Marriages and Other Unions in Private International Law – Separate but Equal?

Susanne Lilian Gössl* and Jinske Verhellen**

*Senior Research Assistant, Law Faculty, University of Bonn, Email:sgoessl@uni-bonn.de
**Professor of Law, Ghent University, Email:Jinske.Verhellen@UGent.be

ABSTRACT

Many legal systems not only know the concept of marriage but also the one of non-marital registered unions, even though the requirements concerning who can conclude the one or the other union differ, especially regarding the sex of the partners. At the conflict of laws level, most countries show the same approach, i.e. providing two different rules for the validity of each institution. Using the examples of Belgian and the German law, both having very different substantive rules but very similar private international law rules, we show that this distinction itself leads to problems for international couples – even within the European Union – and contradicts the general approach which private international law has regarding the characterization of unknown foreign concepts. Inspired by the 1978 Hague Marriage Convention and several national approaches, we propose one broad conflict of laws rule for marital and non-marital unions, leaving substantive values to the public policy exception.

I. INTRODUCTION

A Belgian woman and a German woman live and work in Brussels. In December 2010, they married in Brussels. In August 2016, the German woman returned to Munich, where she filed for divorce. The Belgian woman initiated divorce proceedings in Belgium. This divorce case will have different outcomes in Belgium and Germany due to different characterizations of the marriage. Both countries know the institution of marriage and, as an alternative, the institution of a registered non-marital union. Additionally, both countries provide different conflict of laws rules to address each one. The substantive laws differ strongly regarding the two institutions. Nevertheless, the mere fact that the private international law of each country generally distinguishes between marriage and other unions leads to very similar problems at the private international law level. This phenomenon is not limited to Belgian and German private international law; it can be observed in several jurisdictions.

This article argues that at the private international law level, the differentiation between marriage and other forms of formally recognized unions should be abolished. A Belgian–German comparison (II) shows that a distinction between the two institutions at the conflict of laws level necessarily leads to the introduction of
substantive law arguments. This finding contradicts the general principle of characterization, which focuses on the function of an unknown foreign legal institution, rather than on the substantive law background. After showing that both national approaches, independently of the substantive regulation, fail from the conflict of laws perspective, this article proposes the introduction of a new, broad conflict of laws rule that avoids the problems described above (III). Here, the 1978 Hague Marriage Convention and several national approaches, such as Swiss, Dutch, Italian, and Swedish law, provide sources of inspiration.

II. BELGIAN–GERMAN COMPARISON

1. Substantive Law

A. Belgium

Marriage – In Belgium, marriage is gender neutral. A marriage can be entered into by two unmarried persons of the opposite or same sex. In the case of a marriage between two men, there is no presumption of paternity. However, since the Act of 18 May 2006 was introduced, persons in a same-sex marriage are entitled to adopt a child jointly. In the case of a marriage between two women, the situation is different. As of 1 January 2015, the wife of the mother is the co-mother (meemoeder/coparent) of the child (presumption of co-motherhood).

Legal cohabitation – Legal cohabitation (wettelijke samenwoning/cohabitation légale) can be entered into by two unmarried persons of the opposite or the same sex. Neither of the two parties may be part of another legal cohabitating relationship. The Belgian Cour de Cassation found that legal cohabitation did not influence the status of the persons at the time of its introduction. However, due to subsequent legal amendments, legal cohabitation has become a formal relationship. The relationship can range from a sexual-affective one to a relationship between friends or family members. Two brothers, for instance, can make a declaration of legal cohabitation before the civil registrar. The impediments to marriage based on kinship do not apply. The rights and obligations of two persons who enter into legal cohabitation are significantly more limited than those who enter into a marriage. In contrast to marriage, cohabitation can be dissolved by a joint or unilateral declaration before the civil registrar.

B. Germany

Marriage – German substantive law does not recognize the concept of same-sex marriage. Thus, marriage always requires a union between a man and a woman. The German Constitution protects the institution of marriage and so far has been interpreted by the Bundesverfassungsgericht (Constitutional Court) as being limited to a union between a man and a woman. Furthermore, the court requires that spouses intend for this union to endure for the rest of their life and that there be some type of recognition of this union by the State. Even though there is on-going discussion
regarding whether to change the concept of ‘marriage’ and open it to same-sex partners, this change has not occurred yet (critical view recently by Dethloff (2016)).

