PRIVATE INTERNATIONAL LAW ASPECTS OF SAME-SEX MARRIAGES AND PARTNERSHIPS IN EUROPE – DIVIDED WE STAND?

Patrick Wautelet

1. BY WAY OF INTRODUCTION

Family law has undergone a radical change over the last twenty years or so. While marriage previously dominated the field, leaving very little room for non-married couples, whose situation was mainly characterised by the absence of firm legal principles, the recent decades have seen the rise of new legal institutions affording a measure of legal protection to couples outside marriage. This has coincided with the desire to ensure that same-sex couples could find a place within the law. As a result, the landscape of family law has profoundly changed.

If one examines the current state of the law, it becomes clear that following this evolution, a few common points stand out while substantial differences remain. Whereas a large number of countries have created the possibility to register unions different from marriage, not all of them have done so. Some countries have shown indifference to the idea, other have demonstrated clear reluctance, sometimes even outright rejection – witness the provision in favour of different-sex marriage included in the recent Hungarian Constitution.[1] Among the countries which have created 'partnerships' and other new forms of relationships, the diversity is obvious, with some countries offering a close copy of the marriage, while other have opted for a less favourable regime. Finally, a handful of countries have opened up the possibility of marriage to same-sex partners.[2]

From the outset this evolution has been closely studied from the private international law perspective. In view of the ever increasing mobility of persons within the EU and beyond the conflict of laws treatment of same-sex marriages and partnerships is indeed far from a purely theoretical concern.

The cross-border aspects of these relations have already been documented in a number of fundamental studies.[3] Some years down the road, it appears useful to pause and wonder whether the difficulties and problems uncovered in these studies have been resolved. To this end, this paper intends to offer a general review of the private international law of same-sex relationships, focusing on the situation in Member States of the European Union. Because of the number of countries whose laws will be examined, we intend to adopt a bottom-up approach, starting not so much

1 See Art. L of the 2011 Constitution which is to enter into force on the 1st day of 2012. According to this provision, Hungary is to protect the "institution of marriage between man and woman…"

2 The Netherlands (since 2000), Belgium (since 2003), Spain (since 2005), Sweden (since 2009) and Portugal (since 2010).

3 See among other the following groundbreaking works: Curry-Sumner, *All's well that ends registered?,* 2005; Goldstein, La cohabitation hors mariage en droit international privé, *Collected courses* (vol. 320 – 2006, pp. 9-389); Devers, *Le concubinage en droit international privé*, 2004 and González Beilfuss, *Parejas de hecho y matrimonios del mismo sexo*, 2004.

from general questions and problems, but rather from a close examination of the private international law rules pertaining to same-sex relationships (marriages and partnerships) in Europe.[4]

From this examination it will be possible to determine whether and on what issues there exists a consensus among the countries concerned on the treatment of same-sex relationships. This will be done by looking first at the possibility for same-sex partners to access a specific status. In a second stage, the enquiry will focus on the consequences arising out of a particular status. From there the paper intends to identify the difficulties arising out of the lack of consensus. In a final chapter, some thoughts will be offered on the way forward – in particular assessing the merits of a global or European solution to tackle cross-border recognition problems.

Much of the discussion will be speculative, given the (surprising) paucity of case law. No examination will be offered of the specific treatment of same-sex unions under EU law[5] or international law.[6] Likewise, non marital cohabitation, which has not been registered, will not be considered.[7]

2. ACCESS TO MARRIAGE AND PARTNERSHIP

The first question to be examined concerns the possibility for two persons of the same-sex to access a specific status, either marriage or partnership. May two Portuguese men residing in Belgium marry? May two Luxembourg nationals conclude a partnership in Germany? While the same question arises for marriage between man and woman, the context is different when the question relates to same-sex partnership or marriage: the relative novelty of same-sex marriage and partnership and the lack of consensus on the need to offer same-sex relations a specific legal framework means that no identical treatment with different-sex marriages has been achieved.

In order to present the regime applicable to same-sex relations, a distinction must be made between two types of access requirements: in the first place, a legal system may subject access to the registration authorities to specific requirements, aimed at ensuring that the partners present a sufficient connection with the country. In the second place requirements may concern access to the institution itself. Both of these requirements must be studied together. A distinction will be made

4 See for another approach, focusing not so much on the existing rules and their shortcomings, but on the elaboration of a new legal framework based on new methodological approach, Quinones Escamez, Propositions pour la formation, la reconnaissance et l'efficacité internationale des unions conjugales ou de couple, *Rev. crit. dr. int. priv.* 2007, pp. 357-382.

5 Save for the EU conflict of laws rules such as Brussels II*bis* and Rome III Regulations.

6 See *e.g*. Jessurun d'Oliveira, How do International Organisations Cope with the Personal Status of their Staff Members? Some Observations on the Recognition of (Same-Sex) Marriages in International Organisations, in: Venturini/Bariatti (eds.), *New Instruments of Private International Law,* 2009, pp. 505-531.

7 See *e.g*. Gautier, Les couples internationaux de concubins, *Rev. crit. dr. int. priv.* 1991, pp. 525-539.

between same-sex marriage and partnerships, as both institutions have until now been subject to different rules.

2.1. Same-sex marriage

In order to account for the current practice of States, a distinction must be made between those countries which have and the countries which have not opened up marriage to same-sex partners. In the latter the question of access to same-sex marriage indeed raises specific questions unknown in the former.

2.1.1. Countries which have opened up marriage to same-sex partners

In those countries which have opened up marriage to same-sex partners, the prevailing solution seems to be to apply *mutatis mutandis* the rules drafted for 'classic' marriages. In most cases, no specific provisions were therefore adopted.[8] Same-sex marriages are governed by the very same conflict of laws provisions drafted for marriage in general. This is the case in the Netherlands,[9] Belgium[10] and, more recently, Sweden[11] and Norway.[12] In Spain, same-sex marriages are also subject to the same rules applicable to different-sex-marriage, as no specific provisions were adopted when same-sex marriage was made possible.[13]

8 Portugal does not seem to have adopted any specific conflict of law rules when it opened marriage to same-sex partners. The Act N° 9/2010 of 31 May 2010 does not include any specific provision on cross-border aspects of same-sex marriage.

9 See Art. 2 of the *Wet Conflictenrecht Huwelijk*.

10 See Art. 46 of the Code of Private International Law (hereinafter the 'Code'). In general, see Fiorini, New Belgium Law on Same-sex Marriage and its PIL Implications, *Intl. Comp. L. Q.* 2003, pp. 1039-1049 and Pintens/Scherpe, Gleichgeschlechtliche Ehen im belgischen internationalen Privatrecht, *Das Standesamt* 2004, pp. 290-292.

11 According to Bogdan, same-sex marriages are since the Marriage Code was amended in 2009 considered to be “regular” marriages which are as such subject to the same Swedish rules dealing with the applicable law as traditional heterosexual marital unions (Bogdan, Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden, *Nordic Journal of International Law*, 2009, pp. 253-261 at p. 256). See also Jänterä-Jareborg, Sweden: The Same-Sex Marriage Reform with Special Regard to Concerns of Religion, *IPRax* 2010, pp. 1505-1508.

12 Frantzen reports that no specific conflict of laws provisions were adopted to deal with access to same-sex marriage in Norway (Frantzen, Einführung der gleichgeschlechtlichen Ehe im norwegischen Recht, *FamRZ* 2008, pp. 1707-1708). Accordingly, the general provisions of the Norwegian Marriage Act (Act n° 47 of 4 July 1991, as amended) apply.

13 The application of the general rules has, however, led to many difficulties, some of which were solved by a general resolution adopted by the DGRN (*Resolución Circular de la dirección General de los Registros y de Notariado sobre matrimonios civiles entre personas del mimso sexo*, adopted on 29 July 2005). The DGRN has also issued two decisions in October 2005 and April 2006, dealing with concrete cases. These resolutions leave many questions open and have received many criticism in the literature. See in general Orejudo Prieto de Los Mozos, Private International Law Problems Relating to the Celebration of Same-Sex Marriages: DGRN of 29 July 2005, *Yearb. Priv. Int'l. L.* 2006, vol. 8, pp. 299-306 (who questions the qualification of the gender requirement, at pp. 303-304 and also points to the “poor argumentation of the decisions of the DGRN”) and Vaquero López, A propósito de la resolución de la DGRN de 29 de julio de 2005 sobre matrimonios civiles entre personas del mismo sexo, *Anuario español de derecho internacional privado*, 2006, pp. 611-631.

Likewise, the rules which govern the formal requirements of marriage have been made applicable to same-sex unions.[14] This also applies to the rules limiting the jurisdiction of local authorities to celebrate a marriage: here too, the rules for 'classic marriage' have been opened to same-sex marriages.[15]

The application of the rules devised for the 'classic' marriage is obvious and self-explanatory: if a country decides to open up marriage to same-sex relationships, there seems to be no good reason to reserve a specific conflict of law treatment to such marriage. As one commentator has noted in relation to the lack of any distinct private international law treatment under Spanish private international law, “it should be seen as the logical consequence of the legislator's intent to ignore any difference between same-sex and different-sex marriages under Spanish law.”[16]

The application of 'classic' rules does not, however, resolve all questions. These rules may, in countries where access to marriage is governed by the national law of the spouses, lead to the result that no marriage may be celebrated, if one of the future spouses possesses the nationality of a State whose law does not allow same-sex marriage. At the same time, the possibility to conclude a same-sex marriage may attract people with few or no connection to the jurisdiction. Countries are therefore engaged in a balancing exercise between opening up the possibility to conclude a marriage, so that marriage is not reserved exclusively to nationals of those States where same-sex marriage is allowed, and limiting it in order to avoid marriage tourism. In that respect, there is a clear distinction with different-sex marriage, where such considerations are absent.[17]

In order to deal with the restrictions imposed by the national law of the spouses, some countries which allow same-sex marriage, have therefore adopted specific rules aimed at making same-sex marriage possible. So it is that in Belgium, Art. 46-2 of the Code of Private International Law provides that if the law of one of the future spouses does not allow the marriage, this law will be ignored because deemed to be in violation of international public policy.[18] This is a rather radical option, which has been

14 See in Belgium Art. 47 of the Code; in the Netherlands Art. 4 *Wet Conflictenrecht Huwelijk* (which incorporates the solution of Art. 2 of the 1978 Hague Convention).

