



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Private International Law Aspects Relating to Homosexual Couples*

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1. Introduction

Societies all over the world are permanently changing. The lifestyle of many persons differs considerably from that of previous generations. In many countries this also has consequences in respect of family law. Old traditional rules are confronted with new facts and circumstances and are therefore under pressure to be modified by the courts or legislators.

The reactions of the family laws of various jurisdictions concerning the new developments in our societies often differ considerably. As a reaction to the increasing number of persons living together permanently in a same-sex relationship some countries have developed special rules on cohabitation and registration, others have introduced a legal institution referred to as a registered partnership which creates a new civil status and a number of countries have even created the institution of same-sex marriage. Still other jurisdictions have not enacted any new legislation in this field. Nevertheless, in several jurisdictions, the introduction of a new civil status or at least new legislation on the formalisation of same-sex relations is under discussion. On the other hand, other jurisdictions are reluctant to change their family law in order to facilitate the formalisation of same-sex relations.

Because of the ever increasing international mobility of persons, not only the authorities of countries where new rules have come into force are confronted with new legal possibilities and the consequences thereof, but the authorities of other jurisdictions also face this dilemma. On the one hand, these authorities may be asked to discuss the desirability of following the

* Session IIB3. National Reports received from: Argentina, Medina; Belgium, Wautelet; Canada, Guillemard & Prujiner; Finland, Mikkola; France, Fulchiron; Germany, Martiny; Greece, Vasilakakis; Italy, Boschiero; the Netherlands, Curry-Sumner; Scotland, Carruthers; Serbia, Knezevic & Pavic; Spain, Gonzalez Beilfuss; Sweden, Bogdan; US, Hay.

tendencies which can be observed in the family law of some countries. On the other hand – and this is a direct consequence of the international mobility of persons – they have to decide to which degree they accept the legal consequences of relations between persons established under a same-sex marriage, registered partnership, or any other kind of registration or cohabitation legislation of other countries.

Therefore, the new institutions and rules constitute a challenge for private international law in all countries of the world. Moreover, also the jurisdictions which have introduced the new legal institutions and rules have to adapt their conflict rules, jurisdiction rules and rules on the recognition of foreign similar, but not identical, institutions and rules. Most of the traditional rules of private international law prove to be insufficiently flexible to be applied to the new institutions and rules.

The core issue of the national reports on the private international aspects relating to homosexual couples is the reaction of the private international laws of the different jurisdictions to new institutions such as a same-sex marriage, a registered partnership, and other ways of registering or regulating same-sex cohabitation. Because of the fact that it is likely that the private international law rules in respect of same-sex couples will be influenced by the general attitude of jurisdictions towards homosexual couples, in particular by the possibilities that jurisdictions offer to homosexuals in order to legally formalise their relationship by means of, for example, a marriage, a registered partnership or another type of registered contract, in section 2 a brief description of these possibilities will be given in relation to jurisdictions whose private international law rules will be compared and analysed in this report. The description is based on the information provided by the national reports.

This description, comparison and analysis will – in principle – be restricted to the jurisdictions on which national reports were received for the 2006 conference of the International Academy of Comparative Law.¹ Information on other legal systems will only be mentioned occasionally.

As most of the national reports deal with the private international law reactions to same-sex marriages and registered partnerships, the private international law questions relating to these relationships will constitute the central issues in this report. The private international law dimensions of cohabitation contracts concluded by same-sex couples or of the legal consequences of informal cohabitation will not be discussed.²

¹ *See supra* note *.

² The reports by Bogdan (Sweden) and Curry-Sumner (the Netherlands) also expressly made this choice. *See* on the extremely interesting Swedish legislation on the legal consequences of informal cohabitation (the Cohabitees Act, Sambolagen 2003:376) the national report by Bogdan. It is obvious that interesting private international law questions are linked to this innovative legislation when, for example, a Swedish couple, who have already been cohabiting for many years in Sweden, move to another country. *See also* the remarks on the private international law aspects of non-registered same-sex relationships in the German national report (Martiny) and the Scottish report (Carruthers).

2. The Increasing Possibilities to Formalise a Homosexual Relationship

2.1. Same-sex Marriage

Five jurisdictions to be compared in this report: Belgium, Canada, Massachusetts, the Netherlands and Spain offer same-sex couples the possibility to marry.³

In the Netherlands this possibility has existed since 1 April 2001. The rules which are applicable to a same-sex marriage are in principle the same as those which are applicable to an opposite-sex marriage. There are only two exceptions: same-sex spouses are not eligible to adopt children from another country and the presumption of 'paternity' does not apply to the female spouse of a woman who gives birth to a child.

The national report of the Netherlands (Curry-Sumner) underlines that the same-sex marriage was only introduced in the European part of the Kingdom of the Netherlands and not in the Overseas Territories of the Netherlands Antilles and Aruba. Both territories have their own legislative authority in the field of *inter alia* family law. Five years ago, it was unclear whether a same-sex marriage celebrated in the European part of the Netherlands would be recognised in the Netherlands Overseas Territories. In 2005 this question was answered in the affirmative by the Joint Court of Appeal of the Netherlands Antilles and Aruba⁴ in a decision concerning a lesbian couple who had married in the European part of the Netherlands. The couple sought to have their marriage recognised in Aruba, which was initially refused by the Registrar. The Joint Court of Appeal held that the marriage must be recognised on the basis of Article 40 of the Charter for the Kingdom of The Netherlands⁵ (*Statuut voor het Koninkrijk der Nederlanden*), and thus must be registered in the Population Register.

In Belgium a same-sex marriage is made possible by the Act of 13 February 2003⁶ (in force since 1 June 2003). The Belgian Constitutional Court (Cour d'arbitrage) rejected an appeal against this Act.⁷ Differences with an opposite-sex marriage originally existed in the field of the presumption of paternity and adoption. However, by the Act of 18 May 2006 an amendment was made so that same-sex couples are also eligible to adopt children.⁸

In Massachusetts the Supreme Court⁹ allowed same-sex marriages by declaring that its state law which restricts marriage to heterosexual couples is unconstitutional. Same-

³ South Africa has also introduced same-sex marriages. See the decision of the South African Constitutional Court, available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>.

⁴ *Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba*, 23 August 2005, Case No. EJ 2101/04 – H.12/05.

⁵ This Article deals with the recognition and enforcement of judgments and authentic deeds.

⁶ *Moniteur belge* 28 February 2003.

⁷ *Cour d'Arbitrage* 20 October 2004, n° 159/2004, *Journal des tribunaux* 2005, 51.

⁸ *Loi modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe*, *Moniteur belge* 20 June 2006.

⁹ *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

sex marriages have been celebrated there since May 2004. There are attempts to overturn this decision by means of a constitutional amendment, but, to date, these have not been successful. As the American national report (by Hay) points out, the supreme courts in three other American States have also concluded that restricting marriage to opposite-sex couples violates the constitution of the State involved. That already happened in Hawaii in 1993, in Alaska in 1998 and in Vermont in 1999.¹⁰ However, in Vermont the court concluded that the restriction of marriage to heterosexual couples violated that State's constitution and declared that general marriage law should be applicable to same-sex couples, unless the legislator came up with an alternative. In reaction to this, the Vermont legislator introduced a "civil union" for same-sex couples, which gives the parties to such a union essentially the same rights as those of spouses. In Alaska and Hawaii, the Supreme Court decisions were overturned by State constitutional amendments. In California, the City of San Francisco allowed same-sex couples to marry, but already in 2004 the Californian Supreme Court declared that these marriages were void.¹¹ In this context it has to be mentioned that in 1993 the German Federal Constitutional Court came to the conclusion that restricting marriage to opposite-sex couples does not violate constitutional rights.¹²

In Spain same-sex couples have been able to marry since July 2005 with basically the same legal consequences as a traditional marriage.¹³ However, the presumption of paternity does not apply to the female spouse of a woman who gives birth to a child.¹⁴

The Canadian report (by Guillemard and Prujiner) mentions that on the Canadian federal level the legislator has recently defined marriage, for civil purposes, as 'the lawful union of two persons to the exclusion of all others' and provided expressly 'For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex'.¹⁵ The report describes the remarkable developments in the different Canadian provinces and territories leading up to the enactment of this Act, where some Canadian jurisdictions introduced civil unions and others made marriage available for same-sex couples.

¹⁰ The report by Hay (USA) mentions that lower courts in New York and Washington have come to the same conclusion. He refers to *Hernandez v. Robles*, 7 Misc.3d 459, 794 N.Y.S.2d 579 (Sup. Ct., N.Y. County 2005). However, Hay also refers to a decision of another lower court which upheld New York's restriction to opposite-sex marriage on both state and federal constitutional grounds: *Seymore v. Holcomb*, 7 Misc.3d 530, 790 N.Y.S.2d 858 (Sup. Ct., Tomkins County 2005). The Supreme Court of New York heard an appeal against the *Hernandez* decision and on 8 December 2005 it concluded that the relevant sections of the Domestic Relations Act are constitutional and valid: 2005 NY App Div LEXIS 8002.

¹¹ *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1113, 95 P.3d 459, 495 (2004).

¹² Bundesverfassungsgericht 4 October 1993, NJW 1993, 3058. *See* the German national report.

¹³ Act 13/2005 of 1 July 2005, BOE 2005, 157 (Ley por la que se modifica el Código Civil en materia de derecho a contraer matrimonio).

¹⁴ The Spanish report (Gonzalez Beilfuss) mentions that the opposition party Partido Popular challenged the constitutionality of the new act. The Constitutional Court has not yet decided on this complaint.

¹⁵ Art. 1, respectively 4 Civil Marriage Act of 20 July 2005 (Chapter 33).

2.2. The Registered Partnership as a New Civil Status

Seven other countries to be discussed in this report have introduced the institution of a registered partnership as a separate civil status. This occurred first of all in the Scandinavian countries.

The first country which introduced the institution of a registered partnership was Denmark.¹⁶ The Danish example was followed by Sweden. Since 1 January 1995 this country has offered same-sex couples the possibility to register their partnership.¹⁷ The legal consequences of a registered partnership are in most respects the same as those of a heterosexual marriage. The Registered Partnership Act is relatively short and refers repeatedly to the existing legislation on marriage, but even its own substantive rules are similar to those relating to a marriage. Originally there were some significant differences, but they have gradually been abolished: In 2003, registered partners were allowed to adopt children jointly, and in 2005 female registered partners were equated with married couples in respect of medical assistance under the Insemination Act¹⁸ and the Act on Fertilization Outside of the Body (in vitro fertilization).¹⁹

The Netherlands followed the Danish and Swedish example and on 1 January 1998 it opened up the possibility to enter into a registered partnership for both same-sex and opposite-sex couples.²⁰ The availability of a registered partnership for opposite-sex couples is a significant difference with the rules in the Scandinavian countries. The legal consequences of a registered partnership and a marriage are nearly the same.²¹ However, registered partners are excluded from adopting a child from abroad and when a child is born to a woman in a registered partnership, her partner does not automatically become a legal parent. Furthermore, an important difference exists in respect of dissolving such a partnership. Arts. 1:80c-1:80g of the Netherlands Civil Code regarding the termination of a registered partnership are inspired by the grounds for the termination of a marriage (Art. 1:149 Netherlands Civil Code). However, a judicial separation, available to married couples wishing to terminate their marriage, is not available to registered partners.²² On the other hand, unlike marriage,

¹⁶ Denmark introduced the institution of a registered partnership by the Act of 7 June 1989, which entered into force on 1 October 1989.