Registered partnership – As same-sex partners also have the constitutionally protected right to conclude a partnership, in 2001, the German legislature introduced the concept of registered life partnership (Lebenspartnerschaft) as an equivalent to marriage but limited it (exclusively) to partners of the same sex. Highly influenced by the Constitutional Court’s decisions on equality and non-discrimination, the regulation of those partnerships has gradually been approximated to the law of marriage. Both institutions are almost equal in terms of requirements and consequences. Nevertheless, there remain some differences, especially the exclusion of registered partners from joint adoption (gemeinschaftliche Adoption) (Dethloff, 2015: s 15, para. 20). In addition, there are no presumptions of paternity/maternity associated with a child born to a partner or other possibilities to achieve parental status than by adopting the partner’s child (step-child adoption – Stiefkindadoption). German domestic law does not know the concept of a registered partnership or civil union for a heterosexual couple. For such a couple, the only means through which to formalize the relationship is marriage.

2. First Result of the Comparison
The substantive law of the two countries differs profoundly in the treatment and understanding of a marriage and a registered union. The Belgian legislature opened both institutions to couples, regardless of the persons’ sex, but regards a non-marital union as substantially different from a marriage. Instead, the German legislature provides access to marriage exclusively to heterosexual couples, while registered partnerships are only available to same-sex couples. Substantially, however, the two institutions are supposed to be (nearly) equal. Nevertheless, both legal systems provide a very similar distinction at the private international law level. This article will show that this distinction itself, independently of the substantive law, creates problems for international couples such as the one from our example above.

3. Conflict of Laws Rules
A. Belgium
The Belgian Code of Private International Law (2004) provides different conflict rules for marriage, on the one hand, and non-marital relationships of cohabitation, on the other. The Code defines the term ‘relationship of cohabitation’ (relatie van samenleven/relation de vie commune) as a situation involving cohabitation that requires registration with a public authority and that does not create a bond that is equal to marriage.

Marriage – The Code adheres to the traditional distinction between the formal and substantial validity of marriage. The formalities regarding the celebration of marriage are governed by the law of the State on the territory of which the marriage is celebrated. The conditions regarding the validity of the marriage are governed for each spouse by the law of the State of the spouse’s nationality.

In the year that Belgium extended access to the institution of marriage to same-sex couples (2003), the Belgian legislature was finalizing its codification of private
international law. In the course of parliamentary proceedings on the Code of Private International Law, it was considered obvious that the changes to Belgian substantive marriage law had to be taken into account. The question arose whether non-Belgians could use this legislation, even though there is no similar legislation in the State of their nationality. After discussing several amendments, the Belgian legislature introduced a far-reaching conflict rule in order to open the Belgian same-sex marriage to foreigners in Belgium. For same-sex marriages, the Code provides for an exception. If a provision of the national law of the spouse(s) prohibits same-sex marriage, this provision will not be applied if one of the spouses is a national of a State that allows same-sex marriage or has his/her habitual residence in such a State. This solution had already been announced previously in a Circular of 2003 from the Minister of Justice.

Whilst capacity to marry is still governed by the national law, any incapacity to enter into a same-sex marriage will be disregarded if one of the future spouses has the nationality of a State permitting same-sex marriage or has his or her habitual residence in such a State. This solution retains nationality as the primary connecting factor but adds, as an exception to the nationality principle, a reference to the residence of one of the partners if it is needed to render the marriage valid. Furthermore, the Code of Private International Law demands an additional connection with Belgium. A marriage can be celebrated in Belgium only if one of the future spouses is a Belgian national, is domiciled in Belgium or has had his/her habitual residence in Belgium for at least 3 months. With this additional residence requirement, the legislature aimed to avoid ‘marriage tourism’.

The Belgian legislature made an explicit choice in its substantive law as well as in its private international law: equal treatment for same-sex couples, even in cross-border situations. In our example, the Belgian and the German women used these provisions to conclude their marriage in Belgium . . . a marriage which is not possible in Germany.