15 See in Belgium the application of Art. 44 of the Code. In the Netherlands, application of Art. 1:43 of the Civil Code (which provides that at least one of the future spouses should be domiciled in the Netherlands or be a Dutch citizen).

16 Orejudo Prieto de Los Mozos, (fn. 13), at p. 300.

17 For marriages between man and woman, the current outlook is one where restrictions are imposed mainly because of the concern to avoid marriages of convenience. See *e.g.* Foblets/Vanheule, Marriages of convenience in Belgium: the Punitive Approach Gains Ground in Migration Law, *Eur. J. Migration L.* 2006, 263-280.

18 See in general Romand/Geeroms, La loi belge du 13 février 2003 et le droit international privé: de la circulaire ministérielle du 23 janvier 2004 à l'alinéa 2 de l'Art. 46 du Nouveau Code, in: *Aspects de droit international privé des partenariats enregistrés en Europe: actes de la XVIe Journée de Droit international privé du 5 mars 2004 à Lausanne*, 2004, pp. 105-136.

criticised.[19] Likewise, in Spain, the Direccion General indicated that the application of a foreign law could violate public policy if the result was that same-sex marriage could not be concluded.[20] In the Netherlands, the difficulty is less acute as the system already includes a mechanism in *favor matrimonii*: in accordance with the Hague Marriage Convention of 1978, Art. 2 of the *Wet Conflictenrecht Huwelijk* provides that marriage is possible if the spouses comply with the requirements of Dutch law. If this is not the case, a marriage is also possible if the spouses comply with the requirements of their national law.[21] [22]

These rules have considerably extended the possibility to conclude same-sex marriages. In order to avoid marriage shopping, the legislators have, however, imposed some additional requirements. So it is that under Art. 2 of the Dutch law one of the spouses must have his habitual residence in the Netherlands or possess the Dutch nationality. Art. 46 of the Belgian Code goes further: it is sufficient that one of the spouses has the nationality or is habitually resident in a country under whose law same-sex

19 Initially, the interpretation resulted from an administrative circular issued by the Minister of Justice, which stated that any foreign legal prohibition on same-sex marriage must be considered discriminatory and contrary to Belgian public order, and therefore should not be applied (Circular of 23 January 2004, published in the *Official Gazette* of 24 January 2004). See the strong criticism by Renchon, L'avènement du mariage homosexuel dans le Code civil belge, in *Rev. b. dr. intl. dr. comp*. 2004, 169-207, at pp. 189-190 (from a substantive point of view) and by Traest, De omzendbrief van 23 january 2004 betreffende het homohuwelijk of: hoe een omzendbrief Belgische conflictenregels wil wijzigen, *Echtscheidingsjournaal*, 2004, pp. 49-52 (criticising the use of a ministerial circular).

20 This was one of the many arguments used by the Direction general to reverse the decision of the registrar who had refused to celebrate a marriage between a Spanish citizen and a foreigner. The reasoning used by the Direction general is quite confused, as it rests on various mechanisms: next to the public policy argument, the Direction has also referred to renvoi and the possibility to disregard the foreign nationality of one of the partners who also possessed Spanish nationality. For more details, see Gonzalez Beilfuss, Private international law aspects of homosexual couples. Spanish Report, *Report to the XVIIth Congress of International Academy of Comparative Law*, Utrecht, 2006, at pp. 5-6.

21 This is called the "*conflictenrechtelijke herkansing*", see Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 8th ed. 2005, at p. 97, N° 108. The same solution applies in Luxembourg, which has also ratified the 1978 Hague Convention. See Art. 171 of the Luxembourg Civil Code. This explains why the Luxembourg government has refrained from suggesting the adoption of specific rules. In the draft legislation submitted to the Luxembourg Parliament, the government has indicated that the general conflict of law rule will be applicable to same-sex marriage.

22 In Norway, it seems that the *favor matrimonii* policy is also present: in principle, the requirements to celebrate a marriage are governed by Norwegian law, whatever nationality the spouses may possess. However, foreign spouses and spouses who do not habitually reside in Norway are required to submit a certificate stating that there is nothing to prevent him or her from contracting a marriage in Norway. If such documentary evidence cannot be submitted, the spouse may file a certificate stating that he or she is not registered as married or a registered partner in his or her home country. Finally, section 7(g) of the Marriage Act provides that the National Population Register may make an exception to the requirement of producing a certificate "when there are special reasons for doing so". This could possibly be used to allow two persons of the same-sex to conclude a marriage in Norway even though such marriage would not be possible in their home jurisdiction.

marriage is possible. In Sweden, the same result is achieved by another rule: if none of the parties is a Swedish citizen or habitually resides in Sweden, each of the parties must fulfill the requirements of the law of at least one country of which he or she is a citizen or where he or she habitually resides.[23]

These rules and mechanisms leave, however, some room for marriages to be concluded between spouses who could not get married in their countries of origin. As a consequence, limping relationships have been created. In most countries, it seems that the fact that the marriage will not be recognised in the country of one of the spouses, is not taken into account.[24]

2.1.2. Countries which have not opened up marriage to same-sex partners

In countries which have resisted opening up marriage to same-sex partners, no specific rules have been adopted to deal with such marriages.[25] Instead, two difficulties must be faced.

A first difficulty relates to the question whether the same-sex marriage should be dealt with as a marriage for the application of the conflict of law rules. An intense debate has raged on this issue, notably in France. Among others, Fulchiron has argued that even though private international law commands a wide reading of the concepts used in its rules, it would go too far to consider that a same-sex marriage is a marriage for private international law purposes.[26] According to Fulchiron, such an extension would touch upon the very "nature" of the marriage and would unavoidably have consequences for the domestic debate.[27] In Italy, one court appears to have followed the same reasoning and refused to consider that a marriage celebrated in the Netherlands could be treated as

23 This follows from section 1 para. 2 of the 1904 Act on Certain International Marriages and Guardianship Relations. If one of the partners is a Swedish citizen, only Swedish law will apply.

24 Bogdan indicates that the question whether the Swedish marriage will be recognised in the country of origin of the spouse "is considered to be their problem and is not taken into account by the Swedish authorities", Bogdan, (fn. 11), at p. 257.

25 I leave aside the initiatives taken by various local authorities, such as cities or regions, which have attempted to give same-sex relationships some recognition. This has been the case in Italy, as has been documented by Boschiero, Les unions homosexuelles à l'épreuve du droit international privé italien, *Rivista di diritto internazionale* 2007, 50-131, at pp. 55-57. As Boschiero notes, these initiatives do not purport to grant same-sex partners a real legal status, at most they are relevant for benefits granted by local authorities.

26 See Fulchiron, Le droit français et les mariages homosexuels étrangers, *Dalloz*, Chron. 2006, n° 19, 1253-1258, at p.1254.

27 The opinion of Fulchiron is, however, not undisputed. Other French authors have argued that a same-sex marriage should be considered a marriage for private international law purposes (see *e.g.* Weiss-Gout/Niboyet-Hoegy, La reconnaissance mutuelle des mariages entre personnes de même sexe et des partenariats entre personnes de même sexe ou de sexe opposé. La situation dans les différents Etats membres. Besoin d'une action de l'UE?, *Report European Parliament*, PE 432.731, 2010 at p. 9.

a marriage because the two spouses were of the same sex.[28] In Ireland, the High Court decided in December 2006 that a marriage celebrated in Canada between two Irish women could not be recognised in Ireland since the concept of marriage was under the Irish Constitution reserved for opposite-sex couples.[29]

If a same-sex marriage cannot be dealt with as a marriage, an alternative solution must be found. It has been suggested to look at the rules applicable for partnership – provided such rules exist. This solution had been suggested in Sweden, before this country opened up marriage to same-sex spouses.[30] When Sweden only allowed same-sex partners to form a partnership and not to marry, it had indeed been suggested that the celebration of a same-sex marriage would be refused because this type of union would be considered under Swedish private international law as a type of registered partnership and not as a marriage. As a consequence, the specific rule regarding access to partnership would be applied.[31] Until now, the solution has only been expressly adopted in Switzerland.[32]

Another option is to consider that a marriage between two persons of the same sex is a marriage. If one elects to consider that marriage includes both marriage between persons of different sex and same-sex marriage, it

28 See the decision of the *Tribunale di Latina* of 10 June 2005, published in *Famiglia e Diritto*, 2005, 411 with comments by Schlesinger and Bonini Baraldi. In this case, the court was seized of a request to recognise a marriage celebrated in the Netherlands between two Italian men. The local registrar had refused to register the marriage in the public records. The court held that the marriage was considered non-existent because under the Italian Constitutional tradition, a marriage could only exist between spouses of different sex. See the criticism of Bonini Baraldi, Family vs. Solidarity. Recent Epiphanies of the Italian reductionist anomaly in the debate on *de facto* couples, in: Boele-Woelki (ed.), *Debates in Family Law Around the Globe at the Dawn of the 21st Century*, 2009, 253, at pp. 274-276 and Boschiero, (fn. 25) at pp. 61-62. The Italian Minister of Justice seems to have given several indications in the same sense, see the references in Rossolillo, Registered partnerships e matrimoni tra persone dello stesso sesso: problemi di qualificazione ed effetti nell'ordinamento italiano, (2003) *Rivista di diritto internazionale privato e processuale*, p. 363-398, at p. 391, n° 10.

