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UPDATE ON THE DEVELOPMENTS IN INTERNAL LAW AND PRIVATE INTERNATIONAL LAW CONCERNING COHABITATION OUTSIDE MARRIAGE, INCLUDING REGISTERED PARTNERSHIPS

drawn up by the Permanent Bureau

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MISE À JOUR DES DEVELOPPEMENTS EN DROIT INTERNE ET DROIT INTERNATIONAL PRIVÉ SUR LA COHABITATION HORS MARIAGE, Y COMPRIS LES PARTENARIATS ENREGISTRÉS

établi par le Bureau Permanent

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I. Introduction

1. Individuals cohabitating outside marriage may face numerous challenges when they leave the State where the unmarried cohabitation or registered partnership was formed and become subject to a foreign legal system that does not necessarily recognise their status in relation to one another, or in relation to third parties, such as adopted children.

2. The Hague Conference on Private International Law, therefore, decided to include this subject on its Agenda and has been monitoring the private international law aspects of "unmarried couples" (or "cohabitation outside marriage including registered partnerships" as the matter was referred to later) since 1987.[1] While initial research focused on applicable law in this area, the scope was expanded in 1995 to include "jurisdiction, applicable law, and recognition and enforcement of judgments in respect to unmarried couples".[2]

3. In April 2013, the Council on General Affairs and Policy invited the Permanent Bureau to continue to follow developments in this area and, resources allowing, to update its "Note on developments in internal law and private international law concerning cohabitation outside marriage, including registered partnerships" of 2008 (hereinafter "Preliminary Document No 11 / 2008").[3] An update is, indeed, desirable in light of the increasing number of individuals in an unmarried cohabitation or registered partnership and the developments in law and jurisprudence at national and international levels, including developments relating to conflict of law rules in this area.

4. At the national level, for instance, the "Registered Partnership Act" entered into force in Austria on 1 January 2010. In Bolivia, the *Unión conyugal libre o de hecho* for opposite-sex couples will be admitted by simple registration as of the entry into force of the *Código de Familias y del Proceso Familiar* in August 2015.[4] Croatia adopted the "Life Partnership Act" which came into force in August 2014. Ecuador's Constitution of 2008 provides the same rights and obligations to married and unmarried cohabitating couples[5] and in 2014, Resolution No 174 on civil partnership registration was adopted.[6] In Estonia, the "Cohabitation Act" will enter into force in 2016. It provides for a procedure for entering into a "cohabitation agreement", for the rights and responsibilities of registered civil partners and the grounds for terminating the "cohabitation agreement".[7] In Ireland, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 came into effect on 1 January 2011 allowing the registration of "civil partnerships" and giving same-sex couples similar rights and responsibilities to those in civil marriages. The 2010 legislation also provides rights for long-term unmarried cohabitees (opposite or same-sex) who have not entered into a civil partnership or marriage.[8] In 2008, Uruguay adopted the *Unión concubinaria* for opposite and same-sex couples.[9]

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[1] See (1) "Note on the law applicable to unmarried couples", Prel. Doc. No 8 of December 1987, *Proceedings of the Sixteenth Session* (1988), Tome I, *Miscellaneous matters*, The Hague, SDU, 1991, pp. 159 *et seq.*; (2) "Note on the law applicable to unmarried couples", Prel. Doc. No 5 of April 1992 for the attention of the Special Commission of June 1992 on General Affairs and Policy of the Conference, *Proceedings of the Seventeenth Session* (1993), Tome I, *Miscellaneous matters*, The Hague, SDU, 1995, pp. 109 *et seq.*; (3) "Private international law aspects of cohabitation outside marriage and registered partnership", Prel. Doc. No 9 of May 2000 for the attention of the Special Commission of May 2000 on General Affairs and Policy of the Conference; and (4) "Note on developments in internal law and private international law concerning cohabitation outside marriage, including registered partnerships", Prel. Doc. No 11 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference (hereinafter, "Prel. Doc. No 11 / 2008"). (Nos (3) and (4) are available at < www.hcch.net > under "Work in Progress" then "General Affairs".) The various discussions that took place at Council and Special Commission meetings are reflected in these Notes.

[2] "Conclusions of the Special Commission of June 1995 on General Affairs and Policy of the Conference", Prel. Doc. No 9 of December 1995, *Proceedings of the Eighteenth Session* (1996), Tome I, *Miscellaneous matters*, The Hague, SDU, 1999, at pp. 108 *et seq.* and *Final Act of the Eighteenth Session of the Hague Conference on Private International Law*, 19 October 1996, under Part B 4 c.

[3] Conclusions and Recommendations adopted by the Council of 2013 (9-11 April 2013), para. 11(c), available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[4] See Arts 137 and 164 of the Bolivian *Código de Familias y del Proceso Familiar* of 23 October 2014. The recognition of a *Unión conyugal libre o de hecho* required the completion of certain conditions in a procedure before the family court; the new law provides for a registration of the union in an administrative procedure.

[5] Art. 68 of the 2008 Constitution of Ecuador.

[6] *Resolución de la Dirección General de Registro Civil, Identificación y Cedulación No 174* entered into force on 15 September 2014.

[7] While the Estonian Family Law Act of 2009 defines marriage as a union of one man and one woman, the Cohabitation Act is gender neutral, thus extending legal recognition to all registered partners regardless of their sex, see Sitting Review "Riigikogu approved Cohabitation Act" of 9 October 2014, at < www.riigikogu.ee >.

[8] See for more information, *e.g.*, < www.citizensinformation.ie >, under "Family and Relationships".

[9] *Ley No* 18.246, *Unión Concubinaria,* of 2008. For more information on Latin American States, see N. Rubaja,

5. At the regional level, the European Commission (hereinafter, the "EC") has proposed a regulation on the property regimes of registered partnerships[10] following, among others, an impact assessment which found that problems stemming from uncertainty surrounding property aspects cost international couples in registered partnerships in the European Union (hereinafter, the "EU") an estimated €17 million per year.[11]

6. This document discusses developments related to the private international law aspects of cohabitation outside marriage that have emerged since 2008, with a particular focus on registered partnerships. It does not aim to provide a comprehensive update of national laws, though domestic law trends which impact registered partnerships will be discussed.

II. Definition of "cohabitation outside marriage" and other terminology

7. The term "cohabitation outside marriage" as used in this document encompasses "unmarried cohabitation" and "registered partnerships".

8. **"Unmarried cohabitation"** as used in this document should be understood as referring to *concubinage* or *de facto* union without this union being registered with an authority, formed by the parties' actual cohabitation. Since in most legal systems this term is not defined, this is simply a working definition.[12] Individuals living in unmarried cohabitation are referred to in this document as "unmarried cohabitees".

9. The term **"registered partnerships"** refers to a form of cohabitation outside marriage which, in order to be valid requires the fulfilment of certain formalities, specifically registration in a central registry. Since terminology in domestic legislation differs, the term as used in this document has a wide meaning covering all forms of cohabitation outside marriage that, to be valid, need to be registered. Therefore, the term "registered partnerships" also comprises "domestic partnerships", "civil partnerships", "civil unions", "permanent couple unions", "statutory cohabitation", registered "*de facto* relationships" and "civil pacts of solidarity", for instance. Individuals in a registered partnership are referred to in this document as "registered partners".

10. An explanation of how unmarried cohabitation and registered partnerships are named and defined in various jurisdictions is provided in Preliminary Document No 11 / 2008[13] and shall not be repeated here.

III. Global increase in cohabitation outside marriage

11. Globally, cohabitation outside marriage is on the rise as an alternative to marriage or as a stage preceding marriage. This rise is coupled with an increasing birth rate outside wedlock. Consequently, the challenges faced by unmarried cohabitees or registered partners in an international context affect an ever-growing number of people, including an increasing number of children that may require protection in a private international law context.

12. Without aiming to provide comprehensive statistics, some facts are worth mentioning to reflect the growing magnitude of the issue.[14]

13. In the United Kingdom, for example, cohabitation outside marriage is the fastest growing family type with the number having doubled since 1996, increasing from 6.5% to 11.7% of the

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"Derecho internacional privado de familia. Perspectiva desde el ordenamiento jurídico argentino", Ed. Abeledo Perrot, 2012, Argentina, pp. 190 *et seq.*

[10] "Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships" (COM(2011)127 of 16 March 2011), at < http://eur-lex.europa.eu >. Since marriage and registered partnerships have different characteristics and produce different legal consequences, the EC has presented two separate proposals: the aforementioned one on property consequences of registered partnerships and another on matrimonial property regimes.

[11] See the "Impact Assessment Study on Community Instruments concerning matrimonial property regimes and property of unmarried couples with transnational elements (Final Report of 2010)", hereinafter "Impact Assessment Study", at < http://ec.europa.eu/justice/civil/files/ia_on_mpr_main_report_en.pdf >, pp. 157-158.

[12] For an explanation of the terminology, see Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 10 *et seq*.

[13] Prel. Doc. No 11 / 2008 (*ibid.*), paras 18 *et seq.* and paras 72 *et seq*.

[14] Some statistics are also included in the Prel. Doc. No 11 / 2008 (*ibid.*), see, *e.g.*, para. 6 for selected African and Latin American States.

population, or 5.9 million people in 2012.[15] It is predicted that by 2031, one in four couples will be cohabiting outside marriage.[16]

14. In Australia, the rate of couples living together without marrying has increased steadily: while in 1971, the vast majority of couples in a "living-together union" were married to each other (more than 99%), cohabitation outside marriage has increased since that time, reaching 16% in 2011.[17]

15. In New Zealand, the rate of marriages has slowed down over the past several years, partially attributable to the rise of "*de facto* unions".[18] In 1996, approximately one in four men and women aged between 15 and 44 years who were cohabitating were not legally married. By 2006, this figure had increased to around two in five.[19] A growing proportion of New Zealanders, therefore, live together without legally formalising their union.