Relationships of cohabitation – The Code of Private International Law abandoned the principle of nationality for relationships of cohabitation. Such relationships are governed by the law of the State on the territory in which the relationship was first registered (lex loci registrationis). This law determines the conditions under which the relationship can be established, the effects of the relationship on the assets of the parties, as well as the causes and conditions under which the relationship can be terminated. This conflict rule has a much broader scope than the aforementioned conflict rule for marriage. The latter refers only to the law that is applicable to the conclusion of the marriage.

B. Germany

Heterosexual marriage – The substantive validity of the conclusion of a marriage follows each spouse’s law of the person, ie each spouse’s nationality. For each future spouse, the requirements of the nationality law must be fulfilled. For it to be formally valid, the requirements of either the lex causae or the place of the celebration must be fulfilled.
Same-sex registered partnerships – The law that is applicable to registered partnerships is determined by a separate rule. All non-marital same-sex unions, which are called ‘Registered Partnership’ or something similar, in Germany are characterized as falling within its scope. Consequently, all individuals with questions concerning registered partnerships should refer to the law of the place where the partnership was registered. If two partnerships have been registered in different countries, the place of the latter registration prevails. Nevertheless, the German rule limits the effects of a lex causae of registered partnerships on the effects of German registered partnerships (for a discussion of the consequences on our case, see section II.5).

Other forms of unions – As German substantive law only acknowledges these two forms of partnerships, the conflict of laws rules do not provide any provisions for same-sex marriages or heterosexual registered unions. If the couple in our example would have formalized their relationship in Germany, they could apply for the registration of their union only; consequently, German law applies. The fact that other forms of unions or marriages are not acknowledged in Germany creates special problems in the recognition of other forms of registered unions or same-sex marriages that are concluded abroad.

4. Second Result of the Comparison
Both the German and the Belgian conflict of laws systems distinguish between a registered non-marital union and a marriage. This distinction has an important cross-border impact, especially in cases where a couple has already formalized the relationship abroad and claims that it should be recognized in one of the other States, e.g. if the couple in our example concluded a same-sex marriage in Belgium and moved to Germany, seeking recognition of the marriage in Germany, or if the couple concluded a registered life partnership under German law and sought recognition in Belgium. We will elaborate on this point in the next paragraphs.

5. Recognition
The next section addresses the issue of ‘recognition’ or ‘acceptance’ in Belgium and Germany of marriages or non-marital unions that are concluded or registered abroad. Using those terms, we refer to the effect of a legal status in Belgium or Germany that is acquired in another country (not to the formal ‘recognition’ of foreign court decisions). In the case of the recognition or acceptance of a foreign marriage or non-marital union, national authorities must determine which law is applicable to the marriage or union concluded abroad to determine its validity requirements. If those requirements are fulfilled according to the German or Belgian conflict of laws system, the marriage or non-marital union will be ‘recognized’ or ‘accepted’. Even though the use of the term ‘recognition’ can be confusing (Gössl, 2016a), we will still use it, as the term is the one that is technically used in both jurisdictions and in several international conventions.

A. Belgium
By providing separate conflict rules, the Belgian legislature has complicated the recognition or acceptance in Belgium of foreign marriages and non-marital unions that
are registered abroad. The recognition in Belgium of foreign marriages and non-marital unions implies a control of the applicable law (the so-called ‘contrôle de la loi applicable’ or ‘review as to the applicable law’). A foreign marriage, for instance, must comply with the same conditions that would have to be fulfilled under the Belgian conflict rules if the marriage were to occur in Belgium.

In its transition provisions, the Code of Private International Law provides a specific rule for the recognition of same-sex marriages concluded abroad. If the foreign marriage complies with the nationality or residence conditions of the Belgian Code, it may be recognized in Belgium effective as of 1 June 2003 (entry into force of the provisions on same-sex marriage in the Civil Code) instead of 1 October 2004 (entry into force of the Private International Law Code). Since the Code of Private International Law provides a different conflict rule on marriage, on the one hand, and relationships of cohabitation, on the other, the characterization of the foreign institution is of crucial importance. Article 46 of the Private International Law Code discussed above (section II.3.A) applies to any legal status that is equivalent to marriage, regardless of its name (‘marriage’, ‘partnership’, ‘civil union’, etc.). Consequently, this provision is applicable not only to a Norwegian same-sex marriage but also to a German registered life partnership.