29 *Zappone and Gilligan v Revenue Commissioners*, [2008] 2 IR 41 (High Court, Dunne J. 14 December 2006). The case is apparently still under review before the Irish Supreme Court.

30 In France the same suggestion has been made by those who consider that a same-sex marriage cannot be deemed to be a marriage for private international law purposes: Fulchiron, (fn. 26) at p.1255.

31 Bogdan, Some Reflections on the Treatment of Dutch Same-Sex Marriages in European and Private International Law, in: Einhorn/Siehr (eds.), *Intercontinental Cooperation Through Private International Law - Essays in Memory of Peter E. Nygh*, 2004, 25, at p. 28. In France, the same solution has been suggested by Callé following the adoption of a specific conflict of law rule dealing with partnerships: according to Callé, it could be possible to consider that same-sex marriage is a form of partnership as contemplated by the French legislator: Callé, Introduction en droit français d'une règle de conflit propre aux partenariats enregistrés, *Rép. Defrénois*, 2009, n° 38989, at p. 1663.

32 See Art. 45-3 of the 1987 Swiss Private International Law Act, according to which "Un mariage valablement célébré à l'étranger entre personnes du même sexe est reconnu en Suisse en tant que partenariat enregistré". German commentators have supported this option, see among others Mankowski, Art. 17b EGBGB, in: *Staudingers Kommentar zum BGB*, 2003, at p. 820-821, No. 22-23.

does not, however, mean that the marriage will necessarily be celebrated.[33] If one applies the classic rules conceived for marriage, the possibility for same-sex couples to marry, could still be blocked by various mechanisms. Take the example of France, where access to marriage is governed by the national law of the future spouses. If two Belgian citizens wish to marry in France, the law normally applicable will allow the marriage. The question then moves to another topic: will the public policy exception be used to deny these persons the possibility to marry? In France, the answer seems to be positive.[34] Bogdan suggested a couple of years ago that "most countries will probably decline to celebrate the same-sex marriage even if both parties are Dutch and therefore considered to be governed by Dutch law".[35] This suggestion is probably to a large extent still valid today, as evidenced by the fact that some countries which have not opened up marriage to same-sex partners also refuse to allow celebration of such marriages by foreign embassies and consulates on their territory.[36] [37]

2.2. Partnerships

33 Or recognised. The *Verwaltungsgericht* Karlsruhe has indeed refused to give effect to a marriage celebrated in the Netherlands between a Chinese national and a Dutch citizen: after having reviewed the matter under European law, the Karlsruhe court concluded that the same-sex marriage did not qualify as a marriage under the rules relating to free circulation of person (at that time Regulation 1612/68). For the sake of completeness, the Court added that if one considered the marriage as such and applied Art. 13 EGBGB, the conclusion would necessarily be that the marriage was not valid, since same-sex marriage is not allowed under Chinese law. The Court concluded that it was therefore not even necessary to call upon the public policy exception (Verwaltungsgericht Karlsruhe, 9 September 2004, available at *www.lsvd.de*). See the comments by Koolhoven, Het Nederlandse opengestelde huwelijk in het Duitse IPR. De eerste rechterlijke uitspraak is daar!, *N.I.P.R.* 2005, at pp. 138-142.

34 See *e.g.* Weiss-Gout/Niboyet-Hoegy, (fn. 27), at p. 12, note 29 and Malaurie/Fulchiron, *La famille*, 3rd ed. 2008, at p. 91, n° 172 – who note that "... *l'ordre public français, qui réserve le mariage aux personnes de sexes différents, s'opposerait à ce qu'une telle situation soit créée sur le territoire national*".

35 Bogdan, (fn. 31), at p. 28. See for the position under English law before the adoption of the Civil Partnership Act, Tan, New forms of Cohabitation in Europe: Challenges for English Private International Law, in: Boele-Woelki (ed.), *Perspectives for the unification and harmonisation of family law in Europe*, 2003, 437-461, at pp. 459-460. Ms Tan argued that recognition would be denied on public policy ground.

36 This seems to be the case in Italy, see Boschiero, (fn. 25), at pp. 60. In the Netherlands, it seems that the position was taken early on that French consular authorities could not conclude French law partnership if one of the partners possessed the French nationality. The reason was apparently that according to the Dutch authorities, the French partnership should be deemed to be equivalent to marriage – see on this aspect Jessurun d'Oliveira, Le partenariat enregistré et le droit international privé, *Travaux comité fr. droit international privé* 2000-2002, pp. 81, 89.

37 Another possibility to prevent the celebration of marriage is to characterise the requirement that spouses should be of different sexes as a formal aspect of marriage and, therefore, subject to the *lex fori* (see the discussion by Knezevic and Pavic, Private International Law Aspects of Homosexual Couples in Serbia, Report to the XVIIth Congress of International Academy of Comparative Law, Utrecht, 2006, at p. 2). Another possibility mentioned in the same report is to consider that the provisions of local family law restricting access to marriage to different-sex partners are '*Eingriffsnormen*'.

The private international law treatment of partnerships has for some time proved to be an "embarrassment".[38] In the first years after same-sex partnerships started to appear, several options were considered. A first option linked partnerships to contracts and borrowed the applicable law from the rules dealing with cross-border contracts.[39] This approach was short-lived: even though some legislators attempted to confine the partnerships they created to the realm of contracts,[40] the contractual approach was rapidly found unconvincing.[41] A close observation revealed indeed the many commonalities between partnership and marriage – such as the prohibition to enter two partnerships simultaneously, the application of prohibition inspired by marriage in relation to the kinship links between spouses and the application *mutatis mutandis* and to various degrees of rules relating to the effects of marriage.[42] Further, it was found that allowing partners to benefit from the conflict of laws rules devised for cross-border contracts would lead to unacceptable results.[43]

The only credible alternative to an approach based on contracts, was to start from the hypothesis that partnerships were family relations. This starting point has been rapidly accepted. However, it did not lead to unanimous results. A point of contention emerged on the question whether it was acceptable to apply the traditional rules devised for family

38 According to Mayer/Heuzé, *Droit international privé*, 9th ed. 407, No. 547.

39 See *e.g.* the analysis of Revillard, Le pacte civil de solidarité en droit international privé, *Rép. Defrénois*, 2000, n° 37124, at p. 337, No. 13 and Revillard, Les unions hors mariage. Regards sur la pratique de droit international privé, in *Des concubinages. Etudes offertes à Jacqueline Rubellin-Devichi*, 2002, 579-599, at pp. 589-590, no. 32. The choice for contract was certainly in part inspired by the precedent of non marital cohabitation, where the rules of contract have also been applied in some cases (see OGH, 18 February 1982, *FamRZ* 1982, 1010).

40 In France, Art. 515-1 of the Civil Code provides that "*Un pacte civil de solidarité est un contrat conclu par deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune*". In Belgium, the legislator has inserted the provisions in relation to the 'cohabitation légale' in the third book of the Civil Code, dealing in general with assets and the way they are acquired... This has not prevented the same legislator from including specific provisions relating to partnerships in general in the Code of private international law, some of which simply refer to the rules applicable to marriage. As Jessurun d'Oliveira, (fn. 36) at p. 94 has observed: "l'ambiguïté au pouvoir!"

41 See *e.g.* Henneron, New forms of cohabitation: private international law aspects of registered partnerships, in: Boele-Woelki (ed.), *Perspectives for the unification and harmonisation of family law in Europe*, 2003, 462-470, at p. 467-468; Erauw/Verhellen, Het conflictenrecht van de wettelijke samenwoning. Internationale aspecten van een niet-huwelijkse samenwoningsvorm, *Echtsscheidingsjournaal*, 1999, (150-161), at p. 160, nr. 44 and Rossolillo, (fn. 28), at pp. 386-387, n° 7. The debate has, however, reappeared with the adoption of the Rome I Regulation. Art. 1(2)(b) of the Regulation indeed provides that it does not apply to "obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations". On the interpretation of this exclusion, see Francq, Le règlement 'Rome I' sur la loi applicable aux obligations contractuelles. De quelques changements..., *J.D.I.* 2009, (41-69), No. 10.

42 See the observations by Jessurun d'Oliveira, (fn. 36) at pp. 85-86.

43 See the review of the criticisms by Seraglini, Les nouvelles formes de conjugalité: nouveau 'jouet' pour la doctrine de droit international privé?, in: Flauss-Diem et al (eds.), *Du Pacs aux nouvelles conjugalités: où en est l'Europe?*, 2006, 115-146 at pp. 122-125.

situations and in particular for marriages. An ambitious, if isolated, position suggested that an attempt should be made to treat partnerships on the basis of conflict of law rules adopted for marriage.[44] Several elements made it, however, difficult to maintain this ambition. First, the intervention of many legislators when adopting legislation on partnerships was precisely meant to create something different from marriage.[45] Further, the diversity of partnerships and lack of consensus on the content of the relationship made it difficult to proceed from the assumption that all relations should be treated equally.[46]

This explains why a third approach emerged, which has rapidly gained predominance. A consensus has indeed emerged to consider that partnerships are family relations which should, however, be subject to specific rules. The rule which seems to have received widespread recognition is that access to partnership should be governed by the law of the country where the partners seek to have their union registered or otherwise formalised.[47] This is often expressed by subjecting the would be partners to the requirements of the *lex loci registrationis*.[48] This rule has

44 See *e.g*. Chanteloup, Menus propos autour du pacte civil de solidarité en droit international privé, *Gaz. Pal.* 2000, N° 275, pp. 4-16 and Kairallah, Les partenariats enregistrés en droit international privé (Propos autour de la loi du 15 novembre 1999 sur le pacte civil de solidarité), *Rev. crit. dr. int. priv.* 2000, 317 ff at p. 321, § 7. Kairallah suggested to distinguish between various forms of partnerships and to reserve the application of the conflict of laws rules aimed for marriage to those partnerships which closely ressemble marriage.