16. Cohabitation outside marriage has also become a common part of family formation in the United States of America, serving both as a step towards marriage and as an alternative to marriage.[20] The 2010 Census revealed that 6.6% of all households were unmarried partner households, totalling 7.7 million couples, marking a 41% increase from the 2000 Census.[21]

17. In Canada, married couples remained the predominant family structure (67%) in 2011 but between 2006 and 2011, the number of "common-law" couples rose by 13.9%, more than four times the 3.1% increase for married couples.[22]

18. The number of registered partnerships specifically is also on the increase, for instance, in Europe where many States now allow couples to register their relationships.[23] The figures are higher for jurisdictions which, like France, have created a system of registered partnerships open to both opposite-sex and same-sex couples.[24] Thus in France, in 2000, one year after the entry into force of the statute creating the *pacte civil de solidarité* (hereinafter, "Pacs"), there were approximately 23,000 Pacs; in 2006, the number had increased to approximately 77,400 and in 2012 to approximately 160,200.[25]

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[15] Office for National Statistics, "Short Report: Cohabitation in the UK, 2012" of 1 November 2012, p. 1, at < http://www.ons.gov.uk/ons/rel/family-demography/families-and-households/2012/cohabitation-rpt.html >. For the purpose of the statistics, cohabitation refers to living with a partner, but not being married to or in a civil partnership with them. The report states (at p. 4) that the number of same-sex cohabitating couples has increased by 345% since 1996 and the number of opposite-sex cohabitating couples by 98%; as of 2012, there were 2.9 million opposite-sex cohabiting couples and 69,000 same-sex cohabitating couples living in the United Kingdom.

[16] The Government Actuary's Department cited by Baroness Hale in *Stack v. Dowden* [2007] UKHL 17.

[17] R. Weston and L. Qu, "Working Out Relationships", Australian Institute of Family Studies 4, 2013, pp. 4-5 (2013), at < http://www.aifs.gov.au/institute/pubs/factssheets/2013/familytrends/aft3/aft3.pdf >. J. Price states that Australia has more people in *de facto* relationships or who have never been married than in marriages, see "No stats support adjectival stoning of Gillard*", The Sydney Morning Herald* of 2 July 2013, at < www.smh.com.au >.

[18] Statistics New Zealand, "Marriage rate drops to a historic low", of 17 June 2011, at < www.stats.govt.nz >.

[19] Since 2005, two people, whether of opposite or the same sex, can enter into a civil union. By the end of 2011, in total 2,152 civil unions had been registered to New Zealand residents along with 439 to overseas residents. See Statistics New Zealand, "Demographic Trends: 2012", published in January 2013, at < www.stats.govt.nz >, pp. 17-18. See also J. Cribb, "Focus on Families: New Zealand Families of Yesterday and Tomorrow", *Social Policy Journal of New Zealand*, Issue 35, June 2009.

[20] C.E. Copen, K. Daniels, W.D. Mosher, "First premarital cohabitation in the United States: 2006-2010 national survey of family growth", *National Health Statistics Report*, No 64 of 4 April 2013, at < http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf >, p. 7. See also S.K. Berenson, "Should Cohabitation Matter in Family Law?", *Journal of Law and Family Studies*, Vol. 13, pp. 289-328 of 2011, in particular p. 308.

[21] "Households and Families: 2010", US Census Bureau, April 2012, p. 3 and pp. 7-8, at < http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf >. The total includes same-sex partners whether or not they are married in a certain State.

[22] Statistics Canada, "Portrait of Families and Living Arrangements in Canada, 2011 Census of Population", at < http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.pdf >, p. 5.

[23] See < http://europa.eu/youreurope/citizens/family/couple/index_en.htm > for information on EU Member States. See also Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 73 *et seq*.

[24] *E.g.*, in the Netherlands where registered partnerships are possible for same-sex and opposite-sex couples, the number of marriages dropped sharply but civil partnerships rose slightly in 2013, see "Statistics Netherlands" at < http://www.cbs.nl/en-GB/menu/themas/bevolking/publicaties/artikelen/archief/2014/2014-006-pb.htm >, press release of 6 February 2014.

[25] *Institut national de la statistique et des études économiques (Insee)*, "Évolution du nombre de mariages et de pacs conclus jusqu'en 2013" at < http://www.insee.fr/fr/themes/tableau.asp?ref_id=NATTEF02327 >.

19. In Germany, the number of married couples decreased between 1996 and 2012 by approximately 8% whereas the number of "partnerships" has increased by approximately 50%.[26]

20. In legal systems which have instituted a form of registered partnership reserved for same-sex couples, the figures are not as large but still remarkable in due proportion.[27] In Switzerland, for example, over 2,000 same-sex partnerships were registered within the first year of this being allowed (2007). The figure decreased to 695 new partnerships in 2012 and 693 in 2013.[28]

21. Changes in social attitudes towards cohabitation outside marriage are also reported from Africa although data measuring the prevalence of cohabitation outside marriage is sparse. In South Africa, for example, the constant decline in the number of marriages is partly explained by the fact that more couples are cohabitating without marrying.[29] Statistics from 2006 concerning Nigeria show that many adults within the usual marriage age range seem to be either delaying marriage or putting it off indefinitely. An explanation of this phenomenon could be that many of them are simply cohabiting.[30]

22. While marriage remains the predominant family structure in many Asian countries, recent studies indicate that cohabitation outside marriage is on the rise, for instance, as an antecedent to marriage.[31]

23. Aside from an increase in cohabitation outside marriage, one can observe that the birth of children out of wedlock within these relationships is becoming more common in some regions, creating pressure on existing private international law, for example, when one or both parents relocate with their child to another country.

24. In Europe, for example, the birth rates outside wedlock varied in 2012 from approximately 7% (Greece) to almost 67% (Iceland).[32] They have been increasing steadily in almost every country signalling new patterns of family formation alongside the more traditional pattern.[33] For instance, in the United Kingdom, there were 1.8 million children living with unmarried parents in 2012, doubling from 0.9 million in 1996.[34]

25. In the United States of America, between 2002 and 2010, the percentage of non-marital births that occurred to a cohabiting couple outside marriage increased from 41 to 58%, while the percentage of births to unmarried women not cohabiting decreased.[35] The birth of children out of wedlock is therefore increasingly likely to occur within a cohabitation outside marriage.

26. In Australia, around 35% of all births between 2006 and 2011 were out of wedlock[36] and two-thirds of these births were to couples cohabitating outside marriage. Studies indicate that the proportion of births to single mothers has held steady while the overall percentage of ex-

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[26] This includes registered and not registered, same-sex and opposite-sex partnerships, see W. Hammes, "Haushalte und Lebensformen der Bevölkerung – Ergebnisse des Mikrozensus 2012", *Statistisches Bundesamt*, November 2013, at < https://www.destatis.de >, under "Publikationen", then "Wirtschaft und Statistik", p. 789.

[27] *E.g.*, In Finland, the number of registered partnerships until the end of 2013 shows a steady increase to 373 registered partnerships in 2013, see "Statistics Finland" then "Vital statistics" at < www.stat.fi/tup/suoluk/suoluk_vaesto_en.html >.

[28] Swiss Federal Authority for Statistics at < http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/07.html >.

[29] See Statistics South Africa, "Marriages and divorces 2001", released in December 2012, pp. 2 *et seq.*, at < http://www.statssa.gov.za/publications/P0307/P03072011.pdf >, and "South Africans marrying less", *Times Life* of 6 February 2013, at < http://www.timeslive.co.za/lifestyle/2013/02/06/south-africans-marrying-less >.

[30] See, *e.g.*, M. Attah, "Extending family law to non-marital cohabitation in Nigeria", *International Journal of Law, Policy and the Family* (2012), pp. 162-186, in particular p. 167.

[31] J.M. Raymo, M. Iwasawa, L. Bumpass write that "more recent studies demonstrating substantial increases in the prevalence of cohabitation in Japan […] provide seemingly powerful evidence for the general importance of non-marital cohabitation in low-fertility, late-marriage societies", in "Cohabitation and family formation in Japan", *Demography*, 2009; 46(4):785–803, available at < http://www.ncbi.nlm.nih.gov /pmc/articles/PMC2831360/ >. See also Cao Yin, "Rise in unmarried splits a headache", *China Daily* of 20 November 2012, at < http://www.chinadaily.com.cn/china/2012-11/20/content_15942937.htm >, and *The Economist*, "The flight from marriage" of 20 August 2011, at < http://www.economist.com/node/21526329 >.

[32] See Eurostat, "Live births outside marriage" at < http://ec.europa.eu/eurostat >.

[33] "EU Employment and Social Situation", European Commission, *Quarterly Review*, Special Supplement on Demographic Trends, March 2013, at < ec.europa.eu/social/BlobServlet?docId=9967&langId=en >, pp. 24-25.

[34] J. Papworth, "Why a Cohabitation Agreement is Essential for Non-Married Couples", *The Guardian* of 9 March 2013 at < www.guardian.co.uk >. See also in this regard the "Short Report" (*op. cit.* note 15) at pp. 4 *et seq.* stating that 39% of opposite sex cohabiting couples have dependent children.

[35] See S.C. Curtin, S.J. Ventura, G.M. Martinez, *National Center for Health Statistics Data Brief*, No 162 of August 2014, p. 4, at < www.cdc.gov >, and C.E. Copen, *et al.* (*op. cit.* note 20), p. 7.

[36] R. Weston and L. Qu *(op. cit.* note 17*)*, p. 12. This percentage includes births to cohabitating couples and to single mothers.

nuptial births has increased. It therefore appears that the rise in ex-nuptial births over recent years can be attributed almost entirely to the increase in the proportion of babies born to cohabiting parents. Thus, cohabitation outside marriage seems to have increasingly become a setting for raising children.[37]

27. It is understood that many unmarried cohabitees or registered partners may never experience any cross-border context which might raise questions of private international law. Attention should, however, be drawn to the global increase in the number of international couples or couples with an international dimension. The fact that more and more people move across national borders to live, study or work leads to a higher number of couples with partners of different nationalities, couples living in a State of which neither is a national, children being relocated to a State that is not their State of birth, or partners buying or owning assets in different States.

28. For example, the aforementioned "Impact Assessment Study" found that of the approximately 211,000 registered partnerships in the EU, approximately 36,000 (17%) are assumed to have international aspects and that one quarter of the 53,000 new registered partnerships per year (around 13,000) involve persons from different countries. It is expected that the number of international registered partnerships will increase in the future.[38]

IV. Continuing diversity in domestic legislation

29. The increase in cohabitation outside marriage and the fact that more States provide for registered partnership schemes show a trend towards wider prevalence and acceptance of family forms different from marriage and of new institutions affording legal protection to unmarried cohabitees and registered partners.