The central question is, thus, whether the foreign institution is equivalent to marriage. A Circular of the Minister of Justice dated 29 May 2007 sums up a number of foreign cohabitation relationships that are considered equivalent to marriage, including Scandinavian partnerships, German registered life partnerships and English civil partnerships. More generally, the Circular puts forth two criteria that render a foreign institution as equivalent to marriage. The establishment of the foreign relationship, the effects (apart from those concerning descent and adoption), and the termination of the relationship should be organized identically to those of marriage. In addition to this substantial criterion, it must be impossible to get married in the State in which the relationship was registered. This condition prevents the Dutch registered partnership from being officially put on the same level as marriage. After all, in the Netherlands, both people of a different sex and the same sex can choose to marry. By selecting a registered partnership, they voluntarily exclude themselves from marriage. On the other hand, if the couple in our example had concluded a registered life partnership in Germany, it would have been accepted as a same-sex marriage in Belgium. There is no case law yet with regard to the dissolution in Belgium of such a German partnership that became a marriage in Belgium through its recognition/acceptance.

Although the Belgian legislature has clarified the meaning of the term ‘relationship of cohabitation’ that appears in the conflict of laws rule, it is clear that this clarification has not resolved the characterization issue.

B. Germany

Similar to the Belgian approach to recognizing or accepting a foreign marriage or registered union, the German civil servant or registrar must determine which law is applicable. Therefore, the question arises regarding which conflict of laws rules apply when a marriage or union that is different from its German equivalent needs to be
recognized in Germany. This issue of characterization is especially difficult for persons in same-sex marriages and heterosexual registered unions as known by other legal systems but not by the German legal order. Is a same-sex marriage a ‘marriage’ or a ‘registered partnership’ according to private international law rules? This question arises for the same-sex couple married under Belgian law who moved to Germany, although a similar problem would occur in the case of a man and a woman in a Belgian registered partnership seeking recognition in Germany.

Following the substantive law definition of the constitutional court, German courts several times have characterized a foreign same-sex marriage as a ‘partnership’, rather than a marriage, within the meaning of German private international law. Consequently, the aforementioned limitation comes into play. As a foreign ‘partnership’ can never exceed the German rules relating to partnerships, a same-sex marriage will always be treated and, therefore, registered as a life partnership. This can lead to problems, especially if the couple later seeks a divorce in Germany as the place of residence. The court will apply the rules relating to the dissolution of a registered life partnership and terminate the partnership. Nevertheless, it will not issue a divorce decision. Therefore, if recognition of the dissolution subsequently is sought in a country that recognizes the relationship as a marriage, a limping relationship exists, as there is no divorce decision to recognize. The burden to recognize the dissolution of a partnership as a divorce under the law of the recognizing State, therefore, rests with the couple and the amicability of the foreign court.

Finally, the characterization of a registered union between a man and a woman creates difficulties. Following the definition that the constitutional court provided regarding ‘marriage’, this kind of partnership would fulfil the requirements of a formally recognized union between a man and a woman who intend to have a life-long relationship. Thus, consequently, the conflict of laws rule for marriage would apply. The majority of legal scholars, nevertheless, opt for a characterization as a ‘registered partnership’ or an application of its analogous rules, as the institution was created by the legislature as an alternative, rather than a substitute, to marriage (eg Coester, 2015: para. 125ff; Wagner, 2001: 288; Hohloch and Kjelland, 2001: 223, 229; Becker, 2011: 274ff; Coester-Waltjen and Coester, 2014: 73, 79–81). There has not been a court decision yet.