45 As Devers has noted, “l'élargissement des catégories du for devant aussi respecter la place de l'institution étrangère dans son environnement juridique, il était délicat de prétendre qualifier 'mariage' des relations de concubinage que les lois étrangères s'attachent à distinguer du mariage”, Devers (fn. 3) at p. 461, § 764.

46 In fact, when it was suggested to apply the rules of family relationship, this was always done with some caveat or adaptation. See *e.g*. Mayer/Heuzé, *Droit international privé*, 9th ed. 407-408 n° 547: Mayer and Heuzé suggested that partnerships should be governed by the rule found in Art. 3-3 of the French Civil Code, which subjects family law relationships to the national law of the persons concerned. In view of the fact that not all countries have adopted a partnership statute, Mayer and Heuzé, however, suggested that contrary to marriage, the applicable law governs all aspects of the partnerships, from the requirements to access a partnership to the effects it produces.

47 The application of the law of the country of registration has been widely advocated in the literature, see *e.g*. Fulchiron, Réflexions sur les unions hors mariage en droit international privé, *J.D.I*, 2000, 889; Devers, (fn. 3), at pp. 196-201; Henneron, (fn. 41), at p. 469-470.

48 Note, however, that no consensus has emerged on the scope of the rule: is it applicable only to 'weak' partnerships, such as the French one, or is it also applicable to 'strong' partnership such as the Dutch one?

been adopted in Belgium,[49] Germany,[50] France,[51] Denmark[52] and recently in Austria.[53] The same applied in Sweden before the Act on partnership was abolished.[54]

Swiss law reaches the same result by declaring applicable to partnerships the rule pertaining to marriage.[55] It is interesting to note that in England [56] and in the Netherlands, as is the case in Switzerland, the rule is expressed unilaterally, by reference only to the application of local law.[57]

The application of local law is also the rule when determining which formal requirements govern the creation of a partnership. Here too, different methods exist. In some countries, reference is made to the rules which

49 Art. 60 of the Code of Private International Law. Note that this rule only applies to partnerships as defined in Art. 58 of the Code. Partnerships which do not meet the requirements of this definition, because they create stronger links between the partners, are deemed to be marriages and dealt as such under the private international rules of the Code.

50 Art. 17b EGBGB. See R. Wagner, Das neue Internationale Privat- und Verfahrensrecht zur eingetragenen Lebenspartnerschaft, *IPRax* 2001, pp. 281-293 and Forkert, *Eingetragene Lebenspartnerschaften im deutschen IPR: Art. 17b EGBGB*, 2003, p. 362.

51 Art. 515-7-1 of the Civil Code. The adoption of this law had been prepared and suggested in a report published in 2004: see Granet-Lambrechts, Trente-deux propositions pour une révision de la loi du 15 novembre 1999 relative au pacs, *Dr. famille* 2005, 11 ff. - which already suggested to subject partnerships to the law of the place of registration. In general, see Peroz, La loi applicable aux partenariats enregistrés, *J.D.I.* 2010, vol. 137, at pp. 399-410 and Joubert/Morel, Les partenariats enregistrés en droit international privé depuis la loi du 12 mai 2009, *JCP*, N, 2009, 1285.

52 See Art. 3(2) of the Danish Act, which provides that the provisions of the Danish Act on marriage applies *mutatis mutandis* to partnerships.

53 Art. 27a of the Austrian Private International Law Act of 1978, as amended by the *Eingetragene Partnerschaft-Gesetz* of 2009.

54 Pursuant to section 3, para. 4 and section 9 of Chapter 1 of the Registered Partnership Act (today abolished), access to a partnership was always governed by Swedish law, no matter what nationality(-ies) the partners possessed. See Bogdan, Private International Law Aspects of Homosexual Couples, *Report to the XVIIth Congress of International Academy of Comparative Law*, Utrecht, 2006, p. 3.

55 Art. 65a of the 1987 Swiss Act on Private International Law provides that "*Les dispositions du chapitre 3 s'appliquent par analogie au partenariat enregistré, à l'exception des art. 43, al. 2, et 44, al. 2*". As a result, Art. 44(1) of the Act applies both to marriages and partnerships. Under this provision, access to marriage or partnership is only possible provided the requirements of Swiss law are met. It is interesting to note that Art. 65(a) expressly disapplies Art. 44(2) of the Act, which makes it possible to conclude a marriage even though the requirements of Swiss law are not met, when the future spouses meet the requirements of one of their national laws. Hence, access to partnership is made more difficult than access to marriage (on the rationale of this rule, Bucher, *Le couple en droit international privé*, 2004, at p.188, n° 525).

56 Fawcett/Carruthers, *Cheshire, North & Fawcett Private International Law*, 14th ed. 2008, at p. 938.

57 See Art. 1-2 of the *Wet Conflictenrecht Geregistreerd Partnerschap*. Unlike for marriage, there is no possibility to fall back on the provisions of the national law of the partners if the partners do not fulfill the requirements of Dutch law. Strikwerda notes in this respect that "*Een conflictenrechtelijke herkansing op grond van de nationale wet van de aanstaande partners .... ontbreekt hier, omdat de Nederlandse regeling van het geregistreerde partnerschap rechtsvergelijkend beschouwd betrekkelijk uniek is, zodat een verwijzing naar de nationale wet goede zin mist*" (Strikwerda, 8th ed. 2005, at p. 98, N° 108). On the reasons of the choice by the Dutch legislator for unilateral rules, see Jessurun d'Oliveira, (fn. 36) at p. 91.

apply to marriage.[58] Some laws do not include a specific conflict of law rule for the formal requirements. Rather, this question is taken together with all other requirements aimed at the creation of a partnership, which are governed by local law.[59] In other countries, a conflict of law rule is adopted, which provides for the application of local law.[60]

The application of local law opens the way for foreigners to enter into a local partnership – without any examination of the possibility for the persons concerned to enter into such a partnership under their national law.[61] As has been done for same-sex marriage, most States have therefore imposed additional requirements which restrict the access to partnerships. The goal was plainly to avoid to become a so-called 'registration-haven' for foreigners – which could be even more prevalent than for marriage, since the prevailing view in relation to the effects of partnership is to submit these effects to the law of the country where the partnership was registered (*infra*). These rules require that there be a connection between the partners and the State.

The nature of this connection may vary – and has changed over time.[62] In many countries, these requirements are based on the residence of the partners. This is the case in Belgium,[63] France,[64] Luxembourg,[65] Spain[66] and

58 *E.g*. Section 2(1) Danish Act. This was also the case in Sweden before the Partnership Act was abolished.

59 This is the case in Belgium (Art. 60 Belgian Code PIL), in France (Art. 515-7-1 Civil Code) and in Germany.

60 See in the Netherlands Art. 1-3 Wet Conflictenrecht Geregistreerd Partnerschap. In Finland, § 11 Finnish Partnership Act provides that "The right to the registration of partnership before a Finnish authority shall be determined in accordance with the laws of Finland".

61 On the possible risk of creating liming relationships, see hereinafter.

62 Jessurun d'Oliveira recalls that Scandinavian countries were at first hesitant to open their partnerships to foreigners, requiring a clear link with the country. The situation gradually evolved and access to partnership in these countries was made easier for foreigners: Jessurun d'Oliveira, (fn. 36) at p. 87. On the evolution in Sweden, see Bogdan, Amendment of Swedish Private International Law regarding Registered Partnerships, *IPRax* 2001, pp. 353-354.

63 See Art. 59 § 2 of the Belgian Code (access to partnership is only possible provided the two partners habitually reside in Belgium).

64 According to Art. 515-3 of the French Civil Code, "Les personnes qui concluent un pacte civil de solidarité en font la déclaration conjointe au greffe du tribunal d'instance dans le ressort duquel elles fixent leur résidence commune ou, en cas d'empêchement grave à la fixation de celle-ci, dans le ressort duquel se trouve la résidence de l'une des parties." The same provision allows, however, also the conclusion of a PAC's before French officials abroad (diplomatic or consular agent), provided at least one of the partners is a French national. Callé has called for these requirements to be strengthened in view of the importance given by the law of 12 May 2009 to the law of the country of registration, Callé, (fn. 31) at pp. 1666-7.

65 Art. 3(1) of the Luxembourg Registered Partnership Act provides that the partners must make the declaration before the registrar of their "domicile or common residence". Art. 4(4) of the same act requires that the partners reside legally in Luxembourg (exception to this requirement is made for citizens of EU Member States).

66 According to Gonzalez Beilfuss (fn. 20 at p. 10) – who reports that the requirement of holding a '*vencidad administrativa*' (i.e. habitual residence supplemented by registration in the local Population Registry) has been questioned from a constitutional point of view.

Switzerland.[67] In a limited number of States, access to partnership is reserved to nationals of the State or at least requires that one of the partners is a national. This is the case in Slovenia[68] and the Czech Republic.[69] In yet other countries, the requirements are based on a combination of residence and nationality of the partners. The combination is usually an alternative, as is the case in the Netherlands, where partners may conclude a partnership if they reside in the Netherlands but also if one of the partners is a Dutch national.[70] In Nordic countries, the same alternative system is applied, whereby registration is possible if the partners either reside in the country or are national of the country.[71] [72] Finally, one should also mention the peculiar case of Germany: it appears that Germany does not impose any requirement in relation to the partners' nationality or residence. In other words, foreign nationals who do not habitually reside in Germany could apparently enter into a partnership in Germany on the occasion of a short-term visit to this country.