¹⁷ Lagen om registrerat partnerskap (Registered Partnership Act) 1994:1117.

¹⁸ Act 1984:1140.

¹⁹ Act 1988:711.

²⁰ Act of 5 July 1997, *Staatsblad* 1997, 324.

²¹ See the national report by Curry-Sumner and K. Waaldijk, *More or less together, Level of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries* 138 (2005).

²² See for the reasons for this difference the national report by Curry-Sumner.

registered partnerships may be dissolved by means of an administrative procedure without judicial intervention based on the mutual agreement of the partners. A registered partnership may be converted by the partners into a marriage and vice versa.

Finland introduced the institution of a registered partnership by the Act on Registration of Partnership of 9 November 2001.²³ The legal effects of a partnership are – in principle – the same as the legal effects of a marriage with the exception of the provisions of the Paternity Act²⁴ on the establishment of paternity on the basis of marriage, the provisions of the Adoption Act²⁵ and the regulations of the Names Act²⁶ pursuant to which only spouses can adopt each other's surname or use a double name consisting of both their surnames. A registered partnership is dissolved if one of the partners dies or if the registration is declared dissolved by a District Court. Like in the case of marriages, a dissolution is possible after a reconsideration period of six months or after having lived apart for a period of 2 years.

Germany introduced the possibility to register same-sex unions by the Act on Life Partnerships of 16 February 2001, as amended.²⁷ Two persons of the same sex may conclude a life partnership (*Lebenspartnerschaft*) by making reciprocal declarations that they want to conclude such a partnership. The declarations have to be made and registered at a competent office which is normally the civil registration office (§1 Life Partnership Act), but in Bavaria a notary is competent. In many respects, a life partnership has legal consequences similar to those of a marriage, e.g. the surviving same-sex partner is a legal heir (§10(1) Life Partnership Act).²⁸ But there are also remarkable differences: e.g. life partners do not have the right to adopt children jointly, but one of the registered partners may adopt the other partner's child (stepchild adoption), (§9(7) Life Partnership Act). Originally, it was obviously a goal of the German legislator to maintain some differences between the legal consequences of a marriage, on the one side, and a life partnership, on the other, in order to show that the latter institution is not a marriage. In other words: The legislator wanted to maintain a 'distance' between the new institution of life partnership and the traditional marriage protected by Art. 6 of the German Constitution. Nevertheless, the level of legal consequences has been gradually raised by amending the legislation. For example, since 2005 the general rules on matrimonial property law apply equally.

²³ Act 950/2001 (laki rekisteröidystä parisuhteesta), which entered into force on 1 March 2002.

²⁴ Act 700/1975 (isyyslaki).

²⁵ Act 153/1985 (laki lapseksiottamisesta).

²⁶ Act 694/1985 (nimilaki).

²⁷ Act on Life Partnerships introduced by Art. 3 §25 of the Act to end discrimination of same-sex unions (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften) of 16 February 2001, Bundesgesetzblatt 2001 I p. 266 (English translation in Boele-Woelki & Fuchs (Eds.), *Legal Recognition of Same-Sex Couples in Europe* (2003), p. 256 ff.). – Amended by the laws of 15 December 2004, Bundesgesetzblatt 2004 I p. 3396 and 6 February 2005, Bundesgesetzblatt 2005 I p. 203.

²⁸ See for a detailed description the report by Martiny.

Upon the application of one or both of the life partners, the life partnership will be dissolved by means of a judgment (*'Aufhebung'* according to §15(1)1 Life Partnership Act), if both life partners have declared that they do not want to continue with the life partnership and that twelve months have elapsed since that declaration or if one partner has declared that he/she does not want to continue the life partnership and 36 months have elapsed since that declaration.

In Scotland, the institution of civil partnership was introduced by the Civil Partnership Act 2004, which entered into force in December 2005. A civil partnership is defined as a legal relationship between two people of the same sex which is formed when they register as civil partners of each other, and which only ends upon death, dissolution or annulment. A registered partnership may be dissolved by means of a court decree, if it is established that the partnership has broken down irretrievably. The new institution of civil partnership does not equate to the Scots conception of marriage, but the legislative provisions are modelled upon the provisions concerning marriage.

In the USA, two States have introduced a so-called 'civil union'. Vermont did so as a reaction to the decision of the highest state court that a marriage should otherwise be allowed for same-sex couples. Vermont gives the parties to such an union essentially equal rights with those of spouses in a marriage, and requires – as in a marriage – a formal procedure for its dissolution.²⁹ Connecticut followed Vermont's example in 2005.³⁰ The law provides for the same rights for those united in a "civil union" as are enjoyed by parties to a "marriage which is the union between a man and a woman." In this way, Connecticut stresses that a civil union is not a marriage.

Furthermore, the regulation of the domestic partnership in California has a strong similarity to a civil union. The California domestic partnership law provides that registered domestic partners have "the same rights, protections and benefits, and shall be subject to the same responsibilities, obligations, and duties under law ... as ... spouses."³¹ It provides procedures for the dissolution of the partnership (§§299(a) and (d)). In his national report Hay (USA) underpins the 'decidedly status-oriented approach' and concludes that it 'seems to be the functional equivalent of a civil union.'³²

Finally, it has to be mentioned that several jurisdictions within Spain have introduced legislation on unmarried couples. The Spanish report (by Gonzalez Beilfuss) stresses that this regional legislation is very diverse in content.

²⁹ 15 V.S.A. § 1201 et seq. (2004). The civil union statute was upheld in *Brady v. Dean*, 173 Vt. 542, 790 A.2d. 428 (2001).

³⁰ SB 963, in force on 1 October 2005.

³¹ Cal. Fam. Code § 297.5 (2005).

³² The validity of California's domestic partnership law was upheld after a challenge to the effect that it violated the DOMA-like prohibition against same-sex marriage: *Knight v. Superior Court of Sacramento County*, 128 Cal.App.4th 14, 26 Cal. Rptr.3d 687, 698 (Cal. App. 2005).

2.3. Other Types of Registration

Remarkable is the legal situation of same-sex couples in Argentina. On the federal level some statutes extend their benefits to same-sex partners. The Argentine national report (by Medina) refers to the Retirement and Pension Act,³³ the Health Insurance Providers Act³⁴ and the Lease of Urban Property Act. However, two Argentinian provinces have introduced the possibility of a registered partnership: the Autonomous City of Buenos Aires and the Province of Rio Negro.

In Buenos Aires, Act 1004 of 17 January 2003 has created a Public Registry for the city of Buenos Aires's jurisdiction in order to register civil unions ('union civil'), civil union dissolutions, and to issue certificates concerning these entries. Two people, regardless of their sex or sexual orientation, can register their union if they have lived together for a minimum of two years within a stable and publicly known relationship or if they have a common child ('descendencia comun'). For exercising the rights, obligations and benefits that result from the legislation of Buenos Aires, the civil union partners are treated as spouses. The impediments for registering a civil union correspond with the usual impediments for a marriage³⁵ with – of course – the exception that also same-sex couples may register their union. A civil union will be dissolved by mutual agreement, by a unilateral declaration by one of the partners (and registered by the Public Registry of Civil Unions), if one of the partners marries or upon the death of a partner.

In the Province of Rio Negro Act 3736 of 9 May 2003³⁶ makes it possible for same-sex couples to sign an affidavit in the presence of two witnesses and before a competent authority to the effect that they live together. Different to the regulation in Buenos Aires, this possibility is not available to opposite-sex couples. The impediments which usually exist for marriage will also apply, again with the exception of the requirement that the partners are of the opposite sex. The affidavit allows the partners to obtain the rights and obligations that the legislation of the province provides.

The Argentine national report (by Medina) points out that these civil unions in Buenos Aires and Rio Negro do not create a new civil status or a family relationship. A non-federal legislator cannot create rules in the field of family law, which is within the exclusive competence of the National Congress.

By the Act of 23 November 1998 Belgium introduced a kind of registered partnership, called a 'cohabitation légale' (legal cohabitation).³⁷ The rules on legal cohabitation become

³³ Act 24.241.

³⁴ Act 23.660.

³⁵ Compare Art. 116 Civil Code of Argentina.

³⁶ Boletín Oficial 4097 of 15 May 2003.

³⁷ Act of 23 November 1998 'instaurant la cohabitation légale', *Moniteur belge* 12 janvier 1999.

applicable after a declaration by two non-married adults in the presence of an officer of civil status. This legal cohabitation is open to both same-sex and opposite sex couples and also for close relatives! Already the fact that close relatives can conclude such a legal cohabitation makes this institution very different from the Scandinavian, German, Dutch or Scottish registered partnerships. A legal cohabitation can be dissolved by mutual agreement or even by a unilateral declaration by one of the partners registered by the officer of civil status or by marrying somebody else. The legal consequences of a legal cohabitation are much less far-reaching than those of a marriage. A legal cohabitation does not have consequences as far as civil status is concerned, in spite of the involvement of an officer of civil status, who has to be present during the mutual declarations by the partners to the effect that they want to conclude a contract of legal cohabitation. A contract of legal cohabitation neither creates an obligation to cohabit nor an obligation of fidelity between the partners. After the dissolution of the legal cohabitation no maintenance obligations exist.

The French report (by Fulchiron) mentions the ‘pact civil de solidarité’ (abbreviated as: PACS), which was introduced by Act 99-944 of 15 November 1999. The PACS is defined in Art. 515-1 Code civil as a contract between two natural persons who have reached the age of majority and who are of different sexes or of the same sex in order to organise their common life. A PACS gives considerably fewer rights than a marriage gives. For example, the partners do not have automatic succession rights if one of them dies.

The Italian report (by Boschiero) describes the attempts of several cities and regions to introduce the possibility of registering same-sex relationships. But registered unions do not have consequences as regards civil status.³⁸

A number of states in the United States provide some protection for “domestic partners”³⁹, but without equating domestic partner status with marital spousal rights. All the domestic partnership legislation has in common that benefits are extended with respect to “domestic partners”, but no “status” is created that parties might claim to be “exportable”. The effects of such “domestic partnerships” are thus exclusively local.⁴⁰

The Greek, Italian⁴¹ and Serbian national reports mention that their laws do not offer any explicit possibility to enter into any kind of same-sex marriage, partnership or registered contract. In Serbia Art. 3 Family Code underpins that ‘marriage is a legal relationship between

³⁸ The report refers for further information to <http://www.arcigay.it7show.php?152>.

³⁹ Some states define “domestic partner” as anyone (regardless of gender) who is the principal’s “sole partner.” The American Law Institute’s Principles of Family Dissolution (2002) define as domestic partners people of the “same or opposite sex ... who for a significant period of time share a primary residence and a life together as a couple.” Several states emphasize the same-sex nature of the relationship. Remarkable is the approach of California: to be eligible to file a Declaration of Domestic Partnership, the parties have to be of the same-sex *or* over the age of 62. Cal. Fam.Code § 297 (2005).