6. Third Result of the Comparison

Even though the substantive laws in Belgium and Germany differ fundamentally regarding their definition of marriage and registered non-marital unions, on the acceptance/recognition level, the arguments regarding how the conflict of laws rules relating to those two institutions must be distinguished are very similar. This shows that the underlying substantive values are not the reason for the distinction. Instead, the reason is the private international law itself or, more accurately, that both private international law systems provide two conflict of laws rules that need to be distinguished. This distinction creates friction when registered unions (marriages and others) differ from the domestic law characterization, especially in cases in which a couple has already formalized the relationship abroad and claims recognition in one of the other States. The burden of the friction rests on the citizens involved.
7. National Applications of European Union Instruments

At the European Union (EU) level, there are no conflict of laws rules or rules regarding the recognition of foreign marriages and non-marital unions. The dissolution of marriages is regulated in the Brussels IIa Regulation (jurisdiction and recognition) and the Rome III Regulation (applicable law). Property consequences of marriages and partnerships are regulated in two separate Regulations (jurisdiction, applicable law and recognition) which will enter into force 29 January 2019.

There is still no clear answer to the question regarding whether the dissolution of same-sex marriage falls within the scope of the Brussels IIa Regulation (Authors who consider Brussels IIa not applicable or who leave the question unanswered: Pintens, 2006; Tomasi et al, 2007: 342ff; Wautelet, 2012: 159ff; Authors who argue in favour of a broad interpretation of the notion marriage: Gruber, 2013: 200ff; Ni Shúilleabháin, 2010: 105ff; Swennen, 2007: 396.). The Regulation itself provides no definition of the concept of marriage, nor does it refer explicitly to the national laws of the Member States – in contrast to the Rome III Regulation and the Matrimonial Property Regulation. So far, the European Court of Justice has not ruled on this issue. Belgian and German case law and literature reveal different approaches.

A. Belgium

In Belgian case law, the first contours of a flexible application of Brussels IIa are starting to take shape. In one case, the Brussels Court of First Instance applied the rules of jurisdiction included in the Brussels IIa Regulation when considering a divorce petition between two women who were married in Belgium. Unfortunately, the court did not comment on the applicability of the Regulation. This applicability was taken for granted. In another case, the Arlon Court of First Instance also brought the dissolution of a same-sex marriage under the scope of the application of Brussels IIa. However, in both cases, Brussels IIa did not offer international jurisdiction to the Belgian courts, and both courts took recourse to the forum necessitatis provision of the Belgian Code of Private International Law. The Court of Arlon set aside the fact that Article 3 of the Brussels IIa Regulation granted international jurisdiction to the French courts. It argued that France did not accept same-sex marriages (at the time) and, therefore, would not grant a divorce. The court of Arlon thus applied the Brussels IIa Regulation only to check whether the Regulation gave jurisdiction to the courts of a Member State that recognizes same-sex marriages. As this was not the case, the court applied national jurisdiction rules included in the Belgian Code of Private International Law.

There has not been a court decision on the scope of the application of the Rome III Regulation regarding that question.

B. Germany

Following the traditional concept of marriage, so far courts have applied the Brussels IIa Regulation only to a marriage between a man and a woman, excluding therefore all kinds of partnerships and marriages between same-sex partners and applying the
national rule on the competence of the dissolution of a registered life partnership instead. 41

There has not been a decision on the scope of application of the Rome III Regulation regarding that question, yet. Scholars are highly divided with regard to whether the scope should be equal to that of Brussels IIa (for such an autonomous definition, see e.g Kemper, 2012: 64; Mörtsdorf-Schulte, 2013: 800) or should be extended to all kinds of validly terminated marriages (determined as an incidental question) (Gössl, 2016b: paras. 56–60; Gruber, 2015: para. 15; Hau, 2013: 1247; Rauscher, 2012: para. 825).

8. Fourth Result of the Comparison
Regarding EU private international law instruments, the national approaches differ by the definition of marriage, which reflect different national values.

How the new instruments that also provide conflict of laws rules for registered unions will be interpreted can only be assumed, but most likely they will also reflect the national approaches resulting from the distinction elaborated above.

III. THOUGHTS ON AN ALTERNATIVE APPROACH

1. The Failure of the Current Approaches
This brief comparison shows that both ways of characterizing marriage as distinct from non-marital unions fall back on substantive law reasons and make life difficult for couples moving from one country to another. This contradicts the general purpose of private international law to minimize the problems of cross-border interactions. It also contradicts the EU policies of enhancing free movement of citizens and couples within the EU.