Taken together, the rules adopted for cross-border partnerships depart significantly from the traditional approach used for marriage. This is particularly striking for the emphasis placed on the role of the local law even in jurisdictions where access to marriage is traditionally governed by the law of the nationality of the spouses. The application of local law may certainly be commanded from the perspective of the practitioner, as it offers ease of application. This is particularly relevant in an area where rapid growth and change of legislations makes it more difficult for authorities to verify compliance with requirements of national law.

Beyond pragmatism and ease of application, the choice for local law also embodies a substantive decision: even though the number of countries which accept partnerships is steadily growing, there remains a great number of countries where such institution is unknown. Hence the

67 According to Art. 5(1) of the Swiss Partnership Act, the request for registration must be presented to the registrar of the 'domicile' of one of the parties. Art. 5(4) adds that if the partners are not Swiss citizens, they must first establish that they legally reside in Switzerland. See also Art. 43 (1) of the Swiss Private International Law Act (declared applicable to partnerships by Art. 65a) and sec. 8(1)(b) of the UK Civil Partnership Act (requirement of 7 days of residence).

68 Art. 3(2) Registered Partnership Act of Slovenia.

69 § 5 Czech Republic Registered Partnership Law.

70 See Art. 80a § 4 of the Dutch Civil Code – according to which persons who wish to conclude a partnership must in principle do so before the registrar of their domicile in the Netherlands. If the persons reside outside the Netherlands, registration is also possible if at least one of the partners is a Dutch national.

71 § 2(3)(1) of the Norwegian Law; § 10 Finish Registered Partnership Act; § 2(2) n° 2 Danish Registered Partnership Act. The Swedish Partnership Act provided likewise for a combination: the specific connection with Sweden was deemed to exist if at least one of the applicants was either habitually resident in Sweden for two years or was a Swedish citizen with its habitual residence in Sweden (section 2 of Chapter 1 of the Act, which has now been repealed).

72 The Scandinavian countries also adopted an interesting system: in order to take into account the fact that partnerships were already allowed in other countries, the law adds that citizenship of these countries must be taken to rank equally with local citizenship. For nationals of these countries, access to partnerships is hence made easier. See in this respect, Bogdan, (fn. 54) at p. 3.

application of the classic nationality threshold, where access to a family law institution such as marriage is subject to compliance with the requirements of the national law,[73] would only allow registration for nationals of countries which have introduced legal partnerships. On the contrary, the application of local law, allows a larger participation.[74] There is therefore a real political choice made when adopting such an approach.[75] At the same time, the application of local law helps to underline that partnership is and remains something different from marriage. Finally, by sticking to the application of its local law, a country can avoid having to create a partnership under foreign law. This is appealing for many countries since the content of the 'partnership' may vary greatly in the various legislations. States make careful choices when adopting a partnership statute, as to what effects they wish the partnership to produce. This decision could be imperiled if a State was required to apply foreign law.

The choice for the application of local law rests upon different explanations. It also has various consequences. The first one is that it creates two categories of marital unions for conflict of laws purposes. There is indeed a clear difference between marriage and partnership. This is only the logical consequence of the State's decision to create a partnership next to the marriage. On this question, conflict of laws follows the substantive choice. It does not seem that this creates a discriminatory difference of treatment.

Another consequence is that States where partnerships are subject to local law will only allow the creation of a partnership in the form they have accepted. In other words, it is not possible for partners residing in State A to request that their partnership be concluded under the law of State B. For marriage, this question does not arise: whether a marriage is concluded under local 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. Current practice indeed dictates that creation and content of marriage as status are disconnected.

For partnerships, this question remains relevant, as the shape and consequences of partnerships may vary in the various laws. It is enough to refer to the difference existing between countries where partnership is open only to same-sex partners, such as Germany and England, and

73 The outlook is obviously different in those countries where access to marriage is subject to local law, such as England. In those countries, there is much less need for a specific regulation of same-sex regulations as foreign partners cannot 'import' their own law.

74 On this 'pioneer's problem', see hereinafter.

75 See the observations by Jessurun d'Oliveira, (fn. 36), at p. 91. Jessurun notes the “souci de favoriser les personnes, surtout de nationalité étrangère, et d'orientation homosexuelle, et de leur permettre de faire enregistrer leur partenariat”. Devers suggested that it was “impossible” to adopt a neutral conflict of laws rule, Devers (fn. 3) at p. 196, § 312.

countries where different-sex partners also may enter into a partnership. The question where a partnership is entered into remains therefore relevant.

Finally, the choice for the application of local law also has consequences on the recognition side. Since access to the partnership is not subject to the national law of the partners, it may be that the partners enter into a relationship which does not exist, or only exists in a significantly different shape in the country of origin. The seeds of limping relationships are therefore sown.[76]

3. CONSEQUENCES OF MARRIAGE AND PARTNERSHIP – THE LIFE OF THE RELATIONSHIP

Moving beyond access to the relationship, the consequences of same-sex relationships also deserve a close examination. These consequences may touch upon diverse elements such as the duties and rights of the partners towards each other (is there a duty of fidelity? May one partner claim maintenance when the partnership is ended?) and towards the children. The consequences may affect the personal situation of the partners or their assets – one thinks of the matrimonial assets. Finally, effects in relation to inheritance law should also be considered.

Before looking at the current state of the law, one general question may arise, that of the applicability of international agreements or European regulations. There are indeed many existing international conventions on private international law dealing with the consequences of family relationships, such as the 1978 Hague Conventions on celebration of marriage and matrimonial property. The same question arises in relation to various European instruments, such the Brussels II*bis* Regulation. Should these international agreements also be deemed to apply to same-sex relationships? Looking for the answer to this question is a frustrating experience, as there is very limited practice on the subject.[77] If one leaves aside the most recent instruments,[78] none of the international texts take a

76 In France, it has been observed that even before the adoption of Art. 515-7-1, foreigners could conclude a partnership without any consideration of their national laws, see Mayer/Heuzé, *Droit international privé*, 408, n° 547 and Hammje, Réflexions sur l'Art. 515-7-1 du Code civil, *Rev. crit. dr. int. priv.* 2009, 483, at p. 487 – thereby opening the way for limping relationships.

77 Bogdan mentions one instance where the question has received a firm answer, i.e. that of the intra-Nordic Marriage Convention of 1931. A Swedish Act apparently indicates expressly that this Convention does not apply to same-sex marriages, Bogdan, (fn. 11) at p. 255.

78 See the draft EU Regulations on Matrimonial Property which were presented by the EU Commission in March 2011: one of the drafts deals expressly with the "property consequences of registered partnerships", COM(2011) 127 final. The Commission has explained that a separate instrument was necessary for partnerships "because of the features that distinguish registered partnerships and marriage, and the different legal consequences resulting from these forms of union..." Art. 2(b) of the Proposal defines partnership as follows: "regime governing the shared life of two people which is provided for in law and is registered by an official authority".

firm and open stance on whether it applies to same-sex relationships.

The starting point to deal with this vexed question should probably be that there is no room for a generic answer applicable to all international and European instruments alike. This is because the relevant regulations and conventions have been adopted in various contexts and may not all share the same aims. A further element which should probably be taken into account by way of general principle, is that recourse to national law as a guide to construe concepts used by international instruments should be avoided. This is clearly the case for the various existing European regulations.[79] As a matter of good practice, the same position should be taken when applying international conventions such as the Hague Conventions. The practice of State has, however, been mixed: while Denmark has apparently taken the position that existing international instruments should not be deemed to be applicable to partnerships, unless all Contracting States agree to it,[80] it has been argued in the Netherlands on the other hand that there is room for application of selected international conventions, such as the Hague maintenance conventions, because these conventions apply to maintenance obligations "arising from a family relationship, parentage, marriage or affinity [...]". This is read to be broad enough to include obligations arising out of partnerships.[81]

If one considers the flagship European Regulation, the principle of autonomous interpretation probably means that there is today no room for application of the Brussels II*bis* Regulation when the court is seized of a petition concerning a same-sex marriage.[82] Although this may seem to constitute a regression for the countries which have opened marriage to same-sex partners, this result should be identical whatever position the Member State whose court is seized, has adopted vis-à-vis same-sex relationships. In other words, even if the Member State concerned has allowed same-sex partners to marry, it would run contrary to the European principle of uniform interpretation to use the provisions of the Brussels II*bis* Regulation to determine the jurisdiction of a court in cross-border matters.[83]

This does not mean that all States will dutifully refrain from applying the provisions of the Regulation (or from other international conventions) to same-sex relationships.[84] In fact, there is not much that can be done to stop a State from unilaterally considering that the Brussels II*bis* Regulation

79 The ECJ has already made clear that the concept of 'civil matters' should be interpreted autonomously when reading the Brussels II*bis* Regulation (ECJ, 27 November 2007, *C*, case C-435/06, at § 46).

80 Position reported by, and criticised by Jessurun d'Oliveira, (fn. 36) at p. 93.

81 See the arguments and references in Jessurun d'Oliveira, (fn. 36) at p. 92. See also Curry-Sumner, Private International Law Aspects of Homosexual Couples: the Netherlands Report, *E.J.C.L.* vol. 11.1 (2007) at p. 12, who indicates that "In the eyes of the Dutch authorities, divorces pertaining to cease the bond established as a result of a same-sex marriage, fall within the material scope of" both the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations and of the International Commission on Civil Status Convention on the recognition of decisions relating to the marital bond signed in Luxembourg on 8 September 1967.

applies to same-sex relationships.[85] Further, the situation may change in the future. As for all legal texts, the provisions of the Brussels II*bis* Regulation should be read with due care for present circumstances. The question whether the Member States contemplated the application of the Regulation to same-sex relationships when negotiating the text, seems in that respect less relevant than the question how the concept of 'marriage' should be understood in a European context in 2011.[86] In the future, it may be that the ECJ comes to the conclusion that there is sufficient common ground between the Member States to interpret the concept of marriage as including same-sex marriages.