30. There is, however, currently little harmony between national approaches. For example, some States do not have a registered partnership scheme[39] while others have.[40] Among the latter, some reserve their registered partnership schemes exclusively for opposite-sex partners,[41] others exclusively for same-sex partners,[42] and yet others allow for both.[43]

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[37] *Ibid.*

[38] Furthermore, "[of] the 8,500 partnerships that ended in separation in eleven of the thirteen EU Member States that allowed the registration of partnerships at the federal level at the end of 2009, approximately 25% (around 2,100) concerned international couples". See the "Impact Assessment Study" (*op. cit.* note 11), at p. 156 and the "Commission staff working document impact assessment", accompanying document to the proposed EU Regulation on Registered Partnerships, SEC(2011)0327, available at < http://eur-lex.europa.eu >, at p. 20.

[39] *E.g.*, EU States whose laws do not provide for registered partnerships are Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Poland, Romania, Slovakia (see the website indicated at note 23) but the matter is currently subject to discussion in some of these States (*e.g.*, in Latvia).

[40] *E.g.*, Ecuador, adopted Resolution No 174 in 2014 (see *supra* para. 4); see also *supra* para. 18 for European States.

[41] *E.g.*, in Albania, cohabitating individuals of opposite sex can sign an agreement in the presence of a public notary whereby they determine the consequences resulting from cohabitation in relation to children and assets acquired during the cohabitation (see Arts 163 and 164 of the Family Code of Albania). In Greece, to better protect an increasing number of unmarried couples having children, Law No 3719/2008 (adopted on 15 November 2008) introduced "civil unions". It provides for an official form of partnership that allows two adults of opposite sex to register their relationship within a more flexible legal framework than that provided for by marriage. (It should be noted that the Grand Chamber of the European Court of Human Rights (ECrtHR) held in *Vallianatos and Others v. Greece* (Nos 29381/09 and 32684/09) on 7 November 2013 that the State had "not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008" and concluded that there had been a violation of Art. 14 ("Prohibition of discrimination") taken in conjunction with Art. 8 ("Right to respect for private and family life") of the European Convention on Human Rights (ECHR). To this date [last checked on 5 February 2015], despite its conviction by the ECrtHR, Greece has not modified the law so that it incorporates same-sex couples.).

[42] *E.g.*, the Austrian Registered Partnership Act (see *supra* para. 4) provides same-sex couples with a mechanism for recognising and giving legal effect to their relationships. The UK's Civil Partnership Act 2004 applies to same-sex couples only; opposite-sex couples have no access just as same-sex couples have no access to marriage (Art. 1 reads: "A civil partnership is a relationship between two people of the same sex ("civil partners") […]".); for more information, see K. McK Norrie, "Recognition of Foreign Relationships under the Civil Partnership Act 2004", *Journal of Private International Law (J. Priv. Int. L.*), 2006.

[43] *E.g.*, civil unions in Quebec, Canada, are available to opposite-sex and same-sex couples, Art. 521.1. of the Civil Code of Quebec states (omitting any reference to gender): "A civil union is a commitment by two persons 18 years of age or over who express their free and enlightened consent to live together and to uphold the rights and obligations that derive from that status. […]". Art. 515-1 of the French Civil Code reads: "A civil pact of solidarity (pacs) is a contract entered into by two natural persons of age, of different sexes or of the same sex, to organize their life in common." For more examples, see Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 73-76.

31. For States, the matter of whether to establish a registered partnership scheme and if so, in which form, is often linked to the question of whether or not to allow same-sex marriages.[44] Several States have adopted legislation permitting same-sex marriages,[45] while others have prohibited such legislation through constitutional amendment,[46] and there are judicial reviews on this matter in a number of States.[47] When the European Court of Human Rights (hereinafter, "ECrtHR") ruled in June 2010 on whether the European Convention on Human Rights (hereinafter, "ECHR") imposed an obligation to grant same-sex couples access to marriage, it noted that, while there was an emerging consensus in Europe towards legal recognition of same-sex couples and a "rapid evolution of social attitudes towards same-sex couples", there was not yet a majority of States providing for it and that States enjoyed a wide margin of appreciation.[48]

32. If there is legislation, States adopt their own definition of what constitutes a registered partnership and define the formalities and legal consequences attached to it.[49] While some jurisdictions limit the effects of a registered partnership essentially to property rights and rights with respect to fiscal matters, others provide for broader effects, some even equivalent to marriage.[50]

33. Given the great diversity in States' approaches, it is not possible to identify a single course that faithfully encompasses all legislative developments.

V. Private international law aspects

34. The diversity of forms of cohabitation outside marriage and the differing legal consequences attached to them, where they are provided for in national law, raise questions with respect to private international law rules governing the legal status, effects, and recognition of foreign relationships.[51] This is, for instance, recognised by the EU which stated that "[d]ifferences between EU countries in this field are huge, in terms of not only the possibilities they offer, but also the extent to which partnerships contracted abroad are recognised (if at all)".[52]

35. The prevailing diversity leads to legal uncertainty for unmarried cohabitees or registered partners in cross-border situations where, among others, questions concerning applicable law to and recognition of their unmarried cohabitation or registered partnership arise.[53] While in some States there are no clearly defined frameworks dealing with international cases, others

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[44] *E.g.*, in Sweden, registered partnerships were abolished when marriage for same-sex partners was recognised in 2009 but continue to exist if concluded before May 2009. See also, P. Wautelet, "Private International Law Aspects of Same-sex Marriages and Partnerships in Europe – Divided we Stand?", in *Legal Recognition of Same-sex Relationships in Europe: National, Cross-Border and European Perspectives*, K. Boele-Woelki and A. Fuchs (eds.), Intersentia, 2012, p. 143.

[45] *E.g.*, Denmark (2012), France (2013), Iceland (2010), Luxembourg (2015), New Zealand (2013), Norway (2009), Portugal (2010), Sweden (2009), the United Kingdom (2014, except for Northern Ireland).

[46] *E.g.*, Australia (Marriage Amendment Act 2004 No 126) and Hungary (Art. L of the 2011 Constitution). In Croatia, in a constitutional referendum on 1 December 2013, the majority voted in favour of an amendment to the constitution that would define marriage as being a union between a man and a woman, creating a constitutional prohibition against same-sex marriage.

[47] *E.g.*, in the United States of America, same-sex marriages are allowed in 36 states, with bans remaining in the other 14 (which are under court challenge). In January 2015, the US Supreme Court agreed to hear four new cases on same-sex marriage (*Bourke v. Beshear*, *DeBoer v. Snyder*, *Obergefell v. Hodges*, *Tanco v. Haslam*) stating that it would decide on the power of states to ban same-sex marriages and to refuse recognition of such marriages performed in another state.

[48] See *Schalk and Kopf v. Austria* (No 30141/04) of 24 June 2010, paras 92-93. In conclusion, the ECrtHR held that Art. 12 ("Right to marry") and Art. 14 ("Prohibition of discrimination") in conjunction with Art. 8 ("Right to respect for private and family life") of the ECHR did not impose an obligation on Austria to grant a same-sex couples access to marriage. See also *supra* note 42 in relation to registered partnership in Austria.

[49] *E.g.*, to register a partnership, a series of requirements and formalities have to be completed before the competent authority of the jurisdiction (such as certain conditions related to the gender and age of the partners as well as to the minimum duration of their cohabitation, the condition that both persons are not married and the requirement to have the capacity to enter into contracts). These requirements and formalities vary from jurisdiction to jurisdiction; see Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 81 *et seq*.

[50] See in this regard, *e.g.*, I. Curry-Sumner, "Uniform Patterns Regarding Same-Sex Relationships", *International Law, FORUM du droit international*, Vol. 7, No 3 (2005), pp. 186-194 and N. Rubaja (*op. cit.* note 9), p. 192, citing S.L. Feldstein de Cardenas and L.B. Scotti. See also Prel. Doc. No 11 / 2008 (*ibid.*), paras 72 *et seq*.

[51] See in this regard, Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 156 *et seq.*

[52] See the EU website referred to in note 23.

[53] Scenarios to explore various questions in relation to private international law aspects are, *e.g.*, provided by K. McK Norrie (*op. cit.* note 42) and in Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 253 *et seq*.

have adopted conflict rules in their legislation but these may only address a form of unmarried cohabitation or registered partnership which corresponds to their national concept.[54]

36. The absence of national legislation on cohabitation outside marriage or applicable conflict of law rules may lead to the situation that no authority might be competent to handle legal questions (*e.g.*, regarding the dissolution of a registered partnership) and thus result in a negative conflict of jurisdiction. On the other hand, the existence of conflicting private international law rules may lead to *forum shopping* and a "rush to court".[55]

37. A reflection on how to reduce this legal uncertainty has its limitations with regard to unmarried cohabitation. In most States,[56] unmarried cohabitation (or an unregistered *de facto* union) is considered not as a legal construct but as a purely factual incident[57] and unmarried cohabitees do not have a clearly determined legal status.[58] The absence of a substantive legal framework in most States puts into question the possibility of developing private international law rules for this form of cohabitation outside marriage. The situation is different for registered partnerships.[59] Despite differences in domestic legalisation, their private international law treatment had been the subject of reflections shortly after they started to emerge, revealing various approaches,[60] and some jurisdictions – not all – introduced express private international law provisions. For these reasons, the following sections will focus on registered partnerships.

A. Competence and applicable law

1. Competence and the law applicable to the formation of registered partnerships

38. In a cross-border context, questions concerning access to the registered partnership and its formation requirements[61] arise, for example, when one or both partners do not have the nationality of the State in which they seek registration of their partnership, or one or both have the nationality of the State but the couple has its habitual residence in a different State.

39. Since formation requirements of registered partnerships vary from jurisdiction to jurisdiction, ranging from models which impose a strict criterion of nationality or (common) residence, to models without residence or nationality requirements (but sometimes with diverse intermediate requirements),[62] two important questions arise: first, in which State can a partnership be registered and second, which law applies to the registration?

40. While some States treat partnerships on the basis of the rules adopted for marriage,[63] others consider partnerships as family relations which should be subject to specific rules. These rules determine whether a State's authority is competent or not to register a partnership and thus differ from jurisdiction to jurisdiction.