As the comparison shows, the reason for this failure does not necessarily lie in domestic law or domestic policies but in the fact that each national system tries to distinguish those two institutions without using the traditional way that private international law characterizes foreign institutions. In private international law, characterization (also known as qualification or classification) (see amongst others, Bogdan, 2011: 134ff; Clarkson and Hill, 2011: 20; Rabel, 1958: 49 n. 3; von Bar and Mankowski, 2003: s 7, para. 138) works by examining the function or purpose that the foreign institution has in the foreign legal order and, consequently, comparing it to an institution in the law of the forum that follows the same function or pursues the same purpose (Baratta, 2010: 319ff; Clarkson and Hill, 2011: 27–9; Kegel and Schurig, 2004: s 7 III, 345ff, 349ff; Rabel, 1958: 59ff, 66; von Bar and Mankowski, 2003: s 7, paras. 163–70). Traditionally, it understands legal concepts (such as ‘marriage’ or ‘contract’) more broadly than does domestic law. This is due to private international law’s intention to address unknown phenomena and integrate them into the domestic system. In this regard, it is obvious that a clear distinction between marriage and registered non-marital unions does not work in cross-border cases due to different national substantive law approaches. This distinction only works by falling back on definitions and concepts of the national law. The problem is clear and will become even more prominent, e.g. under the new Matrimonial Property Regulations. Nevertheless, this is opposed to the general purpose of private
international law that handles cross-border cases trying to avoid falling back on domestic concepts and values.

A traditional characterization in private international law, instead, would examine the function of each national institution first and find a common core. The common core function of marriage and/or partnerships could be defined as ‘formalizing or legally recognizing a relationship between consenting partners (maybe with a life-long intention or an intention to form a family)’. Domestic values should be left to the next step in private international law, that of the designation of the applicable law where ‘corrections’ can be made through the public policy exception.  

2. An Alternative Approach: Abolish the Distinction

From a private international law point of view, it seems feasible to abolish the distinction between a marriage and a non-marital union and create one broad conflict of laws rule for all kinds of legally acknowledged relationships between partners (marriage, partnerships, heterosexual, or same-sex) (*de lege ferenda* Coester-Waltjen and Coester, 2014: 79–81; Sonnenberger, 2015: 786, 789ff). This would eliminate the characterization and re-interpretation issue that is the automatic result of the distinction, regardless of whether the legal system has opened marriage or registered non-marital unions to all couples or limited one or both to heterosexual or same-sex couples.

In private international law, there seem to be two connecting factors regarding the validity of marital or non-marital unions: those referring either to the personal laws of the spouses or to the location of the celebration/registration. The former has the advantage that it is less easy to change/manipulate than the latter but it has the disadvantage that it makes it harder to conclude such a union, as often cumulatively the requirements of two legal systems have to be fulfilled. We think the connecting factor should be the place of registration/celebration (*lex loci celebrationis*). When this rule is linked with an additional nationality/domicile/residence requirement, then it comes close to what The Hague Convention of 14 March 1978 provides with regard to the celebration and recognition of the validity of marriages. According to Article 3 of this Convention, a marriage shall be celebrated validly when the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there. The Convention does not expressly define the concept of marriage. The negotiators, after considering the option of excluding same-sex marriages from the scope of the Convention, decided not to do so (van Loon, 2014: 280–3). States Parties to the Convention, having opened up to marriage for same-sex couples, may, thus, apply the Convention to such marriages, as they are not a priori excluded from its scope.