The same solution can probably be accepted when considering the application of the Brussels II*bis* regime to partnerships. There is certainly a stronger convergence between the laws of Member States when one considers the possibility to obtain legal recognition of a union outside marriage. However, it cannot be denied that whether they concern same-sex or different-sex partners, partnerships differ precisely from marriage in that they were created as an institution next to marriage. Assimilating partnerships, even those from countries where partnerships are very close to marriage, to marriage, therefore seems too bold a move at this stage.[87]

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82 This view is not, however, universally accepted. Consider the position of Ní Shuilleabhan, *Cross-Border Divorce Law. Brussels IIbis*, 2010, at pp. 110-111, § 3.42 ff and at pp. 114-116, § 3.48 ff who argues that "a broad definition of 'matrimonial matters' in the Brussels IIbis context would not affect national sensitivities (and indeed from an EU policy perspective, it would very much further the interest in ensuring free movement of judgments and consistent recognition of status, if all forms of marriage/partnership dissolution are covered". See also the position taken by the Dutch State Committee on Private International Law in respect of the predecessor of the Brussels II*bis* Regulation, the Brussels II Regulation. According to the committee, since the Community lacks a common definition of 'marriage', it should be left to the member states to define what a marriage is: Staatscommissie voor het Internationaal Privaatrecht, *Advies inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* (2001), at pp. 20-21, available at *www.rijksoverheid.nl/onderwerpen/wetgeving/privaatrecht/staatscommissie-ipr*.

83 According to Bogdan, this is the "prevailing opinion", i.e. that the Regulation refers merely to traditional marriages between men and women: Bogdan, (fn. 11) at p. 255.

84 The temptation to do so will be greater when the Member State concerned has chosen to extend the application of the provisions of an international instrument, as is sometimes done by Member States in respect of European Regulations. See Art. 4(4) of the Dutch Code of Civil Procedure, which provides that the Brussels II*bis* regime is also applicable to same-sex partners. This is, however, only the case when the Regulation is applied by analogy to situations which do not fall within its scope of application. See also Art. 1:80c (2), Netherlands Civil Code which provides that the Dutch Registrar is competent in this respect on grounds which are identical to those laid down in the Brussels II*bis* Regulation.

85 In this sense, Bogdan, (fn. 11) at p. 255.

86 It seems therefore moot to inquire whether applying this instrument (or another) to same-sex marriages would amount to a unilateral extension of the scope of application to situation not contemplated by the States parties, something which could constitute a violation of an international obligation. The idea that it would be wrong to apply a convention or Regulation to situations which did not exist when the texts were negotiated, proceeds from a static conception of legal interpretation, which is difficult to defend today.

87 For the various arguments, see Pintens, Marriage and Partnership in the Brussels IIa Regulation, in: *Liber memorialis Petar Šarčević*, 2006, 335-344 at pp. 338-343. See e.g.

Looking at the effects of same-sex relationships, it seems again useful to distinguish same-sex marriage from partnership, since different approaches may be used in practice.

3.1. Same-sex marriage

3.1.1. Between countries which have opened up marriage to same-sex partners

Prima facie, the treatment of same-sex marriage does not raise fundamental difficulties if one looks at countries where this form of relationship has been recognised. In these countries, no special rules have been adopted for same-sex marriages, which are therefore governed by the same rules as 'traditional' marriages.[88] Same-sex relationships are therefore subject to multiple rules, there being, in most countries, no single rule governing all consequences of marriage.[89] Hence, when seeking to determine the effects a same-sex marriage is likely to produce, one should work with various rules depending on the issue concerned, as is commonly done for 'classic' marriages.

When one looks at a same-sex marriage concluded abroad, a preliminary question arises: will the marriage will recognised as such? Presumably, this should not raise much difficulty. As Bogdan wrote in relation to Swedish same-sex marriages, “it can be assumed that countries having same-sex marriages in their own law will normally recognise a Swedish same-sex marriage as a regular marriage”.[90] Same-sex marriage will therefore be subject to the same recognition rules as other marriages.[91]

If one examines the fate in Belgium of a Dutch same-sex marriage, the question of the effects is at first sight non problematic: the foreign marriage will be deemed to be a marriage and all other conflict of laws rules will be applied to the marriage – if one of the spouses wishes to divorce, reference will be made to the regular conflict of laws rules relating

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Tribunal of Malines, 12 Jan. 2006, *Echtscheidingsjournaal* 2006 at p. 153, with comments by DE BACKER and JACOBS – the tribunal refused to apply the Brussels II*bis* Regulation to a request for recognition of a Dutch '*flitsscheiding*', whereby a marriage was first converted to a partnership which was thereafter terminated by parties.

88 See *e.g.* for Sweden BOGDAN, (fn. 11) at p. 258.

89 Contemporary private international law has indeed abandoned the idea that all consequences of marriages should be governed by a single rule. Instead, different rules are adopted which provide a solution for the various consequences which can arise from marriage – alimony, assets and assets division, relations with the children, etc.

90 BOGDAN, (fn. 11) at p. 260.

91 Here too one notes a variety of approaches. The 1978 Hague Convention on celebration and recognition of the validity of marriages has only been accepted by a limited number of countries. In most cases, recognition will be subject to determination that the marriage was validly celebrated or concluded in the country where it was concluded. Other requirements may exist, such as an absolute minimum age or or a general public policy exception.

to divorce.

As is the case for questions of access to marriage, the application of the 'normal' rules will, however, sometimes need to be nuanced. This will be the case if same-sex marriage is unknown in the country whose law is declared applicable. Say two Italian women living in Belgium get married in this country. If one of the spouses later files a divorce petition before a court in Belgium, the court will in principle apply Belgian law as the law of their common habitual residence.[92] The spouses may, however, request the court to apply Italian law.[93] As same-sex marriages are unknown under Italian law, the question arises whether the court could nonetheless apply the substantive provisions of Italian law. Or should the court fall back on Belgian law?

A similar difficulty arises if one of the spouses passes away. Italian law will apply, according to both Belgian and Italian private international law, to determine whether the surviving spouse may make any claim on a house owned by the deceased in Italy. Should the provisions of Italian law awarding rights to the surviving spouse be applied in this case, even though under the proper application of Italian law the surviving spouse would be denied that capacity?

A first difficulty is that the Italian substantive rules declared applicable may not be gender neutral and expressly refer to categories such as 'husband' and 'wife'. Would the application of such rules to same-sex marriages corrupt or even violate the relevant foreign law? If one goes beyond the problem of terminology, what arises is a classic issue of 'adaptation': the law declared applicable starts from its own structure and does not make allowance for the legal situation already created under another law. It is accepted that the answer to this problem is to compare the substantive provisions of the laws under review and to determine whether there is a sufficient equivalence between the institutions.[94] When the question arises in a country which has made allowance for same-sex marriage, this process of adaptation will probably lead to the assumption that the same-sex marriage should be considered as such. This would entail that Belgian courts grant to the same-sex spouse all rights given to spouses under Italian inheritance law. The question whether this result would be accepted in Italy remains open.

When one looks at the rules of jurisdiction, some adaptation may also be needed. Take two same-sex partners married in Sweden, who leave Sweden and reside for a long period abroad. If one of the spouses wants to file a divorce application, it may be that this proves impossible in the country of residence of the spouses because the marriage as such is not recognised. This explains why some countries have adapted their rules of

92 Art. 55(1) of the Belgian Private International Law Act.
93 Art. 55(2) of the Belgian Private International Law Act.
94 As explained *e.g.* by Bureau/Muir Watt, *Droit international privé*, 2nd ed. II, 2010, at p. 507, § 478; Bucher, La dimension sociale du droit international privé, *Collected courses*, vol. 341, (27), at p. 239, § 143.

jurisdiction and made it possible for spouses to file a divorce even though the spouses would ordinarily not be able to do so.[95]

3.1.2. Between countries one of which does not allow same-sex marriage

The picture is different if one considers the fate of a same-sex marriage in a country where such marriage is not allowed. How will a same-sex marriage celebrated in Spain fare in Italy if the spouses wish to divorce or one of them requests alimony from the other? What if the same-sex partners reside in Germany? Key question in this case is not so much which law will apply to the consequences of the marriage, but rather whether the same-sex marriage will be recognised and given any effect.

Various attitudes must be distinguished. In some countries, one may suspect that the same-sex marriage will be denied any effect. This would probably be the case in Hungary, where a recent constitutional change expressly outlawed same-sex unions. As a consequence, the same-sex spouses would not be treated as such: they would be free to remarry and could not claim any of the consequences normally attached to marriage. The denial of existence would touch the very essence of the relationship, which would not even be downgraded and treated as a partnership. The question of what law applies to the consequences of marriage therefore becomes moot.