⁴⁰ Hay refers to Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 B.Y.U.L. Rev. 1235.

⁴¹ At least at the national level.

a man and a woman'. Nevertheless, the Serbian report (by Knezevic and Pavic) discusses whether perhaps foreign nationals could under certain circumstances conclude a same-sex marriage in Serbia, because Art. 32 (2) of the Serbian Act on Private international law⁴² states that substantive aspects of the capacity to enter into a marriage are governed by the *lex nationalis* of the future spouses. The provision expressly mentions that in respect of three issues the *lex fori* will apply: bigamy, mental disability and close family ties. A same-sex marriage is not mentioned as an exception to the applicability of the *lex nationalis*, but one would nevertheless expect that the possibility of a same-sex marriage is excluded under the general ordre public exception of Article 4 of the Act on Private international law. The report underpins that the ordre public exception of Serbian Private international law is restricted to a violation of the foundations of society as enshrined in the Constitution. According to the national reporters, there are two possible ways in which a Serbian wedding official could prevent the conclusion of a same-sex marriage by foreign nationals under the application of their *lex nationalis*. One could characterise the requirement of different sexes as a formal aspect of marriage and, therefore, subject to the *lex fori*. The second possibility is to qualify Articles 3 and 15 of the Family Code as special mandatory rules which are applicable irrespective of the law which would otherwise be applicable (*Eingriffsnormen*), although the reporters admit that this would be highly unusual because family law provisions are rarely considered to be '*Eingriffsnormen*'.

3. The Scope of the International Application of Same-sex Marriages, Registered Partnerships etc.

In those jurisdictions where a same-sex marriage is allowed, or a marriage-like registered partnership or any other kind of registration of same-sex relations with considerable legal consequences has been introduced, the geographical scope of application of the rules in question has to be determined. In other words: which persons are entitled to conclude such a same-sex marriage or to register their partnership or to formalise their relationship according to the new rules? Which rules are applicable to the question of whether the persons involved meet the substantive requirements to marry each other, or respectively to conclude a registered partnership or to legally formalise their same-sex relationship? Furthermore, do the persons involved need an appropriate connection with the jurisdiction involved in the form of nationality, domicile or (habitual) residence?

The Swedish report (by Bogdan) points out that because of the fact that most legal systems do not currently have any substantive rules on registered partnerships, it is very difficult to

⁴² Zakon o resavanju sukoba zakona sa propisima drugih zemalja (Law on conflict of law issues concerning laws of other countries), *Sluzbeni list SFRJ* (Official Gazette of the SFRY), 42/82, 72/82, *Sluzbeni list SRJ* (Official Gazette of the FRY) 46/96.

use, in respect of these partnerships, conflict rules similar to the traditional conflict of law rules on marriages, because these rules frequently refer to non-existing substantive rules of foreign countries. Furthermore, it can be assumed that many foreign countries will refuse to recognise and give (full) effect to registered partnerships. This makes it necessary to create special private international law rules (conflict rules and rules on jurisdiction) which must take into account the various, potentially hostile reactions which registered partnerships may encounter abroad. Furthermore, in order to avoid “registration tourism” and – consequently – limping legal relationships, it may be desirable to impose additional requirements regarding nationality or habitual residence for persons wishing to register as partners. *Mutatis mutandis*, similar remarks could be made for same-sex marriages and for alternative rules on the formalisation of same-sex relationships.

The national report by Wautelet (Belgium) is particularly interesting on this point. Wautelet states that the Belgian legislator, which made marriage available for same-sex couples in 2003, did not expressly regulate its geographical scope of application. Therefore the traditional conflict rules obviously had to be applied, which would only allow a same-sex marriage if the national law of both partners would allow such a marriage to be concluded. The result was that – at that very moment – only Belgian and Dutch nationals would be able to conclude a same-sex marriage in Belgium. Wautelet mentions that this view was confirmed in May 2003 by an official instruction from the Ministry of Justice.⁴³ But already in January 2004 the Ministry had replaced this instruction by a new one. Now the Ministry stressed that if the national law would forbid a same-sex marriage this element of the applicable foreign law should be disregarded because of its discriminatory character, if at least one of the future spouses possesses the nationality of a country which allows same-sex marriages or has her/his habitual residence in such a country.⁴⁴ This solution was finally codified in Art. 46 (2) of the new Act on private international law.⁴⁵ Moreover, such a marriage can only be concluded in Belgium if one of the future spouses is a Belgian national, is domiciled in Belgium or has had his/her habitual residence there for at least three months. The Belgian national report mentions another important point: the Belgian officer of civil status can only conclude marriages according to Belgian law. The consequence is that these officials are not able to conclude a registered partnership according to, for example, the law of Sweden between two Swedish men or two Swedish women residing in Belgium. However, the Belgian law would allow these Swedish nationals to conclude a same-sex marriage if they reside in Belgium.

⁴³ See Circulaire relative à la loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil (Moniteur belge 16 May 2003).

⁴⁴ Circulaire remplaçant la circulaire du 8 mai 2003 relative à la loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil, Moniteur belge 27 January 2004.

⁴⁵ Act of 27 July 2004, Moniteur belge 27 July 2004.

The Belgian and Swedish reports illustrate that the right to conclude a same-sex marriage or a registered partnership can *ratione personae* be restricted in two different ways. First of all, if the conflict rules regarding the substantive requirements refer to the applicability of foreign law, in particular to the *lex personalis* (i.e. the *lex nationalis* or *lex domicilii*) of the parties involved, many persons will not be able to conclude a same-sex marriage or registered partnership because of the fact that foreign law frequently does not offer that possibility. Secondly, a jurisdiction which offers the possibility of a same-sex marriage may impose additional nationality, domicile or residence requirements in order to avoid “marriage or registration tourism” and the limping legal relationships which could be the consequence thereof.

In respect of opposite-sex marriages, Art. 3 Hague Convention on Celebration and recognition of the Validity of Marriages of 14 March 1978⁴⁶ provides that a marriage shall be celebrated: 1) where 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, or 2) where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration. Frequently, these choice of law rules refer to the national law of the persons involved or the law of their domicile. An application of this rule *per analogiam* to same-sex marriages⁴⁷ or registered partnerships would provide for a rather wide possibility to conclude a same-sex marriage or a registered partnership in countries where these possibilities are offered, because these countries could apply their own internal law to the substantive requirements if at least one party is a national of or has his/her habitual residence in the country involved. But we can observe that several jurisdictions use a slightly different conflict rule or impose additional requirements.

As already mentioned, Belgium refers same-sex marriages to the *lex nationalis* of each of the spouses, but if this national law forbids a same-sex marriage, such a marriage can nevertheless be concluded in Belgium if one of the future spouses is a national of a country which allows this marriage or has his habitual residence in such a country. Furthermore, there must be an additional connection with Belgium: one of the future spouses must be a Belgian national, domiciled in Belgium or has had his/her habitual residence in Belgium for at least three months.

It is remarkable that in respect of the conclusion of a contract of legal cohabitation in Belgium, the parties must have a common habitual residence in Belgium (Art. 59 Code de

⁴⁶ Tractatenblad 1987, 137.

⁴⁷ See for very interesting remarks on the question whether same-sex marriages fall within the ambit of this Hague Convention the report of the Netherlands, where the discussion on this topic in the Advisory State Committee (*Staatscommissie*) on Private International Law is described with references to *inter alia* – the Dyer report.

droit international privé). The possession of Belgian nationality by one of the parties or the habitual residence of one of the parties in Belgium is not enough. The law applicable to legal cohabitation (inter alia the substantive and formal requirements) is the *lex loci registrationis* (Art. 60 Code de droit international privé).

In Buenos Aires the substantive requirements regarding the registration of a civil union are obviously governed by the provisions in force in Buenos Aires. But this law requires *inter alia* legal domicile ('domicilio legal') within the city's jurisdiction for at least two years before registering the civil union.

Río Negro does not have any residence or other requirement: therefore any person with or without legal domicile in Rio Negro can register a civil union. It is evident that in both jurisdictions nationality cannot play a role in determining the geographical scope of the application of the regulations involved because the Argentine provinces do not have separate nationality.

The Canadian Civil Marriage Act does not contain provisions on private international law. As Guillemard and Prujiner describe in their national report, the conflict rules of the different Canadian jurisdictions apply. The substantive requirements for a marriage are, according to the conflict rules of Quebec, governed by the law applicable to the status of each of the intended spouses (Art. 3088 Civil code of Quebec). With respect to form, marriage is governed by the *lex loci celebrationis*.

Art. 3088 provides that the status and capacity of a natural person are governed by the law of his/her domicile. The domicile of a person is defined by Art. 75 as the place of his/her principal establishment. A change of domicile is effected by actual residence in another place coupled with the intention of the person to make this place the seat of his/her principal establishment. The common law jurisdictions of Canada use the same connecting factor for determining the law which is applicable to the substantive requirement of marriage (*lex loci domicilii*).⁴⁸ For the form of a marriage, the main rule is again the *lex loci celebrationis*.

The conflict rules regarding the substantive requirements which have to be fulfilled by persons who intend to conclude a civil union differ considerably from the conflict rules regarding marriage. Art. 3090 (1) Civil code of Quebec refers to the *lex loci celebrationis* without any other requirement with respect to residence or domicile. Three other Canadian jurisdictions which have introduced a civil union require that both or at least one partner resides in the province involved. Nova Scotia also offers the possibility to conclude a civil union to non-residents who possess immovable property in that province.

In Finland, the law applicable to the substantive requirements for concluding a registered partnership is always Finnish domestic law (section 11 Partnership Act). But section 10 of

⁴⁸ The national report refers to *Brook v. Brook* (1861), [1861-73] All E. R. Rep. 493, 9 H.L. Cas. 193; *Schwebel v. Ungar* (1963), [1964] 1 O.R. 430, 42 D.L.R. (2^d) 622 (C.A.), [1965] R.C.S. 148.

this Act provides that the possibility to conclude a registered partnership in Finland is only open to non-nationals if a) both parties have been habitually resident in Finland for two years immediately before the registration, or b) at least one of the parties is a Finnish citizen (or a citizen of a foreign state that permits registration with comparable effects as the Finnish Act) and is habitually resident in Finland. The states which have a registration system comparable to Finland are not mentioned in the Partnership Act, but are listed in a Governmental Decree. At this moment in time, the states which are on the list are Denmark, Germany, Iceland, the Netherlands, Norway and Sweden.

In Germany the approach differs completely. As Martiny describes in his report, the German legislator wanted to provide access to the legal consequences of a life partnership to all same-sex couples independently of their nationality, domicile and habitual residence.⁴⁹ The risk that in the home State or State of residence of the parties involved such a life partnership will not be recognised is accepted. Therefore there is no special requirement as to the nationality or habitual residence of the parties. Martiny underlines the fact that, since the legislator did not intend any restriction or a requirement of a relationship with Germany, even travelling to Germany with the purpose of registering is not illegal and *fraus legis* (*fraude à la loi*) cannot be successfully invoked.