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[54] See the discussion on this point in Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 174 *et seq*.
[55] See, *e.g.*, "Bringing legal clarity to property rights for international couples", COM(2011) 125 of 16 March 2011, available at < http://eur-lex.europa.eu > with an example involving Greek and Hungarian conflict of law rules.
[56] Very few States use the term "*de facto*" union in domestic legislation to describe a form of cohabitation outside marriage; *e.g.,* a *de facto* relationship is defined in Sec. 4AA of the Family Law Act 1975 of Australia.
[57] Providing a definition of *de facto* unions might be an attempt to identify an "unidentified legal object", see D. Nkounkou, "Le pré-mariage: un O.J.N.I. (objet juridique non identifié)", in *Revue congolaise de droit et des affaires,* 2010, Vol. 3, pp. 25-60.
[58] See the discussion on this point in Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 156 *et seq.*
[59] See also the Preamble of the proposed EU Regulation on Registered Partnerships (*op. cit.* note 10), point 9.
[60] Many studies on this aspect focused on same-sex registered partnerships, *e.g.*, see I. Curry-Sumner, *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe*, Intersentia, 2005, pp. 38 *et seq*. and P. Wautelet (*op. cit.* note 44), pp. 151 *et seq.*
[61] See Prel. Doc. No 11 /2008 (*ibid.*), paras 193 *et seq.* for an explication of applicable law aspects regarding formal and essential requirements (with domestic legislation examples).
[62] See, *e.g.,* on the one hand Canada, Nova Scotia, Vital Statistics Act 2003 § 52-55 (no nationality or residency requirements to enter into a registered domestic partnership); New Zealand, Law of 5 July 1997 (no nationality or residency requirement to enter into a civil union); United States of America, Hawaii, Reciprocal Beneficiaries Act 1997 HB 118 (no nationality or residency requirements); and on the other hand, Argentina (two-year residency requirement); Australia, Tasmania, Relationships Act 2003, Sec. 11 (domicile or "ordinary residence" requirement to enter into a "significant relationship"); Netherlands, Law of 5 July 1997 (nationality or residence requirement for at least one party to enter into a registered partnership). For more information, see also P. Wautelet (*op. cit.* note 44), pp. 154 *et seq.* See also Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 180-192.
[63] *E.g.*, Art. 3(2) of the Danish Registered Partnership Act provides that the provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners. Art. 65*a* of the Swiss *Loi fédérale sur le droit international privé* provides that the provisions of chapter 3 which is the chapter on marriage (Arts 43 *et seq.*) are to be applied by analogy to registered partnerships (with one exception). See for more information A. Bucher (Ed.), *Commentaire Romand, Loi sur le droit international privé, Convention de Lugano*, Helbing Lichtenhahn, 2011, pp. 541 et *seq.*

41. Regarding the formation of a partnership, a number of States apply the law of the State where the partners seek to have their union registered or otherwise formalised (*lex loci registrationis*),[64] while others have adopted a rule providing (exclusively) for the application of domestic law.[65]

42. Although domestic legislation differs, most States will only allow the creation of a partnership in the form they have accepted and avoid creating a partnership under foreign law, which is appealing since the content of the partnership may vary greatly in the various legislations. Unlike with marriage, which can be considered a universal concept, for registered partnerships the question of where a partnership is entered into remains relevant as the requirements and consequences of the partnership may vary in the various laws.[66]

2. Competence and the law applicable to the dissolution of registered partnerships

43. In a cross-border context, the question of whether it is possible to dissolve a registered partnership other than where it was registered may arise. For example, a couple may want to have their partnership dissolved in the State of habitual residence due to the proximity to the authorities of that place.

44. It is possible that the legal system the partners would like to choose does not recognise registered partnerships and therefore has no specific ground of jurisdiction to deal with the case. To resolve this problem and to prevent the risk of denial of justice, some States provide a "*forum necessitatis*".[67] Another solution has been found in the judicial recognition of such relationships for the purpose of dissolving the partnership. For example, in 2013, the Superior Court of Justice of Ontario, Canada, recognised a same-sex civil union concluded in the United Kingdom as a marriage under Canadian law for the purpose of dissolving the relationship.[68] However, legal challenges might still exist, for example, when the local authorities have competence to dissolve the partnership but their private international law rules require the application of a law that does not recognise the partnership or whose application is unwanted by the partners.

45. Concerning the question of which law would be applicable when partners wish to bring an end to their partnership,[69] one approach used in domestic legislation is the application of the

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[64] *E.g.*, Art. 17b(1) of the German Introductory Act to the Civil Code (*EGBGB*) states: "The formation of a registered life partnership, its general effects and property regime, as well as its dissolution are governed by the substantive provisions of the country in which the life partnership is registered.[…]". See also P. Wautelet (*op. cit.* note 44), pp. 151 *et seq.* for same-sex partnerships in Austria, Belgium, Denmark and France as States that subject the partners to the requirements of the *lex loci registrationis*.

[65] *E.g.*, the Finnish Partnership Act provides in Art. 11: "The right to the registration of partnership before a Finnish authority shall be determined in accordance with the laws of Finland.".

[66] According to P. Wautelet (*op. cit.* note 44), "whether a marriage is concluded under domestic law or foreign law, marriage is a universal concept. Even if some differences may exist when one compares the consequences attached to marriage in various laws, the "content" of the relationship will in any case not necessarily be dictated by the law of the State where the marriage has been concluded"; see P. Wautelet at pp. 156-157 where more arguments for the application of domestic law are provided.

[67] See, *e.g.,* Art. 65*b* of the Swiss *Loi fédérale sur le droit international privé:* "When the partners are not domiciled in Switzerland and neither of them is Swiss, the Swiss courts at the place of registration have jurisdiction to entertain actions or petitions relating to the dissolution of a registered partnership, provided that the action or petition cannot be brought at the domicile of either partner or provided that such filing there cannot reasonably be required." (English translation provided by A. Bucher (*op. cit.* note 63)). See also Art. 7 of the proposed EU Regulation on Registered Partnerships (*op. cit.* note 10), which states "[w]here no court of a Member State has jurisdiction under […], or the court designated by those provisions has declined jurisdiction, the courts of a Member State may, exceptionally and if the case has a sufficient connection with that Member State, rule on the property consequences of a registered partnership if proceedings would be impossible or cannot reasonably be brought or conducted in a third State".

[68] See, *e.g.*, J. Bingham, "Civil partnership recognised as "marriage" by court" in *The Telegraph* of 9 January 2013 at < http://www.telegraph.co.uk/women/sex/divorce/9791152/Civil-partnership-recognised-as-marriage-by-court.html >. Within federal States or jurisdictions with autonomous territorial units, there are instances of judicial authorities employing the principle of comity to provide recognition of relationships formed in other States or territories for the purposes of dissolution or inquiry into validity, *e.g.*, the Massachusetts Supreme Court in the United States of America recognised a Vermont same-sex civil union as equivalent to a marriage on grounds of comity for the purpose of a prohibited degrees analysis (*Elia-Warnken v. Elia*, 972 N.E.2d 17, 33-36, Ma. S. Ct. 2012). It found the same-sex marriage entered into in Massachusetts void *ab initio* on grounds that one spouse was party to an undissolved civil union entered into in Vermont at the time of the marriage. However, see *B.S. v. F.B.*, 883 N.Y.S.2d 458 (N.Y. Sup. Ct. 2009) finding that a validly contracted Vermont civil union was not a marriage as required to grant a divorce in New York.

[69] The various approaches States have chosen concerning the termination of unmarried cohabitation (*e.g.,* by unilateral or mutual decision of one or both of the cohabitees) and dissolution of registered partnerships (*e.g.*, by court ruling, notarised joint declaration, agreement or unilateral declaration) are explained in

law of the State in which the partnership was registered (*lex loci registrationis*) which has the advantage of applying a law that is foreseeable for the partners and that necessarily contains rules on registered partnerships.[70] Another approach is to apply domestic law, sometimes with limited recourse to party autonomy through an *optio juris* in favour of the *lex loci registrationis*[71] or with the application of the law of the common foreign nationality of the partners (provided, *i.a.,* that this law contains rules on registered partnerships).[72]

3. Competence and the law applicable to the general effects of registered partnerships

46. When registered partners move to a State other than that where they registered their partnership, the question of which State's authorities are competent to deal with the effects of a registered partnership may arise.[73] Linked to this is the question of what law governs the effects of the registered partnership, such as property rights, rights with respect to financial matters (taxation, welfare and pensions), spousal maintenance, and family rights relating to children.

47. The conflict rules created for registered partnerships mostly concern only some general effects of the partnership (in line with the traditional approach concerning the effects of marriage), such as the effect of the partnership on the duties and rights of the partners towards each other and effects regarding property rights. Effects regarding children and inheritance matters are often dealt with under the relevant specific rules for these matters.[74]

48. Whether a State's authority is competent to deal with the general effects of a foreign registered partnership depends first and foremost on the question of whether this State has recognised the partnership as such (see below in section B.). Furthermore, domestic legislation including conflict of law rules that apply to specific effects, such as property rights, may determine the State whose authorities are competent to deal with the matter.

49. The rules that States have adopted to determine the applicable law differ. Some States apply domestic law exclusively with regard to the consequences of the registered partnership and thus treat foreign registered partnerships as domestic partnerships, no matter where they have been registered.[75] This method leads to a "rewriting" of the partnership and can lead to the partnership producing fewer or more effects than initially foreseen by the partners.[76]

50. In some cases, the general effects of the partnership are governed by the law of the common residence of the partners which may often also lead to the application of domestic law.[77]

51. Other States apply the *lex loci registrationis* rule.[78] Although this rule requires the authority of the host State of the partners to apply foreign law when the partnership was

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Prel. Doc. No 11 / 2008 (*op. cit.* note 1), para. 70 and paras 141 *et seq*.

[70] *E.g.*, Art. 60 of the Belgian *Loi portant le Code de droit international privé* of 16 July 2004 states: "The relationship of co-habitation is governed by the law of the State on the territory of which the relationship was first registered. This law determines in especially the conditions of establishment of the relationship, the effects of the relationship for the assets of parties as well as the causes and conditions for termination of the relationship. […]" (English translation provided at < www.ipr.be >); Art. 515-7-1 of the French Civil Code stipulates: "The conditions of formation and the effects of a registered partnership as well as the causes and effects of its dissolution are subject to the material provisions of the State of the authority that proceeded to its registration.".