This very radical approach is not shared by all countries which have not made it possible for same-sex couples to marry. As for other forms of family relationships unknown under local law, some countries may be prepared to recognise some of the consequences of a same-sex marriage validly concluded abroad. There are for example indications that even though it does not allow same-sex marriage, France would be ready to

95 See the new ground of jurisdiction adopted in Sweden for matrimonial cases so that divorce applications may be filed in Sweden if there are “special reasons” to do so, Bogdan, (fn. 11) at p. 257. Likewise in Norway, a special ground of jurisdiction was adopted to allow spouses who have married in Norway to file a divorce petition in Norway if it appears that no divorce may be obtained in the country of origin of the spouses or in the country where they reside – section 30 b, letter f of the Norwegian Marriage Act.

extend some recognition to foreign same-sex marriages.[96] [97] As a rule, however, no recognition will be extended if one of the spouses possesses the French nationality.[98]

This approach of partial recognition had been advocated by Bogdan, who insisted that it would be more balanced to "examine the circumstances of each particular case in order to find out whether giving effect to the Dutch same-sex marriage legislation would, *in casu*, lead to a result incompatible with the *ordre public* of the forum".[99]

The effects of this piecemeal approach for the same-sex spouses are probably not as devastating as the blunt refusal to recognise the union. It remains, however, that the spouses will live in great uncertainty, without the comfort of knowing in advance what part of their relationship will be accepted. If the same-sex spouses may rely on their marriage in a specific context, it is likely that application will be made of the normal conflict of laws rules. An alternative to the piecemeal approach is to make reference

96 See in particular the answer by the French minister of Justice to question N° 16294, dated 9 March 2006: in relation to the effects in France of a same-sex marriage concluded in the Netherlands, the Minister of Justice stated that, provided none of the spouses were French nationals, such marriage could produce effects in relation to the assets of the spouse – matrimonial property and succession. (the answer has been reproduced in *Rev. crit. dr. int. priv.* 2006, at pp. 440-441). An earlier ministerial answer went in the same direction (answer to question n° 41553 of 26 July 2005, commented upon by Fongaro, *Dr. fam.* 2005, n° 255). Commentators were, however, divided as to the possibility to recognise some effects to foreign same-sex marriage. Using the doctrine of the 'effet atténué' of the public policy, Revillard argued that there was room for recognition of some effects: Revillard, Le PACS, les partenariats enregistrés et les mariages homosexuels en droit international privé, *Rép. Defrénois* 2005, at p. 461. Fulchiron was less convinced. According to Fulchiron, the effet atténué was a "*voile chaste jeté sur une réception générale du mariage homosexuel*": Fulchiron, (fn. 26), at p.1257.

97 See also the decision by a Luxembourg court in relation to a marriage concluded in Belgium between a Belgian national and a third country national (from Madagascar): although the Luxembourg Minister of Foreign Affairs at first refused to grant a residence permit, the Administrative Court reversed and held that the marriage should be given effect: Administrative Tribunal of Luxembourg, 3 October 2005, *BIJ*, 2006, 7, with critical comments by Kinsch. The Court first pointed out to the right to family life as protected by Art. 8 ECHR. It also held that refusing to recognise the marriage would be inconsistent with the choice made by the Luxembourg legislator to recognise the possibility for same-sex partners to conclude a partnership. See our comments in L'union entre personnes de même sexe s'exporte-t-elle bien?, *Rev. dr. étr.* 2009, 699-702.

98 This may be inferred from the answer by the French minister of Justice to question N° 16294, dated 9 March 2006 (reproduced in *Rev. crit. dr. int. priv.* 2006, at pp. 440-441). The position is the same in Scotland for persons with Scots domicile, see Carruthers, Scots Rules of Private International Law Concerning Homosexual Couples. Report to the XVIIth International Congress of Comparative Law, *E.J.C.L.* Vol. 10.3 (Dec. 2006), at p. 1.

99 Bogdan, (fn. 31), at p. 28. It has been argued in Scotland that where same-sex marriage is valid by the *lex loci celebrationis* and where each partner has legal capacity under his personal law to enter into such marriage, recognition of such marriage could be afforded to "certain incidents" of the marriage, Carruthers, (fn. 98) at p. 1. This position is no longer tenable since the entry into force of the Civil Partnership Act. On the position of Scots law, see also McKnorrie, Would Scots Law Recognise a Dutch Same-Sex Marriage?, 7 *Edinburgh L. Rev.* 147-73 (2003).

to the doctrine of the preliminary question and to consider that the existence of a same-sex relationship must, as a preliminary question, be addressed under the law applicable to the main question – such as the right to maintenance or succession rights.[100]

A last position starts from a different assumption: the existence of a family relationship as created abroad is recognised, but the institution is modified: instead of being recognised as a marriage, the same-sex marriage is 'downgraded'. This is the position in Switzerland,[101] Finland [102] and, apparently, also in Germany.[103] As a consequence, a marriage concluded in Luxembourg between two men or two women, will be deemed to be a partnership when the spouses settle in Germany. This is also the current position under English law. Under the Civil Partnership Act, a same-sex marriage concluded in the Netherlands is treated as a civil partnership. This re-characterisation of the relationship will often bring in an important limitation of the effects the relationship may produce. Although there is still some doubt on the question, it seems that the consequence of such a 'downgrade' is that the relationship will be exclusively governed by local law. No reference will be made to the law of the country where the relationship was formed, to govern its consequences.

3.2. Partnerships

What law govern the rights and obligations of same-sex partners? What law will be applied when partners wish to bring an end to their relationship? These questions will be examined both for local partnerships and for foreign partnerships. In the latter case, a preliminary question arises, as one should first find out whether the foreign partnership will be recognised and, if yes, to what extent.

As no consensus has appeared on the question of the consequences of

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100 See the explanations of Boschiero, (fn. 25) at pp. 64-68.

101 See Art. 45-3 Swiss Private International Law Act.

102 Mikkola, Finnish Report, Report to the XVIIth Congress of International Academy of Comparative Law, Utrecht, 2006, at p. 4.

103 At least it is argued in the literature that even though under German law same-sex marriages are not possible, it would be inconsistent to allow recognition of same-sex partnership and to refuse such recognition to foreign same-sex marriages. Accordingly, Martiny has suggested that such marriages should also afforded recognition under Art. 17b EGBGB, Martiny, Private international law aspects of same-sex couples under German law, in this book at § 2.3, footnote 30. See also Mankowski/Höffmann, Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?, *IPRax* 2011, 247-254, at pp. 250-252. A lower court in Berlin has recently followed this opinion and considered that a same-sex marriage concluded in Canada should be treated as a partnership and registered as such in the civil status registers: VG Berlin, 15 June 2010, *IPRax* 2011, at p. 270. Another lower court has likewise considered that a same-sex marriage celebrated in the Netherlands should be dealt with under Art. 17b EGBGB: AG Münster, 20 January 2010, *IPRax* 2011, at p. 269. Compare, however, with Röthel, Gleichgeschlechtliche Ehe und ordre public, *IPRax* 2002, 496-500 – who argued that foreign same-sex marriages should be dealt with under Art. 13 EGBGB and hence considered as marriages.

partnerships, it is necessary to distinguish between different approaches.

3.2.1. First approach: law of the country of origin

In a first group of countries, a clear position has emerged to the effect that the law of the country of registration of the partnership will be applied. This application of the *lex loci registrationis* has been adopted in France,[104] Belgium[105] and the Netherlands.[106] It has also been suggested by the European Commission in its recent Draft Regulation on the property consequences of registered partnerships.[107]

The rationale of the rule is clear: in view of the diversity of laws in terms of partnerships and their effects, it was felt that it was too early to severe the umbilical chord between the partnership and the state or origin. Without a basic consensus on the shape and effects of partnerships, these countries deemed it difficult to allow the application of a foreign law on a local partnership.

At the same time, the *lex loci registrationis* principle guarantees the recognition of foreign partnerships. In principle, the adoption of the *lex loci registrationis* should solve the recognition puzzle easily: foreign partnerships are recognised provided that they comply with the requirements of the country of origin.[108] Recognition is in principle therefore not an issue. It will be granted when the partnership is in compliance with the requirements of the state of origin. The *lex loci registrationis* rule works in other words both as a conflict of law rule and as a recognition rule.[109] This is felt to be in compliance with the free

104 Art. 517-7-1 of the French Civil Code.

105 Art. 60 of the Code of private international law. See also in Québec, Art. 3090.1(2) of the Civil Code.

106 In the Netherlands, the rule is the same although it is expressed differently. Art. 5(1) of the *Wet Conflictenrecht Geregistreerd Partnerschap* provides that for the 'personal relationships' of partners, Dutch law applies if the partnership has been concluded in the Netherlands, while according to Art. 5(2), the law of the country of origin applies if the partnership has been concluded abroad. In the latter case, the rule makes allowance for application of the mechanism of renvoi. As far as the patrimonial relationships are concerned, Art. 6(1) of the law provides that the partners may choose which law applies. If the partners have not made any choice, the law of the State of origin will apply according to Art. 7 *Wet Conflictenrecht Geregistreerd Partnerschap*, which again distinguishes the position of partnerships concluded in the Netherlands and partnerships concluded abroad – the latter being qualified by the possibility to take into account the private international law rules of the country of origin.

107 See Art. 15 of the Proposal for a Council Regulation, COM (2011)127 of 16 March 2011.

108 For France, see *e.g.* Callé, (fn. 31) at p. 1664.

109 In fact, the need to have a rule dealing with recognition of foreign partnerships is the reason why in some countries a conflict of law rule was adopted in the first place. This is clear in France where the new Art. 515-7-1 of the Civil Code was adopted primarily to make it possible for foreign partnerships to be recognised, see Hammje, (fn. 76) at pp. 483-484.

movement imperatives of both the European Union and the ECHR.[110]

A foreign partnership will therefore be governed by foreign law, while a local partnership is subject to local law. This simple principle is only qualified by the operation of classic mechanisms, such as the public policy exception. One could imagine for example that a country could 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 law of the country of origin. Practice has, however, shown that recognition could be granted even where it is not expected. So it is that the French Cour de cassation recently accepted to give effect to the adoption by a woman 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.[111] Another possible limitation to the effects of a foreign partnership may be found when provisions of local law are deemed to be mandatory.[112]

The simplicity of the *lex loci registrationis* principle is, however, somewhat an illusion. Indeed, behind the appearance of a simple rule, substantial difficulties arise.[113] The first one relates to the precise scope of the principle. The scope of the *lex loci registrationis* rule may be limited in two different respects: in the first place in relation to the type of partnerships concerned and in the second place in relation to the effects covered by the rule.