In respect of same-sex marriages the Netherlands follows precisely the conflict rules of art. 3 of the 1978 Hague Convention. Art. 2(a) Marriages (Conflict of Laws) Act (*Wet conflictenrecht huwelijk*) states that the celebration of a marriage will be permitted if each of the future spouses meet the requirements of Dutch law and one of them possesses Dutch nationality or has his/her habitual residence in the Netherlands. Should neither of the parties have their habitual residence in the Netherlands nor possess Dutch nationality, an alternative choice of law rule can be used: a marriage can also take place in the Netherlands if both of the parties satisfy their *lex nationalis* with regard to the substantive marriage requirements.

In respect of questions related to the formal and substantive validity of partnerships registered in the Netherlands, Art. 1 Registered Partnership (Conflict of Laws) Act (*Wet conflictenrecht geregistreerd partnerschap*) provides that Dutch law is applicable. Therefore Art. 1:80a *et seq.* Netherlands Civil Code will always apply. An alternative choice of law rule referring to national law does not exist. In respect of both a marriage and a registered partnership, an additional connection with the Netherlands is required: a marriage or registered partnership can only be concluded in the Netherlands if one of the persons involved has his/her residence (*woonplaats*) in the Netherlands or possesses Dutch nationality (art. 1:43(1) , respectively 80a (4) Civil code).

In Spain the authorities have really struggled with the question of whether foreigners can conclude a same-sex marriage in Spain. The Spanish report refers to several decisions by the

⁴⁹ Explanatory notes to the Act, Bundestags-Drucksache 14/3751 p. 60.

Dirección General de registros y el Notariado on this problem. Gonzalez Beilfuss concludes that a same-sex marriage can be contracted in Spain if one of the future spouses has his/her habitual residence in Spain. The nationality of the parties is irrelevant for determining the competence of the Spanish authorities to allow such marriages. She also mentions that a Spanish consular marriage is possible if one of the parties is a Spanish national and one of the parties, not necessarily the one with Spanish nationality, has his/her habitual residence in the district covered by the Consulate. Of course, the Consul has to respect the conditions laid down by the law of the State in which he or she is accredited.

The scope of application of regional statutes on cohabitation and registered partnerships is considerably more difficult to determine. Several of these statutes require that at least one of the parties has the '*vecindad civil*' of the jurisdiction involved, while other statutes only require that one of the parties is domiciled in the territory and registered in the Population Registry. However, the report indicates that the leading opinion is that these unilateral regional rules violate the Spanish Constitution.

In Sweden, the procedure for and the form of registration, as well as its substantive requirements, are determined by Swedish law (Chapter 1, section 3 (4) and section 9 Registered Partnership Act). Additionally, Chapter 1, section 2 Registered Partnership Act provides that registration may take place only if at least one of the partners has been habitually resident in Sweden for at least two years, *or* if at least one of the partners is a Swedish citizen with habitual residence in Sweden. The Act adds that citizenship of Denmark, Iceland, the Netherlands and Norway shall rank equally with Swedish citizenship. Bogdan mentions in his report that it is rather unfortunate that the countries whose nationals will enjoy such preferential treatment are listed in the text of the Act, without allowing for additions by government decrees. This means that any addition to the list (and such additions are already called for, for example regarding Belgium, Finland and Germany) must take the form of an Act of Parliament, which is very impractical.⁵⁰ Bogdan mentions that the requirement of section 2 was added in order to avoid becoming a "registration haven" and in order to prevent the creation of a large number of limping registrations (*i.e.*, registrations that are not recognised abroad). This is a remarkably cautious attitude, in particular in comparison to the just mentioned German approach. The difference can be explained by the fact that Sweden introduced the institution of registered partnership six years before this was done in Germany.

Massachusetts does not permit out-of-state residents to enter into a Massachusetts marriage if the parties' home law would not recognise it. Hay mentions that this statutory rule antedates the legalisation on same-sex marriages in Massachusetts,⁵¹ but has been applied to deny

⁵⁰ As we could see above, the Finnish legislator has avoided this difficulty.

⁵¹ Mass. G.L. c. 207 §§11-12. The provision is part of Massachusetts's version of the Uniform Marriage Evasion Act.

out-of-state same-sex parties a Massachusetts marriage licence. On 30 March 2006, the Massachusetts Supreme Judicial Court⁵² upheld the application of this restriction: the capacity to marry is determined by both the *lex fori* and the home law of the parties, if the parties are non-residents. If the home law forbids a particular marriage, then that is an impediment to marriage in Massachusetts. This rule extends to all impediments (age, prohibited degrees of consanguinity, and the same sex).⁵³

In Scotland, the legal capacity to enter into a civil partnership is governed by the *lex loci registrationis*, i.e. Scottish law. Remarkable is the fact that if a person with Scottish domicile wants to conclude a registered partnership outside the United Kingdom, his capacity to do so is governed by his Scottish *lex domicilii*. The Scottish report (by Carruthers) mentions that this has the consequence that a Scottish domiciliary cannot evade, for example, the Scottish rules on the prohibited degrees of consanguinity or being under age by going abroad to register the partnership.

3.1. Conclusion

In order to determine whether persons can conclude a same-sex marriage, respectively a registered partnership, or can formalise their relationship in another manner, conflict rules should be used, which are as far as possible similar to the conflict rules which are applied to determine whether persons can conclude a traditional marriage. For example, in those countries which are contracting states to the 1978 Hague convention on celebration and recognition of the validity of marriages, Art. 3 of that convention could be applied *per analogiam*. Art 3 (1) which refers to the *lex loci celebrationis* for the answer to the question of whether the persons involved meet the substantive requirements, already includes certain elements which guarantee that an appropriate connection with the *locus celebrationis* will exist (at least one party must possess the nationality of that country or has his/her habitual residence there). That is already enough. Further measures in order to avoid same-sex marriage tourism or registration tourism are superfluous. In the past few years, many countries have introduced same-sex marriages or registered partnerships. This fact considerably increases the possibility of these relationships being recognised abroad, thereby reducing marriage or registration tourism. There is, therefore, no reason to be extremely cautious.

⁵² *Cote-Whiteacre and others v. Department of Public Health*, N.E.2d , 2006 WL 786227 (Mass.).

⁵³ In the case before the Court, marriage licences were refused to residents of Connecticut, Maine, New Hampshire and Vermont because those states forbid same-sex marriages. The applications by parties from New York and Rhode Island were sent back to the lower court so that the laws of those states could be determined (i.e., as to whether they forbid same-sex marriages).

4. Dissolution of a Same-sex Marriage or Registered Partnership

In respect of the dissolution of a same-sex marriage, registered partnership or another formalised relationship, it is also attractive to apply jurisdiction rules and conflict rules which are, as far as possible, similar to the jurisdiction and conflict rules regarding traditional divorces, which are to some extent unified in international treaties. Furthermore, in the European Union the jurisdiction rules in the field of divorce and related issues are unified by the Brussels IIbis Regulation.⁵⁴ However, as the report by Curry-Sumner points out, it is still an unanswered question whether same-sex marriages fall within the scope of this Regulation.⁵⁵ Furthermore, it is unlikely that the Brussels IIbis Regulation can be applied in order to determine jurisdiction in respect of the dissolution of a registered partnership or another formalised relationship.

In respect of same-sex marriages Curry-Sumner stresses that from the point of view of the Netherlands, there is only one marital institution which is open to couples regardless of their sex. Therefore, the Netherlands has chosen to apply the same rules as those laid down in Brussels IIbis in order to determine international jurisdiction in respect of the dissolution of same-sex marriages. This approach is also attractive because the European Court of Justice may in the future come to the conclusion that same-sex marriages fall within the material scope of the Brussels IIbis Regulation.

The same approach is chosen for the dissolution of a registered partnership. Art. 4(4) Netherlands Code of Civil Procedure provides that the Brussels IIbis regime is applicable *mutatis mutandis*. Moreover, the courts of the Netherlands will always have jurisdiction if the relationship was registered in the Netherlands. Curry-Sumner mentions that when the Dutch *Royal Committee on Private International Law* published its proposals on conflict rules regarding registered partnerships in 1998, there were in fact only four (Scandinavian) countries besides the Netherlands that had introduced equivalent legislation. It was thus deemed suitable to provide an unconditional forum for dissolution questions to all those couples who had registered their partnership in the Netherlands. However, the number of jurisdictions that have introduced a form of registered partnership has increased dramatically. Curry-Sumner therefore concludes that it would now be better to restrict this special forum to those couples who are unable to dissolve their relationship outside of the Netherlands, therefore to reduce it to a residuary forum as the *forum necessitatis*.⁵⁶

⁵⁴ EC Regulation No. 2201/2003 of 27 November 2003, in force in all the EU Member States with the exception of Denmark.

⁵⁵ See also the interesting remarks in the Swedish national report on this issue.

⁵⁶ He refers to *inter alia* the jurisdiction rules as in force in Scotland.

As already mentioned above, a registered partnership in the Netherlands can also be dissolved by the partners registering a mutual agreement to that effect. Therefore, Art. 1:80c (2), Netherlands Civil Code provides that the Dutch Registrar is competent in this respect on grounds which are identical to those laid down in the Brussels IIbis Regulation.⁵⁷

Curry-Sumner criticises⁵⁸ the fact that, unlike in respect of dissolution questions regarding registered partnerships, surprisingly no *forum necessitatis* has been created for same-sex married couples who have concluded their marriage in the Netherlands. This can cause problems if two foreigners conclude a same-sex marriage in the Netherlands and later move to a country where this institution does not exist. If they want to divorce, they could find themselves without recourse to a forum to dissolve their marriage. In order to avoid this situation, a *forum necessitatis* should be introduced.

Regarding the applicable law, the ordinary rules of the Divorce (Conflict of Laws) Act (*Wet conflictenrecht echtscheiding*) will also apply to the dissolution of a same-sex marriage. The parties are in principle permitted to choose Dutch law as the law which is applicable to their divorce (Art. 1(4)). This choice must be made by the parties together or by one of them and uncontested by the other. If such a choice is lacking then the choice of law ladder in Art. 1(1) to (3) determines the applicable law: 1) the common national law applies, or in the absence thereof 2) the law of the common habitual residence, or in the absence thereof 3) the law of the Netherlands.

In respect of the dissolution of a registered partnership other conflict rules apply. In principle Dutch law will apply, but the parties may make a choice in favour of the application of the *lex registrationis*. If the registered partnership was registered in the Netherlands, then Dutch law, as both the *lex fori* and *lex loci registrationis*, will always be applied (Art. 22 WCGP). If the registered partnership was registered abroad and the dissolution is sought on grounds of mutual consent, then also Dutch law will be applied, unless the partners have made a choice in favour of the *lex loci registrationis* (Art. 23 WCGP). When the registered partnership was registered abroad and a dissolution is sought on the ground of a sole petition, Dutch law will also be applied, unless either the parties have jointly chosen for the *lex loci registrationis* or this choice has been made by one party and is not contested by the other, or one party has made a choice in favour of the law of the place where the relationship was

⁵⁷ Art. 1:80c(2), Neth. CC refers to Art. 4(4), Dutch Code of Civil Procedure, which in turn refers to Art. 4(1), Dutch Code of Civil Procedure and thus to the application of the jurisdictional grounds laid down in Brussels IIbis.