As there are only three contracting States (Australia, Luxemburg, and the Netherlands), this treaty has not, however, been successful. Nevertheless, one can find in several (more recent) national private international law rules such a *lex loci celebrationis* reference linked to nationality and/or residence. The Swiss Private International Law Code stipulates that marriage celebration in Switzerland is governed by Swiss law. Dutch private international law provides either the application
of Dutch law if one of the future spouses has Dutch nationality or is resident in the Netherlands or the bilateral application of the national law(s) of the future spouses. Swedish law encompasses an explicit choice for the *lex loci celebrationis*. A marriage (opposite-sex or same-sex) before a Swedish authority is subject to the marriage requirements of Swedish law. If none of the parties is a Swedish citizen or a habitual resident in Sweden, both must, in addition to possessing capacity to marry according to Swedish law, fulfil the requirements of the law of at least one State of which he/she is a citizen or habitual resident. Accordingly, in such a case, foreign law will be applied in addition to Swedish law (Jänterä-Jareborg, 2008: 169; Jänterä-Jareborg, 2013: 155ff; Meurling, 2006: 413ff; Bogdan, 2009: 256ff). The requirement to take into account the obstacles to marriage in the laws of the States to which the parties are connected aims to avoid concluding marriages in Sweden that would limp in the States closely connected with the parties (Jänterä-Jareborg, 2013: 155ff).

A more generous approach would be an open rule with the place of celebration as the only connecting factor, as reflected by the German and the Belgian rule regarding registered non-marital unions. Unwelcome foreign institutions could still be blocked by the public policy exception (Gössl, 2016c: 89; Sonnenberger, 2015: 799). Nevertheless, if a country wishes to avoid broad forum shopping regarding marriages or other forms of registered unions, an additional link could ensure better cross-border acceptance of the legal status as spouses, registered partners, or cohabitees, thus reducing the risk of limping marriages or non-marital unions. It is a matter for each national legislature to decide how generous to be regarding that aspect and, furthermore, how much respect to give to the autonomy of the parties concerned.

This broad conflict rule has the potential to take into account the wishes and expectations of the parties involved and simplify the lives of families across borders. One could assume that the connection to the law of the State where the marriage or partnership is celebrated (*lex loci celebrationis*) reflects an implicit choice of the parties (Verhellen, 2013: 569). In the case of a marriage in Belgium, for instance, it could be assumed that the parties chose that Belgian law should apply.

3. Policy Issues

There may be objections to using the *lex loci celebrationis* in regard to the recognition of marriages concluded abroad. Some concepts of marriage might contradict the fundamental values of the domestic jurisdiction, such as marriages involving minors or polygamous marriages. Or, a national system might regard a same-sex marriage as being contrary to its public policy. Nevertheless, that issue becomes relevant after the determination of the law applicable and, therefore, should remain on that level. The fact that some foreign institutions violate national fundamental values is not a problem that results from the distinction between marriages and registered non-marital unions but is inherent in private international law in general. The clash between fundamental, especially cultural, values has always led to the need to adopt some kind of limitation. For that reason, the public policy exception exists in (probably) every private international law system of the world (Gössl, 2016c). The question regarding whether a domestic system recognizes a marriage or a registered
union legally concluded abroad should be left to this level of private international law.

On the other hand, the public policy exception is regarded as something that only should be used in rare cases. If a legislator decides that national values exclude one concrete form of marriage or non-marital union in general, it could create legal certainty for the parties by introducing a clear rule regarding how those unions will be treated under domestic law. Again, existing private international law rules can serve as a source of inspiration. For instance, the Italian legislature introduced a new rule that a foreign same-sex marriage will be treated in Italy as a registered civil union under Italian law. A comparable rule can be found in the Swiss Private International Law Code. A marriage validly celebrated abroad between persons of the same sex is recognized in Switzerland as a registered partnership. Furthermore, the provision in the Swiss Code that marriages validly celebrated abroad shall be recognized in Switzerland is nuanced if the bride or the groom is a Swiss citizen or if both are domiciled in Switzerland. In this scenario, the marriage performed abroad will be recognized unless the marriage was concluded abroad with the manifest intention of avoiding the provisions of Swiss law concerning the nullity of marriages. This is a consistent way of applying the lex loci celebrationis, with the well-known fraude à la loi exception.

IV. CONCLUSION

Finally, we would like to recapitulate our most important findings:

1. The Belgian and German substantive laws differ profoundly in their treatment and understanding of marriage and registered non-marital unions. The Belgian legislature opened both institutions to couples independently of their sex. The German legislature, instead, provides marriage exclusively to heterosexual couples, while registered life partnerships are available exclusively to same-sex couples.

2. Both the German and the Belgian conflict of laws systems distinguish registered partnerships and marriages in a very similar manner. Therefore, both systems do not characterize in the traditional conflict of laws way by looking at the function of the legal institution, but fall back on substantive law aspects.