[71] *E.g.*, Art. 10:87 of the Dutch Civil Code stipulates that Dutch law applies to the question of whether a registered partnership that has been entered into outside the Netherlands can be ended and, if so, on what grounds. In derogation from this, it allows the application of the law of the State where the registered partnership has been entered into under certain circumstances, including when the partners have chosen that law in their contract or made a choice for that law in legal proceedings.

[72] See Art. 65*a* in connection with Arts 61(2) and 65*c* of the Swiss *Loi fédérale sur le droit international privé*.

[73] See for more information Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 109 *et seq*.

[74] Prel. Doc. No 11 /2008 (*op. cit.* note 1), paras 220 *et seq.* and P. Wautelet (*op. cit.* note 44), pp. 170 *et seq*.

[75] *E.g.*, Sec. 215 of the UK Civil Partnership Act provides: "Two people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship if, under the relevant law, they (a) had capacity to enter into the relationship, and (b) met all requirements necessary to ensure the formal validity of the relationship." Once a foreign partnership satisfies the definition of "overseas relationship" (Sec. 212), it will be recognised in the United Kingdom and treated as a "civil partnership" under UK law if the grounds for recognition in Sec. 215 are met. See for more information K. McK Norrie (*op. cit.* note 42), pp. 139-147.

[76] P. Wautelet (*op. cit.* note 44), p. 173. The "rewriting" problem also exist for marriages but it poses more problems for registered partnerships due to the diversity of partnership regimes in domestic legislation.

[77] *E.g.*, in Switzerland the general effects of the partnership are governed by the law of the common residence of the partners or, where the partners reside in different States, by the law of the State of residence with the closer connection, see Art. 65*a* in connection with Art. 48 of the Swiss *Loi fédérale sur le droit international privé*.

[78] *E.g.*, Belgium and France, see *supra*, note 70. Prel. Doc. No 11 /2008 (*op. cit.* note 1) contains in paras 222 *et*

concluded abroad, it seems straightforward: a foreign partnership will be governed by foreign law, while a local partnership is subject to domestic law.[79] This principle may, however, be qualified by the application of a public policy exception or by mandatory provisions of domestic law.[80] Furthermore, some States have limited the effects a foreign partnership can produce to those provided by domestic law.[81]

52. Another approach is to apply by analogy the rules relating to marriage, which might imply some adaptation if the result of the application of these rules differs notably from the effects of the application of the law under which the partnership was created.[82]

53. In addition, some States enable the partners to choose the law applicable to selected effects of the registered partnership. Party autonomy is in particular provided in relation to the proprietary effects of the partnership.[83]

4. Competence and the law applicable to specific effects of registered partnerships

54. As mentioned above, conflict of law rules created for registered partnerships, such as the *lex loci registrationis* rule, may only apply to the general effects of the partnership whereas other consequences are covered by other conflict of law rules that determine competence and applicable law.

55. In a cross-border situation, the application of a law other than the law of the State where the partnership was registered could lead to less or more effects than intended at the time the partnership was created.[84] Since domestic law on, for instance, succession differs considerably (*e.g.*, succession rights may be determined by the law of the nationality or domicile of the deceased person), a succession claim from a surviving partner may be subject to a law which provides for less or more entitlements than the law of the State where the partnership was registered. There are different ways how this situation could be taken into account. If the law of the State in which the partnership was registered would not grant the surviving partner any succession rights, the authorities in the State where the succession claim is made might refuse any succession rights even if their domestic law would normally grant them.[85] If, in the opposite case, the law applicable to the succession claim does not give any rights to the surviving partner, but the law of the State where the partnership was registered would normally do so, a specific rule might enable the application of the law of the State of origin of the partnership in order to be able to grant succession rights to the surviving partner.[86]

56. Another area which raises questions, in particular when registered partners change their habitual residence, concerns the rights and obligations of unmarried parents in relation to their children, such as parental status, custody and adoption. Most States acknowledge that children born out of wedlock should not be discriminated against based on the status of their parents.[87] Domestic law varies from jurisdiction to jurisdiction and has, in some States, been adapted due

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seq. more examples of domestic legislations.

[79] See for a discussion on the use of the *lex loci registrationis* rule P. Wautelet (*op. cit.* note 44), pp. 161-171.

[80] P. Wautelet (*ibid*.) writes on p. 167 that a State may, for example, refuse to recognise the possibility for one same-sex partner to adopt the child of his / her partner, even though this is possible under the applied foreign law. He then shows that the practice may, however, be different and draws attention to a decision by the French *Cour de Cassation* of 8 July 2010 (No 08-21.740) that accepted to give effect to the adoption by a women of a child born out of her partner, also a woman, excluding the application of the public policy exception which the lower courts had relied on to deny recognition to the adoption which took place in the United States of America. See also Arts 17 ("Overriding mandatory provisions") and 18 ("Public policy") of the proposed EU Regulation on Registered Partnerships (*op. cit.* note 10).

[81] *E.g.*, Art. 17b(4) of the German *EGBGB* states: "The effects of a life partnership registered abroad shall not exceed those arising under the provisions of the German Civil Code and the Registered Partnership Act." On the "*Kappungsgrenze*" see K. Thorn, "The German conflict of law rules on registered partnerships", in K. Boele-Woelki and A. Fuchs (eds.) (*op. cit.* note 44), and Buschbaum, "Kollisionsrecht der Partnerschaften außerhalb der traditionellen Ehe – Teil 1", *RNotZ* 2010, 73.

[82] See A. Bucher (*op. cit.* note 63), pp. 556-557 and P. Wautelet (*op. cit.* note 44), pp. 174-175 on Swiss Law.

[83] See, *e.g.,* Sec. 10.4.4 ("The partnership property regime"), Arts 10:70 *et seq.*, of the Dutch Civil Code. The EU Agency for Fundamental Rights commented on the proposed EU Regulation on Registered Partnerships that "[t]he prohibition of discrimination in Article 21 of the Charter [interdicted] a treatment that is, regarding the choice of applicable law, favourable to married couples but disadvantaging persons who, while in need of recognition for their partnerships, as a matter of political or other opinion, attach importance to leading their private and family lives with a maximum of private autonomy", see FRA Opinion – 1/2012, p. 15, at < http://fra.europa.eu/en >.

[84] See P. Wautelet (*op. cit.* note 44), pp. 170-171 with examples.

[85] See on this aspect A. Bucher (*op. cit.* note 63), pp. 558-559 and P. Wautelet (*ibid.*), p. 172.

[86] See Art. 17b(1) 2nd sentence of the German *EGBGB.*

[87] See, *e.g.*, Art. 2 of the *UN Convention on the Rights of the Child* and Art. 9 of the *European Convention on the Legal Status of Children Born out of Wedlock of 15 October 1975* ("European Convention of 1975").

to discussions concerning the aspect of non-discrimination between married and unmarried parents and between opposite-sex and same-sex couples.[88]

57. Many States have elected not to extend application of the rules on how to establish paternity applicable for married couples to registered partners but have instead adopted specific rules. The establishment of a parent-child relationship between a child and the mother's partner may be more difficult for unmarried than for married couples since a presumption of paternity, provided for by many jurisdictions where parents are married, may not be applicable to cohabiting couples.[89] Under some States' national laws, unmarried mothers are automatically granted custody of their children while unmarried fathers or the registered partner of the mother must carry out further official acts to acquire such rights (*e.g.*, through a court-issued custody order or an acknowledgement of the child).[90]

58. The issue of custody rights of the unmarried mother or father in a cross-border context has also been dealt with by courts at national and international levels on some occasions,[91] including in international child abduction cases.[92] For example, in 2010, the Court of Justice of the European Union (hereinafter, "CJEU") dealt with the question of whether the Brussels IIa Regulation[93] precluded a Member State from requiring that the unmarried father of a child obtain a court order granting him custody to establish "custody rights" under Article 2(11) of that Regulation.[94] Aside from the relevant provisions in the Regulation,[95] the CJEU considered Article 7 of the Charter of Fundamental Rights of the EU and in this, took into account relevant jurisprudence by the ECrtHR. It concluded that the fact that, unlike the mother, the natural

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[88] *E.g.*, on 11 January 2013 Austria published a law that further aligns the rights of children from unmarried with those from married parents (*Kindschafts- und Namensrechts-Änderungsgesetz 2013*); on 16 April 2013 Germany adopted a law concerning parental responsibility of unmarried parents (*Gesetz zur Reform der elterlichen Sorge nicht miteinander verheirateter Eltern*).

[89] See Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 127 *et seq.*

[90] *E.g.*, in Ireland, by law, an unmarried mother is the sole guardian of a child born outside of marriage. Unless the mother agrees to sign a statutory declaration, an unmarried father must apply to the court in order to become a legal guardian of his child (Sec. 6A of the Guardianship of Infants Act 1964, as inserted by Sec. 12 of the Status of Children Act 1987 and Sec. 2(4) of the Guardianship of Infants Act, as inserted by Sec. 4 of the Children Act 1997). In contrast, in Portugal, the *Código Civil Português*, in Arts 1871(1)(c) and 1911(1), confers a presumption of paternity when during the period of legal conception the partners lived in a stable relationship as husband and wife and joint custody upon parents when they live like husband and wife. See for more examples, N. Lowe, "Study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation", Report for the attention of the Committee of Experts on Family Law of the Council of Europe, 2009, pp. 14 *et seq.* See also in this context Arts 3-5 of the European Convention of 1975.