⁵⁸ See the national report of the Netherlands, which refers to I. Curry-Sumner, All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe 441-444 (2005).

registered and both parties have close ties with that country (Art. 23 WC GP). The choice is restricted to the substantive requirements of the dissolution; the form and manner in which the dissolution takes place is governed by the law of the Netherlands.

On the recognition of divorces concerning same-sex marriages obtained in other Member States of the European Union, *e.g.* in Belgium or Spain, the Netherlands will apply the Brussels IIbis Regulation. According to Art. 21, Brussels IIbis, a judgment issued in a Member State shall be recognised in the other Member states without any special procedure. In respect of divorces obtained in non-EU countries, the ordinary rules of Dutch private international law will apply. In this case, the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations,⁵⁹ and the International Commission on Civil Status Convention on the recognition of decisions relating to the marital bond signed in Luxembourg on 8 September 1967⁶⁰ (both ratified by the Netherlands) are relevant. Curry-Sumner stresses that, in the eyes of the Netherlands, divorces concerning a same-sex marriage fall within the material scope of these conventions. In so far as these international instruments do not apply, the national recognition rules will be used. Those rules also apply to the recognition of a dissolution of a registered partnership abroad. A foreign divorce or dissolution will be recognised, if: 1) the foreign divorce/dissolution was obtained by a competent authority; 2) if it was obtained as a result of a unilateral petition, a proper judicial procedure is an additional condition for recognition; 3) nonetheless, even if either of these first two criteria are not met then the divorce/dissolution may still be recognised if the other party has either expressly or implicitly consented to result of the procedure. Furthermore, a foreign decision 4) must also not be contrary to the *ordre public*, or 5) must be in conformity with a previous decision.

Curry-Sumner discusses the interesting question of how it must be determined whether a foreign authority was competent to deal with the dissolution of a registered partnership. He underlines that this is to be judged according to “international standards” and not according to the jurisdictional rules of the issuing country or the law of the Netherlands. *Quid iuris* if the foreign jurisdiction assumed jurisdiction on the basis of an unconditional *forum necessitatis*? Such an unconditional *forum necessitatis* is not an internationally recognised standard of jurisdiction and would thus, under normal circumstances, not be recognised. However, because such a ground of jurisdiction is also recognised in the Netherlands, Curry-Sumner concludes that it would be rather hypocritical to refuse to grant recognition to a foreign dissolution on this basis.⁶¹

⁵⁹ Tractatenblad 1979, 131. Of the jurisdictions compared in this report Finland, Italy, the Netherlands, Sweden and the United Kingdom have ratified this Convention.

⁶⁰ Tractatenblad 1979, 130. Of the jurisdictions compared in this report only the Netherlands has ratified this Convention. Belgium, France, Germany and Greece have signed the convention.

⁶¹ See for more details Curry-Sumner, *supra* note 58, p. 436-445.

In his report, Bogdan pays attention to the opinion defended in the legal literature that the application of treaty provisions regarding marriage to registered partnerships would amount to a unilateral extension of the intended scope of application of international treaties to situations which were not envisaged in the drafting and that such an extension could formally constitute a violation of the international undertakings in question.⁶² He does not share that view. He argues that if, for example, Sweden is willing to apply unilaterally its statute based on the 1970 Hague Convention on the Recognition of Divorces and Legal Separations in order to recognise even partnership dissolutions emanating from the courts of the Contracting States, this would not violate Sweden's obligations under the convention. He stresses that Contracting States without registered partnerships are not affected at all, while those Contracting States where courts dissolve partnerships will certainly appreciate that their judgments are recognised in Sweden. However, the unilateral Swedish decision to apply the Hague Convention does not, of course, create any treaty obligations for the other Contracting States to recognise Swedish partnership dissolutions, although it may persuade them to do so, at least when the Contracting State in question has introduced the registered partnership in its own legal system.

The Canadian report mentions that the courts generally apply the *lex fori* in matters of divorce. In procedures regarding the dissolution of a civil union art. 3090 (2) Civil code of Quebec allows either the *lex domicilii* of the partners or the *lex loci registrationis* to be applied.

In Finland, jurisdiction regarding the dissolution of a registered partnership is regulated in section 13 Partnership Act, which states that a procedure regarding the dissolution of a registered partnership can be commenced in Finland if the partnership has been registered there. Moreover, the grounds of jurisdiction in divorce cases as mentioned in section 119 (1) of the Marriage Act also apply *mutatis mutandis* to the dissolution of a partnership. Therefore a dissolution may take place in Finland, if: 1) at least one registered partner is residing in Finland; or 2) the petitioner has been residing in Finland or otherwise has a close link with Finland and he/she cannot commence dissolution proceedings in a foreign state where either partner is residing, or this would cause unreasonable inconvenience to the petitioner, and the admissibility of the matter in Finland is justified in view of the circumstances. Foreign dissolutions of a registered partnership are normally recognised in Finland provided that the foreign court or authority has international jurisdiction as recognised in Finland, and the recognition does not conflict with Finnish public policy.

The international jurisdiction of the German courts regarding the dissolution of registered partnerships is determined by §661 (3) Code of civil procedure in conjunction with §606a CCP (the general provision on jurisdiction in the case of marriages, which applies with some

⁶² Bogdan refers to Maarit Jänäterä-Jareborg, p. 146, note 39.

amendments). According to these provisions, German jurisdiction exists regarding questions of life partnership if a partner is German or had this nationality at the time of registration (§606a (1)(1)) or if at least one partner has his/her habitual residence in Germany.⁶³ Moreover, the German courts have jurisdiction if the life partnership was entered into before a German civil registrar⁶⁴ (§661 para. 3 No. 1(b) CCP). Therefore, it is guaranteed that a partnership registered in Germany can also be terminated by a German court. A ‘civil registrar’ must here be interpreted as a ‘body which is competent according to state law’ since not all civil registrars throughout Germany are in fact competent.

In Scotland, Section 117 of the Civil Partnership Act 2004 mentions that an action for the dissolution of a civil partnership may be brought at the Court of Session or in the Sheriff Court. The Scottish report (by Carruthers) underlines that section 117 obviously deals with civil partnerships registered in Scotland. She concludes that jurisdiction under this section is based on the place of registration, rather than on a personal connection between one or both parties and the forum. Section 225 deals with the jurisdiction of the Scottish courts regarding the dissolution of a civil partnership formed abroad. A Scottish court in such a case has jurisdiction a) under the regulations of section 219 of the Act (corresponding to Article 3 of Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility);⁶⁵ or b) if no court has jurisdiction under (a) above, and one of the civil partners is domiciled in Scotland on the date when the proceedings are begun; or c) the following conditions are met: (i) the two partners concerned have registered their partnership in Scotland, (ii) no court has jurisdiction under (a) above; and (iii) it appears to the court that it is in the interests of justice to assume jurisdiction in the particular case. The recognition of decrees granting the dissolution of a civil partnership obtained from courts of EU Member States (except Denmark) is regulated by section 234(2) which mirrors the rules in relation to matrimonial decrees under Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental

⁶³ In marriage cases the German courts only have jurisdiction on the basis of habitual residence, if: 1) both spouses have their habitual residence in Germany (§606a para. 1 No. 2 CCP), or 2) one of them is stateless and has his/her habitual residence in Germany (§606a para. 1 No. 3 CCP), or 3) one spouse has his/her habitual residence in Germany, provided that the decision of the German court would not be obviously unrecognisable according to the *lex nationalis* of both spouses.

⁶⁴ Martiny mentions that a ‘civil registrar’ has to be interpreted as a ‘competent authority’ which is competent because of the fact that e.g. in Bavaria the notary is the competent authority for the registration of life partnerships.

⁶⁵ Carruthers mentions that detailed rules are proposed in draft SSI, The Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations [2005], regulation 4. These rules were intended to come into force on 5 December 2005, but have not yet been implemented. Equivalent rules applying in England and Wales, and Northern Ireland, implemented on 5 December 2005, are contained in The Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations SI 2005/3334.

responsibility. The rules for the recognition of non-EU decrees (sections 235-238) closely follow the provisions for the recognition (and the refusal thereof) of foreign equivalent decrees which are contained in the Family Law Act 1986, sections 46 and 51.⁶⁶

In Sweden, Chapter 2, section 3 of the Registered Partnership Act declares that statutory provisions on matrimonial cases also apply in partnership proceedings. This includes, in addition to the rules of private international law on jurisdiction, the applicable law and the recognition of foreign decisions.⁶⁷ In addition, Chapter 2, section 4 of the Act provides that Swedish courts always have jurisdiction to dissolve a partnership if registration has taken place pursuant to Swedish law. In principle, the substantive conditions for dissolution by the Swedish courts are governed by Swedish law.⁶⁸

In respect of procedures to dissolve a same-sex marriage, the Serbian report (by Knezevic and Pavic) makes an interesting remark. It underlines the fact that if a Serbian court, in accordance with the *lex fori*, does not characterize a foreign same-sex marriage as a ‘marriage under Serbian Family Law’, it will probably have to qualify this relationship as a particular kind of contract. Consequently, one would expect that a rescinding remedy, as a kind of surrogate divorce, would be available. *Mutatis mutandis*, this would probably present a method for dissolving same-sex partnerships.⁶⁹

4.1. Conclusion

The approach of several countries in respect of jurisdiction rules which should be used for dissolving both same-sex marriages and registered partnerships, which are in principle the same jurisdiction rules, is very attractive. For the Member States of the European Union this approach also effectively anticipates a possible decision by the European Court of Justice to the effect that at least the dissolution of same-sex marriages falls within the scope of the Brussels Ibis Regulation. But one also has to realise that foreign courts could refuse to deal with such a dissolution because they do not recognise same-sex marriages. As the report by Curry-Sumner points out, the creation of a forum necessitatis is thus necessary. If no court accepts jurisdiction in order to deal with an application for divorce, the courts of the country where the same-sex marriage was concluded (the *forum loci registrationis*), should have jurisdiction. *Mutatis mutandis* the same applies for the dissolution of a registered partnership.

⁶⁶ The report critically mentions only one novelty contained in section 237(2)(b)(ii).

⁶⁷ Bogdan mentions in his report that it could be argued that this even includes the jurisdiction rules contained in the EU Brussels Ibis Regulation, although they are not directly applicable to partnerships. But he concludes that “this seems hardly to be an appropriate solution.”

⁶⁸ See Chapter 3, section 4 of the Act (1904:26 p. 1) concerning Certain International Legal Relationships relating to Marriage and Guardianship.

⁶⁹ Also compare the report by Martiny on the characterisation problems regarding non-registered partnerships.

If one wants to facilitate the spouses or registered partners who want to dissolve their marriage or registered partnership, it could be convenient to grant the courts of this country not exclusively a residual jurisdiction, but an alternative jurisdiction.

