or for the purpose of carrying out the obligations arising from the Treaties. While regulations are of general application to all Member States, directives are primarily intended to create legal relationships between the European Community and the Member State(s) to which it is addressed. A directive is binding upon such states, but

only as to the result achieved, while leaving to the national authorities the choice of form and method.

The other forms of secondary legislation at the EU's disposal are decisions, recommendations and opinions. These relatively weak forms of secondary legislation, although carrying considerable political and moral weight, are less useful in the highly technical field of private international law. Furthermore, the EU also possesses the power to draft Conventions, which was used in the field of private international law prior to the Treaty of Amsterdam (ie the Brussels and Lugano Conventions).

The EU, therefore, not only has the necessary legislative tools at its disposal, but also possesses the political weight to introduce comprehensive instruments regulating the private international law aspects of non-marital registered relationships. Yet progress should be made with caution and under the caveat that the EU selects its approach carefully. Perhaps the best option is to now proceed down the road of a Convention with limited territorial scope and universal application. Although this would perhaps go against the current trend in unifying private international law by means of regulations, this can be explained by virtue of the unique nature of non-marital registered relationships. Unlike divorce, which, barring Malta, is recognised in some form or another across the EU, non-marital registered relationships do not benefit from such widespread acknowledgement. This limited recognition would therefore make it onerous to achieve agreement on any sort of regulation.

Opting for a Convention thus goes some way to acknowledging the fact that although some countries are ready for unified rules in the field of non-marital registered relationships, not all countries are. Furthermore, the same sense of urgency that was manifest during the discussions leading to the conclusion of the Rome Convention is also perceptible in this field. The upshot could be a sort of Schengen area for non-marital registered relationships, with relationships guaranteed recognition within the territory of the Contracting States according to the private international law rules agreed upon. Such an approach would also allow for countries outside of the EU to sign up to the Convention and thus ensure a more uniform approach across the European continent. Although such a Convention would technically be independent of the EU, such developments could be incorporated into the community legislative framework at a later stage.

An alternative option, perhaps more in keeping with current trends, would be for those interested EU Member States to make use of the enhanced co-operation possibilities created by the Treaty of Amsterdam and amended by the Treaty of Nice. Articles 43–45 of the EU Treaty allow for a minimum of eight Member States to establish enhanced co-operation between themselves and thus avail themselves of the institutions, procedures and mechanisms laid down by the EU and EC Treaties.

Although such provisions can only be used as a last resort, any subsequent agreement reached is open to all other Member States; the Commission is placed under an active responsibility to ensure that Member States are encouraged to participate. This power is further explained with respect to the fields of competency covered by the EC Treaty in Arts 11 and 11A of the EC Treaty. Any group of Member States that intends to use the enhanced co-operation possibility must therefore submit a request to the Commission, which submits a request to the Council. Permission is then granted by a qualified majority vote of the Council after consultation with the European Parliament. This procedure would thus allow a select group of Member States to avail themselves of the benefits of regulations, while at the same time avoiding the adverse consequences of having to ensure that any proposal is also acceptable to those countries without national forms of non-marital registered relationship. With these rules never having been used before, perhaps the time has come for the waters to be tested.

Hague Conference on Private International Law

The Hague Conference on Private International Law was founded in 1898 and currently boasts 65 Member States and more than 35 Conventions in various fields of private international law. The Hague Conference first dealt with the issues surrounding unmarried couples in 1987. The Permanent Bureau, although having acknowledged that the issues raised were important, did not suggest urgent consideration and the matter was adopted for further study. Although a second note in April 1992 led to a comparative study, once again no direct results were achieved. The matter was raised again 3 years later, and although some experts considered that the issue of homosexual couples should be included, others worried that this would be too controversial. At the Eighteenth Session, it was once again decided to keep the issue on the agenda, although without priority. This position was reiterated in 2005.

In light of this background, it is clear that one of the main problems for the Hague Conference lies in the controversy surrounding the topic under debate. However, some hope can be gleaned from the statement in the preliminary document from 2000, where it is stated that a:

‘possibility which might be considered would be the establishment of a Working Group, comprising experts from interested States, with a mandate to review current developments and to formulate a possible strategy for developing a uniform approach to the issues of private international law.’

A similar approach has also been adopted with respect to an optional Convention on the applicable law in any future Convention in the field of maintenance. Even so, no further progress has been made on this

issue since 2000. Noting the reluctance of some experts of the Special Commission on maintenance obligations to include same-sex couples within the definition of those entitled to claim under any future Convention, it seems unlikely that a plenary session would lead to substantial results.

The Future

While the role of private international law in an emerging European unification may well be transitory, its importance should neither be overlooked nor undermined. If private international law can be said to distribute international jurisdiction and 'allocate international controversy to the most appropriate legal system', this will inevitably go some way to ensuring the achievement of more legal certainty for the increasing number of couples across Europe entering into these new forms of registered relationship. In striving to achieve these goals, it is clear that although numerous organisations both at European and international level have recognised the need to address these issues, no suitable organisation has really tackled the topic directly.

While the matter at issue is controversial in many countries around the world, it is important that steps are taken by those countries where developments have occurred in order to ensure that these couples having registered their relationship are offered the security of knowing that their relationship will be

recognised, even if only in a limited number of jurisdictions. The restricted scope of the ICCS's mandate, the limited possibilities of reaching a workable solution in the Council of Europe and the lack of legislative force of the European Group for Private International Law, lead one to conclude that only the EU or the Hague Conference are really suited to dealing with the issues raised.

In focusing on the possibilities at the disposal of these organisations, one must bear in mind the current lack of unanimity on the need to address the issues surrounding non-marital registered relationships. The fact that not all of the participating countries in the EU or the Hague Conference would be prepared to ratify or accept a proposal in this field of law will have ramifications for the form of any eventual proposals. Progress at EU level could best, therefore, be realised either by means of a Convention or via the enhanced co-operation procedure. If a worldwide Convention is, however, to be drawn up, it would seem logical and most appropriate that such discussions took place in the forum of the Hague Conference. As long as the Hague Conference remains ambivalent towards these issues, the EU should step forwards and take action. However, since overlap of international instruments should be avoided, if the Hague Conference was to commence work, those interested EU Member States would be best advised to take an active role in such discussions, ensuring the creation of a worldwide instrument.