3. This distinction creates friction in cases of partnerships (marriage and others) that are different from the domestic law characterization, especially in cases where a couple has already formalized the relationship abroad and claims recognition in one of the other States.

4. The friction is likely to be extended at the EU law level as soon as the conflict of laws rules that also require this distinction come into force.

5. The friction, which is based on the substantive distinction between marriages and non-marital unions, can be avoided by a broad conflict of laws rule that includes all forms of registered unions, leaving substantive values to the public policy exception once the applicable law has been designated.
6. The *lex loci celebrationis*, in combination with a concrete description of the circumstances under which recognition of unknown foreign institutions will be refused, would help to enhance legal certainty and respect the autonomy of the parties in the regulation of important aspects of their personal lives.

**NOTES**

1. Belgian Civil Code, art. 143.
2. Ibid, art. 343. Nevertheless, practice shows that same-sex couples face problems with regard to obtaining joint adoption (see *Verschelden and Verhellen*, 2013: 75).
3. Ibid, art. 325/2.
4. Ibid, art. 1475.
6. Ibid, art. 1476, s 2.
7. Art. 6, para. 1 Basic Law (‘Grundgesetz’ – GG).
13. Ibid, art. 47.
18. Code of Private International Law, above note 12, art. 46, s 2.
20. Code of Private International Law, above note 12, art. 44.
21. A concern expressed during parliamentary proceedings, see Parliamentary Record of the Belgian Chamber of Representatives, 23 June 2004, DOC S1 1078/005, 20.
22. For a more extensive discussion, see *Verhellen* (2013: 560ff).
23. Code of Private International Law, above note 12, art. 60. However, this was not the initial intention of the legislator, who held on to the reference to the national law for cohabitation.
relationships until right before the very end of the legislative procedure. The Explanatory Memorandum still even mentions the initial reference to nationality.

24. Introductory Act to the Civil Code (EGBGB), art. 13, para. 1
25. Ibid, art. 11, para. 1.
26. Ibid, art. 17b, para. 1.
27. Ibid, art. 17b, para. 3.
28. Ibid, art. 17b, para. 4.
29. Code of Private International Law, above note 12, art. 27.
32. The Circular is a practical tool, but it is already caught up by legislative developments and the rapidly rising number of forms of registered cohabitation around the world.
   Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/10, 29 December 2010. Belgium and Germany are both participating Member States in Rome III.
35. Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183/1, 8 July 2016. Belgium and Germany are both Participating Member States in this Regulation.
   Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183/30, 8 July 2016. Belgium and Germany are both Participating Member States in this Regulation.
36. Arts. 1, 2, b and art. 13 Rome III Regulation.
37. Recital 17: “This Regulation does not define ‘marriage’, which is defined by the national laws of the Member States.”
38. Court of first instance Brussels, 19 June 2013, (2013) Tijdschrift@ipr.be, Vol. 4, 70 with comment of Wautelet.
40. Code of Private International Law, above note 12, art. 11.
42. Belgian Code of Private International Law, art. 21; Introductory Act to the German Civil Code, art. 6.
43. Latest the new Italian law on the conflict-of-law questions regarding registered partnerships, the new art. 32-ter of the Italian Law No. 218 of 31 May 1995 (modified by decreto legislativo of No. 76 of 20 May 2016); furthermore see our description of the Belgian and German rules regarding marriage.
44. See our description of the Belgian and German rules regarding non-marital unions.
45. See, for instance, art. 44 Belgian Code of Private International Law which stipulates that a marriage before Belgian civil servants only is possible when at least one of the future spouses
is Belgian, has his/her domicile in Belgium or his/her habitual residence of more than 3 months in Belgium.

46. See www.hcch.net.
49. For example, art. 61, para. 2 of the Croatian Constitution of 22 December 1990 (Amendment 5/2014), limiting marriage explicitly to a union between a man and a woman.
50. See new art. 32-bis of the Italian Law No. 218 of 31 May 1995 (modified by decreto legislativo of No. 76 of 20 May 2016).
52. Ibid, art. 45, 2.

REFERENCES