The recognition of foreign decisions on the dissolution of same-sex marriages and registered partnerships should also in principle follow the same rules as those which apply to the recognition of divorces concerning traditional marriages. The conflict rules which determine the law which is applicable to divorce, respectively dissolution, should also be similar to the conflict rules regarding divorce concerning traditional marriages, but should at least allow a choice of law in favour of the *lex loci celebrationis*, respectively the *lex loci registrationis*.

5. The Recognition of Same-sex Marriages, Registered Partnerships and other Types of Registered Contracts which Formalise Same-sex Relationships

The next and perhaps the most interesting issue deals with the recognition of homosexual marriages, homosexual registered partnerships and other types of registered contracts which legally formalise a homosexual relationship in other countries. In this section we will first deal with those countries which have introduced these institutions. Of course, that has also influenced these countries' private international law. In so far as these jurisdictions have statutory provisions on the recognition of this type of legal relationship established abroad, these provisions will be described in detail.

Secondly, we will deal with the attitude of those countries which have not (yet) introduced same-sex marriages, registered partnerships or other methods for formalising same-sex relationships.

5.1. Jurisdictions which have Introduced Same-sex Marriages

In Belgium, Canada, the state of Massachusetts, the Netherlands or Spain there is no general reason why same-sex marriages or registered partnerships concluded in other jurisdictions should not be recognised. On the contrary, in principle one of course expects that these relationships established abroad will be recognised. However, the attitude regarding recognition differs in some interesting details.

In Belgium no special provision exists on the recognition of a marriage (same-sex or opposite-sex) concluded abroad. The Belgian authorities use the same rules which determine whether a marriage can be concluded in Belgium. Therefore, a marriage concluded abroad will be recognised in Belgium if both spouses fulfil (at the time of concluding the marriage) the substantive requirements laid down in their respective national law. If the national law of one (or even both) parties forbids a same-sex marriage, the marriage in question which

has been concluded in a country which recognises such a marriage will nevertheless be recognised if at least one of the parties resides in a country where a same-sex marriage is allowed or possesses the nationality of a country which permits such a marriage.

In Canada, a same-sex marriage concluded abroad will be recognised if the *lex domicilii* of the spouses allows for the conclusion of such a marriage. With regard to a civil union concluded abroad, the recognition rule differs considerably in Quebec: if the *lex loci registrationis* allows for the conclusion of such a civil union, this union will be recognised in Quebec, even in cases where this would be contrary to the *lex domicilii*.

In the Netherlands same-sex marriages concluded abroad will be recognised according to the same rules as those which are applicable to marriages between opposite-sex couples, *i.e.* those laid down in Art. 5 Marriages (Conflict of Laws) Act (*Wet conflictenrecht huwelijk*), which follows Art. 9 of the 1978 Hague Convention: if the marriage has been validly concluded according to the *lex loci celebrationis*, it will be recognised subject to some public policy exceptions. In respect of the recognition of registered partnerships concluded abroad, the situation is more complicated. In principle the rules on recognition contained in Art. 2 (1) Registered Partnerships (Conflict of Laws) Act (*Wet conflictenrecht geregistreerd partnerschap*) correspond with Art. 5(1) Marriages (Conflict of Laws) Act (*Wet conflictenrecht huwelijk*) (again subject to the standard public policy exceptions). However, one must first address the preliminary issue of characterisation. Before one can answer the question of which particular form of “registered partnership” will be recognised, one has to determine whether the registration in question can be considered to be a form of “registered partnership”. The criteria to be applied are (see Art. 2(5), in conjunction with Art. 2(4) Registered Partnerships (Conflict of Laws) Act (*Wet conflictenrecht geregistreerd partnerschap*)): 1) Did the registration take place before a competent authority according to the *lex loci registrationis*?; 2) is the registered partnership a legally regulated exclusive relationship between two persons?; 3) do the obligations between the partners in essence correspond with those of a marriage?

Curry-Sumner underlines the fact that there is some confusion as to the precise interpretation of the condition that the obligations which the partners owe to each other should correspond with those concerning a marriage. He refers to the explanatory notes to the Act where it is stated that the rules also lend themselves to legal institutions which are not officially called a “registered partnership”, but still possess the key characteristics thereof, even if this is not complete, for example Belgian legal cohabitation, the PACS in France and the statutory regulated cohabitation forms in Catalonia and Aragon.⁷⁰ But it is still uncertain whether the courts will follow this interpretation. Curry-Sumner concludes that it would have

⁷⁰ *Tweede Kamer*, 2002-2003, 28 924, No. 3, p. 3.

been a better solution if certain foreign “registered partnerships” would have been *a priori* listed as fulfilling such criteria, leaving the general criteria to be applied on an *ad hoc* basis for new forms of “registered partnership”.⁷¹

The report by Curry-Sumner points to a remarkable difficulty which is caused by the fact that a foreign same-sex marriage is recognised as a marriage and a same-sex registered partnership is recognised as a registered partnership. If two women have registered their partnership in Sweden and then move to the Netherlands, their partnership will be recognised there. If one of the women gives birth to a child in the Netherlands, Swedish law would conclude that both partners are the parents of the child. But according to Art. 1(1) *Wet Conflictenrecht Afstamming* (Parentage (Conflict of Laws) Act), the parentage of the birth mother and her “husband” will be determined according to the law of the parties’ common nationality, or in the absence thereof, according to the law of their common habitual residence, or in the absence thereof, according to the law of the child’s habitual residence. Two difficulties arise in this situation. The female registered partner cannot be classified as a ‘husband’. Secondly, the whole article takes as its starting point that the parties are in fact married. No attention is paid to the possibility that they have concluded a registered partnership. Curry-Sumner further emphasises that no other rule within the Act in question would allow the other registered partner to have her legal parentage recognised. He concludes: “Obviously there appears to have been little thought paid to the ensuing consequences of characterisation of a particular relationship as a marriage or a registered partnership.”

5.2. Countries which Have Introduced Registered Partnerships with Civil Status Consequences

In Finland, a registered partnership between two persons of the same-sex that has been registered in a foreign state is recognised if it is valid in the state where it was registered, except if it would violate the international *ordre public* (section 13 Partnership Act, in conjunction with section 139 Marriage Act). The recognition regulation has adapted – in principle – the legal consequences thereof to those which follow from a registered partnership formalised in Finland and such partnerships are considered to be completely equivalent to local registered partnerships. Such recognition of foreign relationships cannot grant them stronger legal effects – those established in a foreign country – than the legal effects granted to Finnish partnerships. The report (by Mikkola) stresses that foreign same-sex marriages can only be recognised as registered partnerships in Finland.

⁷¹ He refers expressly to the solution adopted in the United Kingdom. *See further* Curry-Sumner, *supra* note 58, pp. 341-343.

If, however, the legal consequences of partnerships formalised abroad are weaker than in Finland, then recognition cannot make the institution any stronger than it is in the place of registration and it cannot be granted the same legal effects as a Finnish institution has. The partners cannot benefit from different laws by simply crossing the border.

In Germany, the recognition of foreign registered partnerships is governed by the multilateral conflict of laws rule of Art. 17b Introductory Law to the Civil Code. This provision refers to the applicability of the *lex registrationis* (the law of the place of registration). As a consequence, a foreign registered partnership will be recognised in Germany if it is valid according to the *lex loci registrationis*. Recognition does not depend on the *lex personalis* of the parties nor on their habitual residence. The German recognition rule naturally causes characterisation problems: which foreign legal relationships have to be characterised as ‘registered life partnerships’ in the sense of Art. 17b Introductory Law? Martiny mentions that this concept has to be interpreted on a comparative law basis. What is meant are relationships between two persons, formally established and with legal effects, but to be distinguished from a marriage. He stresses that a certain degree of different effects is immanent in Art. 17b Introductory Law. However, registration in a public register is an essential requirement. This register does not need to be a general register of civil status. Registration in another register is also sufficient insofar as this is of importance to the acquisition of such a status.

The German report discusses two specific characterisation problems in further detail: same-sex marriages and heterosexual registered partnerships. Same-sex marriages as such are in conflict with German public policy. However, Martiny argues, it is not a same-sex legal relationship as such, but only the marriage dimension (‘the exceeding effect’) that violates this *ordre public*. He stresses that it would be inconsistent if a foreign life partnership in Germany were recognised, whereas an exceeding relationship would find no recognition at all and he uses this inconsistency as an argument for the recognition of a same-sex marriage at least as a life partnership in the sense of art. 17b Introductory Law. In respect of heterosexual partnerships, some German authors argue that Art. 17b Introductory Law presupposes, according to the definition of §1(1) Life Partnership Act, that the partners belong to the same sex and that this article is therefore not applicable,⁷² whereas others underline that Art. 17b Introductory Law does not mention sex and they therefore conclude that this provision also

⁷² Martiny refers to: Frank, MittBayNot 2001 SH 36; Jakob 215, 287.

covers registered heterosexual life partnerships.⁷³ Martiny concludes that in the future an analogy with Art. 13 ff. Introductory Law, which to a large extent leads to an equation with marriage, is preferable.⁷⁴

In Scotland, Part. 5 of the Civil Partnership Act regulates the recognition of ‘overseas relationships’, which are defined as specified relationships,⁷⁵ or as relationships which meet the ‘general conditions’, and which are registered in a country outside the UK by two people who under the ‘relevant law’ are of the same sex at the time when they do so, and neither of whom is already a civil partner or lawfully married. The general conditions are defined in section 214 and require that the relationship is of indeterminate duration; and that the effect of entering into the relationship is that the parties are either treated as married, or are treated as a couple either generally or for specified purposes. An overseas relationship is treated as a civil partnership if the parties have fulfilled all the requirements of the *lex loci registrationis*, including its rules of private international law. However, a Scottish domiciliary must also fulfil the requirements of Scots law regarding the capacity to conclude a civil partnership. Section 216(1) expressly provides that an overseas opposite-sex relationship is not recognised. This is particularly striking, because the Scottish reporter (Carruthers) argues that where a same-sex marriage is valid according to the *lex loci celebrationis*, and where, according to his/her personal law (i.e. according to Scots law, the *lex domicilii*), each contracting party has legal capacity to enter into such a union, recognition is likely to be afforded in Scotland to such a status, or at least to certain incidents thereof. The result of that recognition would be that it would be treated as a civil partnership.

In Sweden the recognition of registered partnerships entered into abroad is regulated by Chapter 1, section 9(3) Registered Partnership Act, which refers to the rules which govern the recognition of marriages that have been concluded in foreign countries.⁷⁶ The main principle is that a foreign partnership is recognised according to its form if it is valid in the country where it was registered. It also suffices that the foreign registration, even if it is not recognised in the country where it took place, is valid in the country or countries of both partners’ nationality or habitual residence.

In respect of the partnership’s legal effects, the Registered Partnership Act refers in Chapter 3, section 1 to the rules on the effects of a marriage, including the rules of Swedish

⁷³ The German report refers to: von Hoffmann/Thorn § 8 No. 73b; Rauscher 188, 190; Bamberger/Roth(-Otte) Art. 17b EGBGB No. 28; Böhmer/Siehr(-Finger) Art. 17b EGBGB No. 5, 9, 14; Anwaltkommentar(-Gebauer) Art. 17b EGBGB No. 8 ff.