[91] *E.g.*, the ECrtHR dealt a few times with the question of whether unmarried fathers can have family rights under the ECHR. In *Nylund v. Finland* (No 27110/95) of 29 June 1999, it recalled from its judgments in *Keegan v. Ireland* of 26 May 1994 and *Kroon and Others v. the Netherlands* of 20 September 1994 that the notion of "family life" in Art. 8 of the ECHR was not confined solely to marriage-based relationships and "may encompass other *de facto* "family" ties where the parties are living together outside marriage". The notion of "family life" could also extend to the relationship between natural fathers and their children born out of wedlock provided there was "a demonstrable interest in and commitment by the natural father to the child both before and after the birth". In the case in point, the Court found that the father's link with the child had an insufficient basis in law and fact to bring the alleged relationship within the scope of "family life". In *Guichard v. France* (No 56838/00) of 2 September 2003, the ECrtHR ruled in essence that national legislation granting parental responsibility solely to the child's mother was not contrary to Art. 8 of the ECHR, provided that the child's father could at any time apply to have the arrangements relating to parental responsibility varied (see also *Balbontin v. United Kingdom*, No 39067/97, of 14 September 1999). In *Zaunegger v. Germany* (No 22028/04) of 3 December 2009, the ECrtHR held that national legislation which did not allow the natural father any possibility of obtaining rights of custody in respect of his child in the absence of an agreement from the mother was an unjustified discrimination against the father and thus a violation of Art. 14 taken together with Art. 8 of the ECHR.

[92] See, *e.g., T. v. O.* [2007] IEHC 326 of 10 September 2007 where the Irish High Court (and in appeal the Supreme Court, *T. v. O.* [2007] IESC 55 of 22 November 2007) dealt with the question of whether an unmarried father, who according to Irish law would not have any custody rights, has "rights of custody" within the meaning of Art. 3 of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

[93] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. On the question whether the Brussels IIa Regulation applies to registered partnerships, see, *e.g.*, T. Garber, "Sind eingetragene Partnerschaften vom Anwendungsbereich der VO Brüssel IIa erfasst?", *Interdisziplinäre Zeitschrift für Familienrecht*, July 2012, pp. 204 *et seq*.

[94] *J. McB v. L. E.*, C-400/10 of 5 October 2010. For a discussion on this case, see, *e.g.*, P. Jiménez Blanco, "Unmarried fathers and child abduction in European Union law", *J. Priv. Int. L.*, Vol. 8, No 1, pp. 135-137 (2012).

[95] The CJEU found in this regard that according to Art. 2(11)(a) of the Regulation, whether or not a child's removal is wrongful depended on the existence of "rights of custody" acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention. The Regulation therefore did not determine which person had such rights of custody, but referred this question to the law of the Member State of the child's habitual residence (see paras 39-44 *of J. McB v. L.E.*, *ibid.*).

(unmarried) father did not automatically possess rights of custody in respect of his child, did not affect the essence of his right to private and family life, provided that he was able to apply to a court, before the removal of the child, and request that custody rights be awarded to him.[96]

59. In this context it should also be noted that the establishment of paternity may not be sufficient in itself to confer parental responsibility. While in some jurisdictions unmarried parents have joint responsibility once paternity is established, in others, the unmarried father can only obtain responsibility by taking (further) steps, such as making an agreement with the mother or obtaining a court order.[97]

60. A question that may arise in a cross-border context is whether the parental responsibility of an unmarried father that has been acquired in one State (*e.g.*, under the law of the State where the partnership had been registered and the family had its habitual residence) subsists when the family moves to another State (and thus the child changes its habitual residence). A solution is provided in Article 16(3) of the 1996 Hague Child Protection Convention[98] which, in order to secure continuity in parent-child relationships, stipulates that a change in a child's habitual residence cannot result in a person losing parental responsibility.[99]

61. Another area of discussion is adoption. Some legal systems that allowed registration of a partnership did not allow the adoption of children by the partners. The situation has been changing through legislative amendments[100] and occasionally been dealt with in domestic[101] and international courts,[102] but it is still diverse. While some jurisdictions require the parents to be married, others permit adoptions by registered partners.[103] Some States refuse adoption by same-sex couples, while others permit it.[104]

62. In a cross-border situation, unmarried parents may seek recognition of the adoption of their child which took place in a different State. A problem may occur in States where the national law does not permit unmarried couples to adopt or limit the ability to adopt to opposite-sex couples.[105] For example, in 2012, international media discussed the situation of Finnish-Italian same-sex registered partners where each had given birth to a daughter who was legally adopted in Finland by the other partner highlighting the fact that when one of the partners

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[96] See paras 45 *et seq*. *of J. McB v. L.E.* (*ibid.*). See also *supra* note 91 for ECrtHR jurisprudence.
[97] See N. Lowe (*op. cit.* note 90), p. 30.
[98] *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.
[99] Art. 16(3) reads: "Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.".
[100] *E.g.,* the *European Convention on the Adoption of Children (Revised) of 27 November 2008* ("2008 Convention") applies to unmarried couples who have entered into a registered partnership in States that recognise this institution. While the scope of the *European Convention on the Adoption of Children of 24 April 1967* is restricted to married couples, the scope of the 2008 Convention has been extended to couples in a registered partnership to take into account a trend in many States of the Council of Europe; see the Explanatory Report of the revised 2008 Convention available at < http://conventions.coe.int/ >.
[101] *E.g.*, the High Court of New Zealand considered in *Re application of AMM and KJO to adopt a child* [2010] NZFLR 629 of 24 June 2010 whether the expression "spouses" in Sec. 3 of the Adoption Act 1955 included a man and a woman who are unmarried but in a stable and committed relationship. It decided that such an interpretation was permissible and that reading "spouses" to mean that only married couples may adopt jointly seemed to discriminate against other types of relationships which were commonplace in New Zealand.
[102] *E.g.*, in *X and Others v. Austria* (No 19010/07) of 19 February 2013, the Grand Chamber of the ECrtHR dealt with the complaint by two women who lived in a homosexual relationship about the Austrian courts' refusal to grant one of the partners the right to adopt the son of the other. It held that there had been a violation of Art. 14 taken in conjunction with Art. 8 of the ECHR on account of the difference in treatment of the applicants in comparison with unmarried opposite-sex couples in which one parent wished to adopt the other partner's child.
[103] *E.g.*, Belgium, Denmark, Germany, Netherlands and Sweden permit adoptions by registered partners, see N. Lowe (*op. cit.* note 90), pp. 15-16. See also Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 130-134.
[104] *E.g.*, Austria, Czech Republic, Italy, Lithuania and Portugal refuse same-sex adoption, see N. Lowe (*ibid.*). See also *supra* note 80 regarding a French *Cour de Cassation* decision on the recognition of a same-sex adoption.
[105] Some federal States are faced with similar problems. In the United States of America, state law governs who may adopt and there is great diversity between states with respect to same-sex and unmarried cohabitees which leads to difficulties that are comparable to those encountered in an international context. *E.g.*, in *In re Sebastian*, 881 N.Y.S.2d 297 (Surr. Ct. 2009), a New York court permitted a genetic mother to adopt the child that was carried to term by her same-sex spouse, despite the fact that both women already had parental status, due to the concern that their parental rights would not be recognised in other jurisdictions, see L.D. Elrod and R.G. Spector, "A review of the year in family law: looking at interjurisdictional recognition", 43 *Fam. L.Q.* 923, 933 (2010). In *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012), a court in New Mexico ruled in 2012 that an adoptive mother's former same-sex partner had standing to adopt the child because the state's Uniform Parentage Act applied to any parent who "openly holds out the child as [her] natural child and has established a personal, financial, or custodial relationship with the child".

travels from Finland to Italy with her adopted child, she faces uncertainty as to whether she has any parental rights outside of the State of habitual residence, *i.e.*, Finland.[106]

63. Although the matter has been increasingly addressed, registered partners – opposite-sex or same-sex – may still face significant uncertainty regarding their status as parents of children to whom they are not biologically related and / or who they have adopted through second-parent adoption abroad. The same applies to the recourse to medically assisted procreation that might be authorised for opposite-sex partners only or not authorised for registered partners at all.

64. Other challenges relate to property rights and other financial benefits. While all States that provide for the possibility to register a partnership give the partnership at least, and even if nothing else, certain effects in regard to property rights,[107] there is diversity in the relevant substantive laws as well as in the conflict of law rules applied to these cases.[108]

65. Aside from developments at the national and bilateral[109] levels in this area, an important multilateral initiative is the aforementioned proposed EU Regulation on Registered Partnerships which adopts rules of private international law that cover the property consequences of registered partnerships. Based on the awareness that uncertainty surrounding the property rights of international couples constituted one of the main obstacles faced by EU citizens in their daily lives when crossing borders, the Regulation aims at establishing a clear legal framework in the EU for determining jurisdiction and the law applicable to the property consequences of registered partnerships.[110] The proposed Regulation offers a legal framework as to the effects of a registered partnership; however, it does not offer recognition of the status itself which remains a matter of domestic law.

66. As to the applicable law to the property effects, the proposed Regulation applies the *lex loci registrationis* rule.[111] Refusal of the application of a rule of law determined by the Regulation is allowed if "such application is manifestly incompatible with the public policy of the forum" but an application of a rule of law "may not be regarded as contrary to the public policy of the forum merely on the grounds that the law of the forum does not recognise registered partnerships".[112]

67. With regard to access to social and financial benefits for unmarried cohabitees and registered partners, a series of important court decisions at domestic[113] and international levels[114] clarified and partly strengthened on the one hand, the right of these couples to benefit

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[106] In Finland, same-sex couples can enter into a registered partnership and an adoption is possible by same-sex partners as second parents. However, Italy does not permit same-sex marriages or registered partnerships and a child cannot have two mothers under domestic law. See P. Geitner, "On gay marriage, Europe strains to square 27 interests", *The New York Times* of 25 July 2012, available at < www.nytimes.com >.

[107] See in this context, Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 110 *et seq.*

[108] See, *e.g.*, "Bringing legal clarity" to property rights for international couples" (*op. cit.* note 55), p. 5.

[109] Germany and France concluded in February 2010 a bilateral agreement establishing a new optional matrimonial property regime with sharing of acquired property that can be selected by spouses. It is the first common matrimonial property regime which works and is liquidated under the same rules in both States and said to be a major legal advance in international family law. Couples in a registered partnership in Germany (*eingetragene Lebenspartnershaft*) can also choose this regime (see § 7(2) LPartG). Although it is a bilateral agreement, any other EU Member State can adopt the optional matrimonial property regime by accession to the agreement. See, *e.g.*, information from the German Federal Ministry of Justice and Consumer Protection at < http://www.bmjv.de/DE/Themen/Gesellschaft/Wahlgueterstand/_doc/_doc.html >, and N. Dethloff, "Der deutsch-französische Wahlgüterstand - Wegbereiter für eine Angleichung des Familienrechts?", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 76, No 3 of July 2012, pp. 509-539.