⁷⁴ Martiny refers to: Jakob 216, 287; Palandt(-Heldrich) Art. 17b EGBGB No. 11. Compare the important remarks by Hay on the necessity of accommodation.

⁷⁵ Defined in section 213, and by reference to Schedule 20, as augmented by the Civil Partnership Act 2004 (Overseas Relationships) Order 2005 (SI 2005/3135).

⁷⁶ Chapter 1, sections 4-9 of the Act (1904:26 p. 1) concerning Certain International Legal Relationships relating to Marriage and Guardianship.

private international law in this field. The effects of a foreign – or even Swedish – registered partnership are thus not generally governed by Swedish law or the law of the country of registration, but depend on the law determined by the appropriate Swedish conflict rule on the legal effects of marriage. Bogdan indicates that, for example, the inheritance rights of a surviving partner are in principle governed by the *lex patriae* of the deceased, the maintenance obligations towards a registered partner are normally governed by his *lex domicilii*, the property regime depends in the first place on the choice of law by the partners themselves and in the second place on their *lex domicilii communis*.

At this point the activities of the International Commission of Civil Status (Commission Internationale de l'état civile, hereinafter abbreviated as CIEC) have to be mentioned. This international organisation, which cooperates closely with the Council of Europe, is working on an international convention on the recognition of registered partnerships.⁷⁷ The draft convention focuses on civil status issues related to registered partnerships. In so far as the *lex registrationis* so provides, other states have to recognise that a registered partnership excludes the possibility for a partner to marry or to conclude a registered partnership with a third person. Furthermore, the family relationship between one partner and the relatives of the other partner have to be recognised. Also the consequences for the family name of the partners have to be recognised. These recognised legal consequences are not annulled if the partners again register their relationship in another country where these legal consequences are not linked to the registration. However, if the country of second registration has stronger legal consequences concerning these just mentioned aspects, then they will be recognised in the country of first registration.⁷⁸

5.3. Countries which Have Not Introduced Registered Partnerships/Civil Unions with Civil Status Consequences

The Argentine national report mentions that the rule in Art. 172 Civil code, which defines marriage as a “relationship between a man and a woman concluded before a competent authority” is part of the Argentine international *ordre public*. The consequence is that same-sex marriages or civil unions equivalent to a marriage will be invalid in Argentina.

The Greek report (by Vasilakakis) also states that, theoretically, the conflict rules would allow – under certain circumstances – for the recognition of same-sex legal relationships, but that would violate the Greek *ordre public*.

⁷⁷ Convention sur la reconnaissance des partenariats enregistrés.

⁷⁸ Of the jurisdictions compared in this report, the following participate in the work of the CIEC: Belgium, France, Germany, Greece, Italy, the Netherlands and the UK.

Extremely interesting and important are the remarks in the report of Hay (USA) concerning, on the one hand, the full faith and credit principle and, on the other, the so-called DOMA legislation in several states of the US. The US Constitution Art. IV, Sec. 1 provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, records and Proceedings shall be proved and the Effect thereof.

The consequence of this full faith and credit principle would be that same-sex marriages and similar institutions like same-sex civil unions concluded in certain states of the US would have to be recognised in the other states. Traditionally, the only exceptions to the obligation to recognise marriages concluded in other states were based on the public policy grounds of polygamy or incest. Furthermore, the Uniform Marriage Evasion Act, currently in force in some form in eight states (Illinois, Massachusetts, Mississippi, New Hampshire, North Dakota, Virginia, West Virginia, and Wisconsin), and the District of Columbia denies recognition to out-of-state marriages concluded by local residents in order to evade the impediments or prohibitions of the local law.

In order to avoid the obligation to recognise same-sex marriages, Congress adopted the “Defense of Marriage Act” (DOMA).⁷⁹ This Act exclusively defines marriage for the *purposes of federal law* as the union between a man and a woman:

In determining the meaning of any Act of Congress or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁸⁰

Furthermore, the DOMA permits the states to deny recognition to other forms of unions, but it does not *command* non-recognition:⁸¹

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Hay mentions in his report that up until July 2005 forty states had either anticipated or accepted the invitation of the DOMA and have defined “marriage” – by state constitutional amendment or by statute – as the union between a man and a woman. As a consequence of this DOMA legislation, many states refuse to adopt legislation allowing alternative legal

⁷⁹ 28 U.S.C.A. §1738C. The US Supreme Court has not yet decided on the federal constitutionality of the Defense of Marriage Act (DOMA), but some lower federal courts have upheld it.

⁸⁰ 1 U.S.C.A. §7. DOMA.

⁸¹ 28 U.S.C.A. §1738C.

same-sex relationships such as “civil unions”⁸² and refuse to recognise same-sex legal relationships validly concluded elsewhere under the law which is applicable there, as well as the situations that arise from that status under the other state’s or country’s law.⁸³

The recognition of the law and judgments of a foreign country is in the US also in principle a matter of state law. Hay mentions that the United States Supreme Court originally viewed this recognition as a matter of comity and to some extent required reciprocity.⁸⁴ But this reciprocity requirement has been abandoned by most states,⁸⁵ which now recognise foreign country judgments on the same or equivalent basis as they do sister-state judgments. Occasionally, in order to protect the forum’s public policy, the courts may engage in a *révision au fond*.

5.4. Conclusion

Those states which have introduced the institution of same-sex marriages or registered partnerships should try to find a common approach to the recognition of similar institutions established abroad, including stronger *and* weaker legal relationships established under foreign law. The activities of the CIEC in this field have to be welcomed and strongly supported. It is regrettable that a number of countries with important experiences concerning registered partnership issues (in particular the Nordic countries) do not participate in the work on this draft convention by the CIEC. For the member States of the EU it would be advisable for them to take inspiration from the experiences with the full faith and credit principle within the US, which fits very well with the necessary implementation of the guarantee of freedom of movement of persons within the territory of the EU for the field of private international law. In view of this guarantee it can no longer be accepted that a certain status acquired in one Member State of the European Union is not recognised in another Member State. In this context the activities of the European group on private international law have to be mentioned, which is working on rules based on the principle of mutual recognition.⁸⁶

⁸² Exceptions are: California, Hawaii, Maine, Maryland, and New Jersey which provide varying degrees of protection for “domestic partners”.

⁸³ Hay mentions that California has adopted the federal definition but, at the same time, expressly provides for the recognition of out-of-state same-sex legal relationships that are equivalent to California domestic partnerships.

⁸⁴ *Hilton v. Guyot*, 159 U.S. 113 (1895). See also Hay, *On Merger and Preclusion (Res Judicata) in U.S. Foreign Judgments Recognition Practice*, in Schütze *et al.*, *Festschrift für Geimer* 325 (2002).

⁸⁵ See American Law Institute, [Proposed] Foreign Judgments Recognition and Enforcement Act § 7 and Reporters’ Notes 2-3 (Final Draft 2005). The American Law Institute is a private association (by election or nature of office) of judges, law professors, and practising attorneys. One of its principal activities is the drafting and promulgation of the (often highly influential) *Restatements of the Law*. See Hay, *supra* note 6, at no. 32.

⁸⁶ See for further information and references the Italian report.

6. The Legal Consequences of Recognition

If a particular jurisdiction provides, under certain circumstances, for the recognition of same-sex legal relationships established under the application of foreign law, then the question has to be answered what the legal consequences of such a recognition are.

Does the recognition imply that only the legal consequences established under foreign law are recognised or does the recognition influence the legal consequences established under foreign law? Does, for example, the recognition adapt the legal consequences to those which follow from a similar institution under the domestic law of the recognising jurisdiction? Could – under certain circumstances – the recognition have the result that certain legal consequences are added?

6.1. Countries which Have Introduced Same-sex Marriages

The Belgian national report mentions that the fact that a foreign (same-sex) marriage is recognised in Belgium does not imply that the foreign law involved determines all the legal consequences of this marriage. The law applicable to some consequences of the marriage may be determined by another conflict rule. That is the case for matrimonial property law and also for the personal consequences of a marriage.

In respect of the recognition of “relations de vie commune” like registered partnerships, the situation is completely different. According to Art. 60 Civil Code the law of the country of registration governs all the consequences of registration. Art. 60(2) mentions expressly that the law of the country of first registration governs the property relationship between the partners, although in relation to third parties a different law applies under certain circumstances.

According to the Canadian report, the general effects of a marriage recognised in Quebec are governed by the *lex domicilii communis*, in the absence thereof the law of the (last) common residence, and in the absence thereof the *lex loci celebrationis* (Art. 3089 Civil code of Quebec). But other legal consequences may be governed by a different law, e.g. maintenance issues by the law of the creditor (Art. 3094), filiation issues by the law of domicile or the nationality of the child or of one of the parents (Art. 3091) or succession issues by the *lex domicilii* of the deceased person.

6.2. Countries which have introduced registered partnerships

In Finland, in matters concerning other personal legal consequences of a partnership, the law of the state where both spouses are domiciled is applied. If the spouses are not domiciled in the same state, the law of the state where the partners were last domiciled during the

partnership will apply if either of them is still domiciled there. If the applicable law is not determined according to the above-mentioned rules, one must observe all relevant connections that the partners have to other states. The applicable law is the law of the state to which the partners have the closest link. The law applicable to maintenance claims is the law of domicile or the habitual residence of the former partner entitled to maintenance (section 128(2) of the Marriage Act). Irrespective of the law which is otherwise applicable, the amount of the maintenance is decided both according to the possibility of the other partner to pay and according to the needs of the receiver, irrespective of the law which is otherwise applicable. The determination of fault in ending the relationship is not relevant. The matter is in other words part of the Finnish '*lois d'application immédiate*'.

Property matters will be solved by applying those rules which are applicable to matrimonial property relations. The starting point is therefore the partners' freedom to choose the applicable law. Otherwise the law will be determined by the common domicile of the partners. When the domicile changes, the applicable law can change as well, but only after 5 years of residency. The law of a new state can only be immediately applied if the partners had been domiciled there at an earlier time during their marriage or if both of them are citizens of that state (section 129 of the Marriage Act). If the partners have not had a common domicile after the registration of their partnership, the applicable law will be determined by the proper law rule: the applicable law is the law of the state to which the spouses have the closest link.