[110] See the proposal for a Regulation on Registered Partnerships, COM(2011)127 (*op. cit.* note 10), at pp. 2-3.

[111] Art. 15 of the proposed EU Regulation on Registered Partnerships (*ibid.*) states: "The law applicable to the property consequences of registered partnerships is the law of the State in which the partnership was registered." The Explanatory Memorandum (*ibid.*, p. 8) notes in this regard that "[t]his principle is in line with the Members States' laws on registered partnerships which usually provide for the application of the law of the Stat of registration, and do not offer partners the option of choosing any law other than the State of registration, even though they may be entitles to conclude agreements between themselves.".

[112] See Art. 18 of the proposed Regulation. Similarly, the recognition and enforcement of a foreign decision cannot be refused merely on the basis that registered partnerships are unknown under domestic law or that the property consequences for registered partnerships differ (Art. 24). According to C. González Beilfuss, it is particularly because of these provisions that the proposed Regulation may make life easier for registered couples, see "The Proposal for a Council Regulation on the Property consequences of Registered Partnerships", *Yearbook of Private International Law*, Vol. 13 (2011), pp. 183-198.

[113] *E.g.*, the German *Bundesverfassungsgericht* (Constitutional Court) ruled on 7 May 2013 (2 BvR 909/06) that exclusion of same-sex registered partners from the benefit of "Ehegattensplitting" ("tax splitting for married couples") constituted a violation of Art. 3(1) of the German Constitution (*Grundgesetz).*

[114] *E.g.*, the ECrtHR dealt in *P.B. and J.S. v. Austria (*No 18984/02) of 22 July 2010 with the situation that only a close relative or a cohabitee of the opposite sex qualified as a dependent of a civil servant for the extension of

from equivalent rights as married couples, and on the other, the right of same-sex couples to be treated equally as couples of the opposite sex. For example, in 2013 the Supreme Court of Canada dealt with a Charter challenge to certain articles on spousal support and property division in the Quebec Civil Code.[115] In the landmark decision *United States v. Windsor*, the United States Supreme Court held in 2013 that restricting US federal interpretation of "marriage" and "spouse" to apply only to heterosexual unions was unconstitutional under the Due Process Clause of the Fifth Amendment.[116]

68. However, despite rulings favouring non-discrimination, the practical realities faced by couples living in an institution which is not recognised in all States remain complex. Legal uncertainty still exists since it is often unclear to which extent unmarried couples should be assimilated to married couples for the purpose of public benefits and civil law rules. Moreover, since States use different criteria to determine whether a partnership is valid in their State, couples who live in a State that refuses to recognise their status could still be denied benefits.

B. Recognition of foreign registered partnerships

69. A discussion on the question of competence or on the question of which law governs the effects of a registered partnership would become moot if the foreign partnership is not recognised as such in the "new" State and thus able to produce any effects there. For example, it is possible that conflict of law rules enable the determination of the applicable law but that the law declared applicable does not recognise the partnership.[117]

70. The recognition of a foreign registered partnership offers legal certainty to couples and families. It avoids limping relationships and situations where one partner enters into a second partnership or a marriage without having first dissolved the earlier registered partnership.[118]

71. The only international instrument on this specific question, the *Convention on the recognition of registered partnerships* of 5 September 2007, developed by the International Commission on Civil Status, has not yet entered into force.[119]

72. Some States have identified certain foreign registered partnerships[120] that are considered equivalent or corresponding to domestic registered partnerships and, therefore, will be recognised automatically.[121] If a foreign partnership is not listed, it must meet extra conditions in addition to the conditions that the identified foreign partnership have met.

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insurance cover; a same-sex partner was excluded from insurance coverage as dependent. The case *Kozak v. Poland* (No 13102/02) of 2 March 2010 concerned an exclusion of persons living in a homosexual relationship from succession to a tenancy and the question of whether this was necessary for the protection of the family. In both cases, the ECrtHR held that there had been a violation of Art. 14 taken in conjunction with Art. 8 of the ECHR. In *J.M. v. the United Kingdom* (No 37060/06) of 28 September 2010, the ECrtHR held that a difference in treatment on grounds of sexual orientation in relation to child support constituted a violation of Art. 14 in conjunction with Art. 1 of Protocol No 1. The CJEU dealt with the question of survivors' benefits under a compulsory occupational pension's scheme for registered partners in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen (*C-267/06) of 1 April 2008 and with the calculation of a supplementary retirement pension for registered partners in *Jürgen Römer v. Freie und Hansestadt Hamburg* (C-147/08) of 10 May 2011.

[115] In *Quebec (Attorney General) v. A*, 2013 SCC 5 of 25 January 2013, it was argued that certain articles on spousal support and property division in the Quebec Civil Code were unconstitutional under Sec. 15(1) of the Charter since they only applied to married or civil union spouses but not to cohabiting couples. The majority of the Supreme Court found that the laws did, in fact, violate the Charter, but that the violation could be justified under Sec. 1; the law was therefore considered as being constitutional.

[116] *U.S. v. Windsor*, 133 S.Ct. 2675, U.S.,2013; see also *Cozen O'Connor v. Tobits*, No 2:11-cv-00045-CDJ (E.D. Pa. Jul. 29, 2013). The *Windsor* case concerned a same-sex couple residing in New York that was lawfully married in Ontario, Canada, in 2007. When one of the spouses died, the other sought to claim the federal estate tax exemption for surviving spouses but was barred from doing so by Sec. 3 of DOMA (codified at 1 U.S.C. § 7) which provided that the term "spouse" only applied to marriages between a man and a woman. The impact of the ruling in *Windsor* was far-reaching since same-sex married couples living in US states that recognised their unions could newly access more than 1,000 federal benefits. However, couples in a same-sex marriage or civil union still face uncertainty as to whether their marriage or union would be effectively recognised in another state. See for more information, *e.g.,* L.R. Westfall, "Looking Beyond DOMA: The Effects of United States v. Windsor on Federal Tax Law", *ABA Section of Taxation NewsQuarterly,* Vol. 33, No 1, Fall 2013, and Crowell & Moring, "Same-Sex Spouse Has Right to Pension Benefits Under ERISA - First Case Following Windsor Decision and its Implications for Benefit Plans" of 7 August 2013 at < http://www.crowell.com >.

[117] See for more information on this aspect P. Wautelet (*op cit.* note 44), pp. 176 *et seq.*

[118] See for more information Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 234-252.

[119] The *Convention on the recognition of registered partnerships* has been ratified by Spain and signed by Portugal, see < http://ciec1.org/ > (last consulted 11 February 2015).

[120] Foreign partnerships encompass, *e.g.*, civil unions, life partnerships, domestic partnerships, civil partnerships.

[121] See, *e.g.*, for New Zealand the Civil Unions (Recognised Overseas Relationships) Regulations 2005 (SR 2005/125), for the United Kingdom the Civil Partnership Act 2004 (Overseas Relationships) Order 2012, for

73. The *lex loci registrationis* rule which is applied by several States also guarantees the recognition of a foreign registered partnership: foreign partnerships are recognised provided that they comply with the requirements of the country of registration. The rule thus works both as a conflict of law rule and as a recognition rule.[122] However, couples may still face legal uncertainty since the application of the *lex loci registrationis* rule may be qualified due to specific requirements of domestic legislation.

74. Some States have included an explicit provision in their conflict of law rules explaining under which circumstances a foreign registered partnership will be recognised.[123]

75. Another question is whether, even if a foreign registered partnership were to be recognised as such in another State, the partnership would still need to be registered at a local court or other authority to produce effects (in all or some areas). For example, the effects of recognition with respect to third parties may be linked in domestic law to the publication of the registered partnership in the relevant civil status registers.[124]

76. Overall, the recognition of a registered partnership in a State other than the one in which it was formed still raises legal and practical questions leading to difficult and sometimes unexpected situations for the partners. To avoid uncertainty, a couple may choose to register their partnership anew in another jurisdiction when moving to or forming a special connection with that jurisdiction.[125] However, in many situations, in particular due to the fact that some States have limited their registered partnership scheme to opposite-sex or same-sex partners, it may not be possible to re-register the partnership in another country.[126] The consequence would be a complete denial of a legal status which had been validly obtained and a limping relationship.

C. Application of international instruments to aspects of registered partnerships

77. A question that follows from the aforementioned challenges in relation to private international law matters of registered partnerships is whether there are any existing international instruments that provide solutions to these challenges, or, in other words, to what extent existing international instruments apply to registered partnerships or cover at least certain aspects of them.

78. As mentioned above, the *Convention on the recognition of registered partnerships* of 5 September 2007 has not yet entered into force. This Convention would provide for the recognition of a registered partnership and its civil status effects in other Contracting States but would not present a comprehensive framework for registered partnerships.

79. The 1978 Hague Conventions on celebration of marriage and matrimonial property[127] do not apply, by definition, to any form of cohabitation outside marriage, including registered

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Ireland the Civil Partnership (Recognition of Registered Foreign Relationships) Orders, for Australia, *e.g.*, the Tasmania Relationships Act 2003 § 65A and the Civil Union Bill 2011.

[122] P. Wautelet (*op. cit.* note 44), p. 167.

[123] *E.g.*, Art. 10:61 of the Dutch Civil Code states in para. 1 that a foreign registered partnership which is valid under the law of the State where it was entered into is recognised in the Netherlands as a valid registered partnership. In para. 5 this is further qualified by requiring that, to be recognised a registered partnership shall concern "a legally regulated form of cohabitation of two persons maintaining a close personal relationship with each other, that at least: (a) is registered by a public authority competent to make such registrations […]; (b) excludes the existence of a marriage or another legally regulated form of cohabitation with a third person, and (c) creates duties (obligations) between the partners that in essence correspond to the marital duties of spouses that the law connects to a marriage" (English translation provided at < www.dutchcivillaw.com >).

[124] *E.g.,* the French *Code civil* applies the *lex loci registrationis* rule (*supra* note 70). Art. 515-3-1(2) states: "The civil pact of solidarity is effective between the parties only upon its registration, which gives the pact a date certain. The pact may be opposed against third parties only on the date that the formalities of publication have been completed. The same is true for agreements that modify the pact." (translation by the Permanent Bureau).

[125] See Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 248 *et seq.* on the issue of multiple registrations.

[126] P. Wautelet (*op. cit.* note 44) discusses (at p. 177) the example of Dutch registered partners of opposite-sex who move to Germany where their partnership will not be recognised as the German scheme only applies to same-sex partners and concludes that the partners "are literally trapped in a relationship which may be difficult to export to the country of their new residence".

[127] *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* and *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*.

partnerships.[128] Certain aspects of the family life of registered partners are, however, covered by other Hague Family Law Conventions:[129]

– According to Article 2(1)(a) of the 2007 Hague Child Support Convention,[130] the Convention applies to maintenance obligations "arising from a parent-child relationship", and Article 2(4) expressly adds that its provisions "apply to children regardless of the marital status of the parents". When a foreign application or decision for child support is based on a parent-child relationship, it should therefore not matter if this relationship is based on a registered partnership. In Article 2(1)(b), the Convention uses the term "spousal support" but under Article 2(3) States have the option to extend the scope to any maintenance obligation "arising from a family relationship".

– If a registered partnership gives rise to maintenance obligations, the 2007 Protocol on the Law Applicable to Maintenance Obligations[131] will apply since Article 1(2) opens its scope of application to maintenance obligations "arising from a family relationship" including obligations in respect of a child "regardless of the marital status of the parents". The Protocol includes in Article 5 a special rule with respect to spouses and ex-spouses. Although it does not mention institutions other than marriage, States recognising such institutions in their legal systems may subject them to the rule in Article 5.[132]

– The 1980 Hague Child Abduction Convention[133] clarifies that the authorities of the State to which the child has been removed or in which it has been retained should determine the issue of the breach of rights of custody (Art. 3) in accordance with the law of the State of habitual residence of the child. It is therefore the law of the State of habitual residence of the child that determines whether a registered partner had custody rights at the time when the child was removed or retained.[134] The same applies in the 1996 Hague Child Protection Convention[135] (Art. 7) which complements the 1980 Hague Child Abduction Convention.

– The 1996 Hague Child Protection Convention upholds parental responsibility that has been acquired under a certain law when the child changes its State of habitual residence (Art. 16(3)).[136] Thus, although registered partners may face uncertainty with respect to the recognition of their formal status as parents, when they move between Contracting States under the 1996 Convention, they nonetheless retain their parental responsibility. It is hoped that the public policy provision in Article 22 is applied restrictively in these cases and that – as required under this provision – any authority wishing to apply this reservation takes into account the child's best interests which would call for the continuity of the regulation of parental responsibility. In general, the 1996 Hague Child Protection Convention helps to ensure the recognition and enforcement of measures directed to the protection of the person or property of the child in all Contracting States and does not distinguish whether these measures are taken in relation to a child with married or unmarried parents.

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[128] According to H. van Loon, some of the rules may, however, be applied by analogy to partnerships, see H. van Loon, "Hague Conventions on Private International Law, Same-Sex Marriage and Non-Marital Institutions" in M. Piers, H. Storme, J. Verhellen (eds.), *Liber Amicorum Johan Erauw*, Intersentia, 2014, pp. 290-291 and 293-294.

[129] See in this regard, H. van Loon (*ibid.*) and P. Wautelet (*op. cit.* note 44), pp. 158-161.

[130] *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

[131] *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.*

[132] The "Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations", Hague Conference, 2013, by A. Bonomi, notes in paras 92-93: "Despite the proposals to that effect […], Article 5 does not mention the institutions similar to marriage, such as certain forms of registered partnership having, with respect to maintenance obligations, effects comparable to marriage. Despite the silence of the instrument, the Diplomatic Session admitted that States recognising such institutions in their legal systems, or willing to recognise them, may subject them to the rule in Article 5. This solution will enable the authorities of those States to avoid treating differently institutions which, under their internal law, are equivalent to marriage. […] This solution is optional in that it is not binding on States which refuse such relationships.".

[133] *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

[134] See in this context *supra*, para. 58 and note 92.

[135] *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

[136] See *supra*, para. 60.

– The text of the 1993 Hague Intercountry Adoption[137] does not expressly specify that couples that wish to adopt a child must be married.[138] Its application to adoptions by registered partners may, therefore, arise where the State of origin and the receiving State are Parties to the Convention and both admit such adoptions. In addition, Article 23(1) of the Convention provides that "an adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States". Therefore, if the competent authorities have considered the registered partners to be "eligible and suitable to adopt" in accordance with Article 5(a), the adoption is to be recognised in all other Contracting States regardless of the marital status of the parents. A foreign State could refuse the recognition of the adoption on public policy grounds (Art. 24) but would need to take into account the best interests of the child.

80. From this, it follows that selected Hague Conventions cover certain aspects of the family life of registered partners. There is, however, no international instrument at the global level dealing with the private international law aspects of cohabitation outside marriage, including registered partnerships, in a comprehensive way.

VI. Conclusion

81. An increasing number of States allow individuals to register their partnerships and provide them with a legal framework determining the rights and obligations of the partners towards each other and towards their children. In situations in which the partners and their children cross borders and seek to "export" their partnership to another State, a number of questions arise regarding competence, applicable law and recognition of the partnership. Many States do not provide conflict of law rules dealing with these questions and even if some legislators have adopted conflict of law rules that apply in these situations, many questions remain unresolved.

82. Legal uncertainty in this area of family law is, on the one hand, due to the fact that States have chosen different approaches with the result that domestic law differs from jurisdiction to jurisdiction. On the other hand, legal uncertainty subsists since the rules of private international law that some States have adopted for registered partnerships vary.

83. As a consequence, limping partnerships still seem to be unavoidable. Registered partners face uncertainty not only regarding the recognition abroad of the legal status they have validly obtained, but also regarding the legal status of their children. The latter aspect brings into play the need to protect the child and to consider the child's best interests.

84. Moreover, important consequences of the partnership remain unclear such as property relations, succession rights and other financial benefits, in particular when the conflict of law rules lead to the application of a law under which the registered partners have more or less rights than they initially thought. Similar problems may occur in the case of marriages but the extent and seriousness of the problem is greater in the case of registered partnerships since domestic legislation varies considerably.

85. In order to avoid such uncertainties, a couple may decide to re-register their partnership in accordance with the law of another State (if that is possible since the gender of the couple may play a role) with the effect that multiple registrations may complicate the recognition issue and procedures in more than one State may be required to dissolve the partnership.[139]

86. Some aspects of the family life of registered partners fall under the scope of application of selected Hague Conventions but there is no international instrument at the global level

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[137] *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.
[138] The Explanatory Report on the 1993 Hague Intercountry Adoption by Convention, Hague Conference, 1994, by G. Parra-Aranguren states in para. 79 that "[t]he question as to the persons who could be prospective adoptive parents was discussed at length in the Special Commission, in particular whether the Convention should cover adoptions applied for by non-married persons of different sex cohabiting together in a stable manner, or by homosexuals or lesbians, living as a couple or individually. Notwithstanding the fact that these cases were thoroughly examined, the problems they raise may be qualified as false problems, since the State of origin and the receiving State shall collaborate from the very beginning and they may refuse the agreement for the adoption to continue, for instance, because of the personal conditions of the prospective adoptive parents. Moreover, in case they agree to those specific kinds of adoption, the other Contracting States are entitled to refuse its recognition on public policy grounds, as permitted by Article 24". See also paras 80-86 of the Explanatory Report.
[139] See Prel. Doc. No 11 / 2008 (*op. cit.* note 1), paras 248-252 and Art. 6 of the *Convention on the recognition of registered partnerships* of 5 September 2007 which has not yet entered into force (*supra* note 71).

dealing with the private international law aspects of cohabitation outside marriage in a comprehensive way.

87. This circumstance, together with the aforementioned aspects of legal uncertainty in cross-border contexts, have led to calls for a worldwide private international law instrument on cohabitation outside marriage which, despite the diversity in domestic legislation, could provide solutions and clarity in international situations.[140]

88. These calls may be supported by the fact that the number of unmarried cohabitees and registered partners is on the rise in most (if not in all) regions of the world and that an increasing "internationalisation" of the family leads to more cross-border cases. This social reality may constitute a basis upon which more efforts towards extending private international family law to cohabitation outside marriage could be built.[141]

89. Due to an ever-growing number of unmarried cohabitees, registered partners and children born out of such relations and the challenges they face in a cross-border context, it seems legitimate to raise the question of the possible need for a global instrument on the subject-matter. The time may have come to have further discussions at the expert level concerning, among others, the possibility to unify existing conflict of law rules and / or to create a set of conflict of law rules that provide clarity, for example, concerning the competence for registering or dissolving a registered partnership, the applicable law to the effects of a registered partnership and its recognition abroad.

90. In light of these considerations, the view of the Permanent Bureau is that the private international law aspects of cohabitation outside marriage should remain on the Agenda of the Conference. If the Council agrees with this approach, the Permanent Bureau suggests to develop a questionnaire in consultation with selected experts from different legal systems and regions. Through this questionnaire, the Permanent Bureau would seek relevant information so as to then discuss the feasibility of a possible instrument including a strategy for developing a uniform approach to the issues of private international law raised in relation to cohabitation outside marriage including registered partnerships.

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[140] See, *i.a.*, J. Erauw and J. Verhellen, "Het conflictenrecht van de wettelijke samenwoning. Internationale aspecten van een niet-huwelijkse samenlevingsvorm" in *Echtscheidingsjournaal 1999*, pp. 150–161 (at p. 160); K. Boele-Woelki, "De wenselijkheid van een IPR-verdrag inzake samenleving buiten huwelijk", *Tijdschrift voor Familie- en Jeugdrecht*, 1999, pp. 11-13, and "The Legal Recognition of Same-Sex Relationships within the European Union", *Tulane Law Review*, Vol. 82, Issue 5 (May 2008), pp. 1949-1982 (at p. 1981, K. Boele-Woelki refers to a global instrument and the role of the Hague Conference on Private International Law); I. Curry-Sumner, "Uniform Patterns Regarding Same-Sex Relationships" (*op. cit. note* 50), pp. 188 and 194; P. Wautelet *(op cit.* note 44), p. 170 *et seq.*

[141] M. Attah (*op. cit.* note 30), p. 163.