In Germany, the approach to the legal effects of the life partnership refers partly to the law which is applicable to the respective issue, according to the general rules of international family law: this is the case for maintenance and succession (Art. 17b para. 1 sentence 2 Introductory Law). However, the minimum effects according to the law of the place of registration shall apply concerning these issues (Art. 17b para. 1 sentence 2 Introductory Law). Property relations between the partners are governed by the *lex loci registrationis*. But the recognition of the effects of a registered partnership is limited, due to the already mentioned fact that the German legislator wanted to retain a certain 'distance' concerning the exceeding legal effects of a marriage. Therefore, the effects of a recognised registered partnership are not accepted if and so far as they are stronger than the legal consequences under German law (Art. 17b para. 4 Introductory Law). Martiny concludes that in this way the applicable law can be modified 'in a sometimes incomprehensible and nearly unlimited way'. He speaks about forcing the foreign institution into the bed of Procrustes of German law.⁸⁷

The American report (by Hay) expressly draws attention to the fact that the recognition of a foreign institution will sometimes make it necessary to try and accommodate ("*Angleichung*" or "*Anpassung*;" "*coordination des systèmes*;" "*aanpassing*") if the *lex fori* does not have a

⁸⁷ Martiny refers also to the critical publications of Gebauer/Staudinger, IPRax 2002, 275 ff.; Jakob 212 f.; Rauscher 189; MünchKomm(-Coester) Art. 17b EGBGB No. 18, 22-23, 88.

provision equivalent to that of the otherwise applicable foreign (other state's) law: a court will fit the concepts of the other state law into its own legal system in order to achieve a comparable result. Hay illustrates this with the "recognition" of a Vermont civil union as being eligible for certain tax exemptions under New Jersey law.⁸⁸ Another example would be the "recognition" of a same-sex marriage concluded in the Netherlands as a registered partnership in Finland or Germany.⁸⁹

In the Swedish national report (by Bogdan) an important complication is touched upon which appears when, according the conflict rules of a country which provides for a same-sex-marriage or a registered partnership, a certain issue (e.g. succession) is governed by the law of a country that has not introduced same-sex marriages or registered partnerships. If, for example, one registered partner has died and foreign law has to be applied in order to determine the heirs to that partner's estate, the rules of the applicable legal system will of course be applied if and so far as it contains substantive rules on the succession rights of the surviving registered partner. However, if the applicable law does not provide for any *ab intestato* succession rights for the surviving registered partner, Bogdan submits that the Swedish courts should apply the foreign legal system's substantive rules on the effects of marriage on succession to the estate of the deceased registered partner. Bogdan mentions that this "disloyal" application of foreign law to issues that this law is not intended to regulate has been criticized, but he stresses that this is the only reasonable alternative to a subsidiary application of Swedish law instead of the law which is applicable according to the relevant conflict rules.⁹⁰

6.3. Conclusion

With regard to the property consequences of a same-sex marriage or a registered partnership the general conflict rules on (matrimonial) property law should determine the applicable law. The same holds true for filiation issues and the law of succession. No special conflict rules should be developed for these issues. However, a common approach needs to be found as to how to deal with cases where a conflict rule, e.g. regarding succession issues, refers to a foreign law which does not provide for registered partnerships or civil unions and therefore does not indicate the succession rights of the surviving registered partner.

⁸⁸ *Hennefeld et al. v. Township of Montclair*, 22 N.J. Tax 166, 2005 N.J. Tax LEXIS 6 (Tax Ct. N.J. 2005).

⁸⁹ See the Finnish, respectively the German national report.

⁹⁰ Compare also the French and the Spanish national reports.

7. Indirect Recognition

If a particular jurisdiction does not provide for the recognition of same-sex legal relationships established under the application of foreign law, the question has to be answered whether a same-sex legal relationship is (under certain circumstances or alternatively for some purposes) nevertheless indirectly recognised in the context of answering certain preliminary questions.

The American reporter Hay underlines the fact that in respect of recognition certain decisions have distinguished between status and the incidents flowing therefrom in upholding an out-of-state marriage for the purpose of spousal rights (e.g., after the death of the partner) when the status (of the marriage) may have violated the *lex celebrationis* or the *lex fori*.⁹¹ Hay points out that, under the traditional rules, a Massachusetts same-sex marriage or a Vermont or Connecticut civil union would have been recognised in the other states of the US, at least as to their incidents, but the developments surrounding DOMA have substantially changed this. He concludes that to the extent that a claim in the second state requires an acceptance of its legal basis under the law of a state permitting same-sex legal relationships (e.g., if dissolution, the division of property, or alimony is the main issue), it will not be entertained if the second state follows, in whatever form, a DOMA-type policy.⁹²

Hay argues that this may be different when a claim arising out of a same-sex legal relationship has been reduced to a monetary judgment in the first state, requiring only its recognition and execution in the second state. The traditional answer has been that the second state may not examine the facts underlying the monetary judgment in order to determine its content. The constitutionality of denying recognition to such a judgment in another state would be very much in doubt.

In respect of certain incidents some jurisdictions tend to give a certain degree of recognition to the existence of a same-sex marriage or a registered partnership established under foreign law. That is for example the case in the Argentine report when answering the question of whether someone bound by a legally formalised relationship established under foreign law would be allowed to conclude a marriage with another person in Argentina. The national reporter (Medina) concludes that fairness requires that the previous same-sex marriage or homosexual partnership should be indirectly recognised as an impediment to a subsequent marriage or a civil union in Argentina. But when answering the same question,

⁹¹ He refers to important case law: e.g., *In re Dalip-Singh Bir's Estate*, 83 Cal.App.2d 256, 188 P.2d 499 (1948) (two "wives" of Indian decedent permitted to share in the intestate's estate); *In re May's Estate*, 305 N.Y. 486, 114 N.E.2d 4 (1953) (an out-of-state marriage between local residents in violation of the forum's rules on consanguinity was recognised for the purpose of appointing the surviving spouse as the administrator of the estate); *In re Estate of Shippy*, 37 Wn.App. 164, 678 P.2d 848 (1984) (the claimant was recognised as the surviving spouse of the deceased putative husband under the law of domicile when the marriage was invalid under the *lex celebrationis*).

⁹² See also Symposium, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 B.Y.U. J. Pub.L. 569 (2004).

the Greek national report stresses that the Greek *ordre public* would also in such cases make the recognition of such a foreign relationship impossible. The Serbian report hesitates on this issue, but finally stresses that the *lex causae* (in effect a *lex nationalis*) qualification would open the door to the widespread ‘recognition’ of foreign marriages.

Interesting are also the different reactions to the question of whether the surviving spouse of a same-sex marriage or the surviving registered partner would be entitled to inherit (a part of) the estate of the deceased partner located in the jurisdiction in question, although the same-sex marriage or registered partnership is as such not recognised. The Argentine reporter concludes that indirect recognition would be possible, in particular regarding personal property. The law which is applicable to succession to such property is the law of the last domicile of the *de cuius*. If, according to that law, the same-sex marriage or registered partnership is valid, then Argentina will accept the legal consequences of that fact in the field of the law of succession.

In this context, the Argentine report also mentions the question of the succession rights of a child adopted by a same-sex couple and the reporter argues that one should pay attention to the fact that Argentina has ratified the Convention of the Rights of the Child. Consequently, the international public policy in adoption matters is guided by the child’s best interest. In this perspective, the report concludes that in such a succession case Argentina must recognise the adoption by a same-sex married couple because it is within the child’s best interest to have his/her family relationship legally recognised. Consequently, the child can inherit (part of) the estate of the adopting same-sex couple.

The Serbian report comes to a similar conclusion. According to Article 30 of the Serbian Act on Private international law the *lex nationalis* of the deceased determines the heirs to the succession. In the opinion of the reporters, preliminary questions should be decided according to the *lex causae* for the main issue. Consequently, if the *lex nationalis* is foreign law, this law should also be used in order to determine whether or not there was indeed a marriage. The report points to a parallel with the treatment of polygamous marriages – not allowing their celebration, but recognising certain financial effects thereof.

The Italian reporter (Boschiero) tends to recognise the succession rights of a surviving same-sex spouse (or registered partner) in respect of property located in Italy as a consequence of a same-sex marriage (or registered partnership) concluded between a Dutch national and a foreigner in the Netherlands. She stresses that, in particular if the couple used to live in the country where they married (or concluded a registered partnership), it is not necessary to conclude that the Italian *ordre public* would be violated.

However, the Greek report again underlines that even if the preliminary question regarding validity is connected dependently, the *ordre public* still makes recognition unlikely.

Remarkable are the reactions of some reports in respect of the adoption of children by a married same-sex couple or by same-sex registered partners.

The American national reporter (Hay) indicates that in several states of the US the adoption of a child has nothing to do with the marital status of the adopting party. Close to half of the states permit a same-sex partner to adopt the biological child of the other.⁹³ But, on the other hand, a state like Florida prohibits adoption by a “homosexual” person. This denial of adoption has been upheld after a constitutional challenge.

The Argentine reporter (Medina) concludes that it is in the child’s best interest to be adopted by a heterosexual couple. However, if there are no heterosexual couples interested in the adoption of a certain child, there is no obstacle to a single homosexual becoming an adopter. Medina mentions that adopting the homosexual partner’s child is not allowed.

Surprisingly, the Greek report states that a same-sex couple cannot adopt a child, but that adoption by one partner is possible, even without the formal consent of the other partner, because the partnership is legally not recognised.

8. Conclusion

The introduction of marriage-like institutions such as registered partnerships and civil unions since 1979 (Denmark) and the opening up of a civil marriage to same-sex couples since 2001 (the Netherlands) are very important developments in family law. They manifest a new attitude by a considerable number of jurisdictions in respect of same-sex relations. They also constitute a challenge for private international law all over the world when dealing with these new institutions and the modernised notion of “marriage”.

The national reports provide us with an impressive list of private international law issues related to same-sex marriages, registered partnerships, civil unions and other types of registration for same-sex relationships. Questions are discussed relating to the establishment of same-sex marriage, a registered partnership or other types of registration, but also questions relating to the dissolution of these relationships, the problems related to the conditions for recognising these relationships established abroad and – last but certainly not least – the potential consequences of recognition. In particular, questions related to the potential legal effects are extremely difficult to answer, because of the fact that the range of effects can be very broad.

It is desirable to develop a uniform approach to these private international law questions, at least in respect of those states which are willing to provide (some level of) recognition to foreign same-sex marriages, registered partnerships and other forms of formalising same-sex

⁹³ Hay refers to *inter alia* *In re Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397 (1995).

relationships. Reading the national reports on those jurisdictions which have introduced same-sex marriages, registered partnerships or other types of formalising same-sex relationships, one can notice – at this point in time – an overwhelming variety of solutions.

It is remarkable that, on the other hand, we can observe that some jurisdictions still maintain the view that same-sex marriages, registered partnerships and other means of formalising same-sex marriages conflict in all circumstances with the international ordre public of their country, even in cases where their jurisdiction is only confronted with these institutions as an incidental issue, i.e. as a preliminary question. It is questionable whether such a total denial of the legal developments in the field of family law in a growing number of other countries is realistic and fair to the legitimate interests of the parties and of third persons involved. I would like to submit that such a complete denial would conflict with the basic idea behind the conflict rules of private international law, which was so accurately described in the subtitle of the treatise by the Argentine-German lawyer Werner Goldschmidt (1910-1987) on *Private International Law*⁹⁴ as “Derecho de tolerancia”: the law of tolerance. In other words and with reference to an old tradition: a total denial would be problematic in view of the necessary comity (comitas) between the different jurisdictions.

Cite as: Gerard-René de Groot, *Private International Law Aspects Relating to Homosexual Couples*, vol. 11.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), <<http://www.ejcl.org/113/article113-12.pdf>>.

⁹⁴ W. Goldschmidt (ed. Depalma), *Derecho internacional privado: derecho de tolerancia*.