Looking at the first issue, there is a striking difference between the approaches of the countries concerned. In some countries, such as the Netherlands and Belgium, the legislator has outlined *ex ante* the minimum content any partnership should have, in order to qualify as partnership. So it is that under Art. 2-5 of the Dutch WCP, a foreign partnership will only be recognised as such provided the partners maintain a close personal relationship and the partnership has been registered by a local and competent authority. Further, the partnership must exclude the possibility for partners to marry or conclude another partnership with a third party. Finally, it must have consequences which are roughly similar to those arising from marriage.[114] Belgium on the other hand reserved the

110 See in this sense, Callé, (fn. 31) at p. 1664-1665 and Hammje, (fn. 76) at p. 484.

111 Cour de cassation, 8 July 2010, *Rev. crit. dr. int. priv.* 2010, 747, with comments by Hammje. In another decision, the Court of First Instance of Bobigny has accepted that two same-sex partners who had concluded a civil partnership in England could benefit from the preferential tax treatment reserved in France to persons who are bound by a partnership: TGI Bobigny, 8 June 2010, *AJ Famille*, 2010, at p. 442 with comments by Cressent.

112 This has been suggested in relation to Art. 515-4 of the French Civil Code by Callé, (fn. 31), at p. 1667.

113 The first difficulty is obviously that the application of the *lex loci registrationis* requires the authority of the host country to apply foreign law when the partnership was concluded abroad. In practice, local authorities could be required to apply Norwegian law for partners registered in Norway, German law for partners registered in Germany, etc. This difficulty has been underlined, Callé, (fn. 31), at p. 1667. It is, however, not unique and arises any time a bilateral conflict of law rule is adopted.

114 It is unclear what is the fate of a foreign partnership which does not meet these

application of the special rule it created for partnership to those foreign partnerships which do not create between the partners a relationship equivalent to that created by marriage.[115]

In France on the contrary, no such 'minimum content' rule has been adopted.[116] Hence, the bilateral conflict of law rule may be applied to any foreign partnership, no matter how weak or strong this partnership is according to the law of its country of origin.[117]

In addition, another issue arises in relation to the scope of the *lex loci registrationis* rule. Does it cover all possible consequences of a partnership, which should therefore be governed by the law of the country of origin? [118] The French text is in that respect, again, deceptively simple. It only refers to the “effects” of the partnership, without any further indication as to the nature of the effects covered. It is therefore unclear whether such effects as property relationship, alimony claims or succession rights are covered.[119] The rule adopted in Belgium goes slightly

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requirements – such as *e.g*. a Belgian law partnership. In the early days, a confusion appeared in the Netherlands in relation to the French partnership: the Dutch Ministry of Foreign Affairs wrote to the French embassy in The Hague that since the French partnership showed much similarity with the Dutch partnership, it should be deemed to fall within the ambit of the Dutch conflict of laws rules in relation to marriage. With Jessurun d'Oliveira, it can be said that this is quite a curious statement, Jessurun d'Oliveira, (fn. 36) at p. 89.

115 Art. 58 of the Code. If the partnership is much stronger and produces effects equivalent to those of marriage, application may be made of the conflict of laws rules covering marriage. The abstract distinction made in the Code of Private International Law has been made more precise by a circular letter issued by the Belgian Minister of Justice in May 2007. According to this document, all registered partnerships, such as the Scandinavian and German schemes that resemble marriage, should be recognised as marriage in Belgium. For more details, see Sieberichs, Qualifikation der deutschen Lebenspartnerschaft als Ehe in Belgien, *IPRax* 2008, pp. 277-278.

116 The situation is the same in Germany, where no clear definition of 'partnership' has been included in Art. 17b EGBGB. It seems accepted that this rule may be applied to foreign partnerships which although not identical to the German partnership, are broadly similar – see Hohloch/Kjelland, The New German Conflicts Rules for Registered Partnerships, *Yearb. Priv. Intl. L.* 2001, 223-235, at p. 229. Comp. with Martiny, Private international law aspects of same-sex couples under German law, in this book at § 2.2, footnotes 26 and 27.

117 It has been observed that the public policy mechanism could nonetheless intervene and prohibit recognition in France of foreign partnerships *e.g*. when it appears that a partnership has been concluded between members of a family (see Hammje, (fn. 76) at p. 487). Further, it is doubted whether the new rule may be applied to same-sex marriage (see Peroz, (fn. 51) at p. 402, n° 11).

118 It is clear and not challenged that issues such as the majority or the parental links between partners, remain governed by the normal conflict of law rules and could, hence, be subject to a foreign law. This is the case for the majority: under French law, two persons may only conclude a partnership provided that they are adults (Art. 515-1 Civil Code). Whether or not the partners are indeed adults, will not be examined under French law but under the normally applicable law: see *e.g*. Callé, (fn. 31), at p. 1664.

119 See the doubts of Hammje, (fn. 76) at p. 489-490 and the examples offered by Callé, (fn. 31) at p. 1667-8. According to Weiss-Gout and Niboyet-Hoegy, it is clear that such effects as adoption, maintenance and inheritance rights are not govened by Art. 515-7-1: Weiss-Gout/Niboyet-Hoegy, (fn. 27) at p. 18. Peroz argues that the rule should apply to all 'patrimonial effects' of the relationship ((fn. 51), at p. 407, n° 26).

further: Art. 60 of the Belgian Code refers to the consequences of the partnership on the partners' "assets". This seems to exclude all other effects, such as possible maintenance claims made by one of the partners. Art. 60 must, however, be read together with other provisions of the Code, which provide specific solutions for other aspects not covered by Art. 60. It seems therefore that for the consequences not covered by Art. 60, one should apply the 'normal' rules of the Code.[120]

The Dutch legislator has gone much further in devising a comprehensive system dealing with the effects of partnerships. The WCP provides a detailed set of rules dealing with the various effects of partnerships, including rules for the relations with third parties. For some issues, the choice has not been made for the *lex loci registrationis*. The WCP, which has greatly benefited from the thinking of Jessurun d'Oliveira, subjects the matrimonial property regimes of the partners to the law chosen.[121] Likewise, the partners may choose which law apply to the dissolution of their partnership.[122]

The scope of the *lex loci registrationis* rule is one issue which deserves close attention. Another problem relates to the consequences of the application of the law of the country of origin. The choice for the law of the country of origin in effects amounts to the model of the *Wirkungerstreckungstheorie*, well known in the law of foreign judgments.[123] As with foreign judgments, the application of the law of the country of origin may give rise to difficulties. This will be the case when the law of the country of origin designates one of its institution and entrusts it with a specific mission in relation to the partnership. Say two partners want to terminate their relationship. How should this be dealt with if it appears that the termination is, according to the law of the country of origin, the privilege of an authority which does not exist in the country where termination is sought, or which does not have such competence in the country where termination is sought? This may explain why in some countries, termination was exclusively reserved for local partnerships [124] or priority was given to local law to govern termination.[125]

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120 The CIEC Convention only addresses what it calls the "effets en matière d'état civil", which concern the effect of a partnership on the possibility for a partner to remarry, the consequences on the name of the partners and the termination of partnership, in so far as it has consequences on the previous two elements.

121 It goes in this respect even further than the 1978 Hague Convention because it does not restrict the choice by partners to the law of their nationality or residence. On this aspect, see Jessurun d'Oliveira, (fn. 36) at p. 92.

122 According to Art. 22 WCP, Dutch law applies in principle, but the parties may make a choice in favour of the application of the *lex registrationis*.

123 As noted by Quinones Escamez, (fn. 4) at p. 371.

124 This is the case in Belgium (Art. 60-3 of the Code). In France, it seems that no such limitation exists. As a consequence, French authorities could be requested to terminate a partnership created under a foreign law. This has given rise to a debate on the question whether French authorities have jurisdiction to entertain such a request and which rules of jurisdiction should be applied, see Callé, (fn. 31), at p. 1669.

125 See *e.g.* Art. 23 of the Dutch WCP: a foreign partnership may in principle only be terminated in the Netherlands on the basis of Dutch law. A provision is made to allow termination on the basis of foreign law if the partners have made a choice for the

The most serious difficulties arise in relation to the consequences of the partnership which are deemed not to be dealt with by the law of the country of origin, but by another conflict of law rule. As already indicated, it is generally accepted that the *lex loci registrationis* only governs some of the consequences of the partnership, leaving other consequences to the general conflict of laws rules. This is manifest when one considers the possible claims of the surviving partner on the estate of a partner who passed away. In France and Belgium, it is accepted that these claims fall outside the *lex loci registrationis* and must be dealt with under the general rule of conflict applicable for succession.[126]

The application of another law than the law of the state of origin could lead to peculiar results. If two same-sex partners who have concluded a partnership in the Netherlands, move to France where one of the partners has bought a house, French law will govern the rights and claims of the surviving partners. A question which arises in this respect is whether the Dutch law partnership may be deemed to correspond to the French law partnership to which the French law provisions on succession refer.[127] This question is not specific to same-sex partnerships. It also arises when dealing with foreign marriages which deviate from the local standard – such as polygamous unions.

It may be easier to deal with this difficulty in those countries which have made an *ex ante* determination of what constitutes a partnership equivalent to the local partnership, such Belgium and the Netherlands. To take the example of two partners bound by a German law partnership who reside in Belgium, the court will have first determined that this partnership must be seen as a marriage for the purposes of conflict of laws rules. It will then not be difficult to accept that the partners must also be treated as spouses when applying Belgian substantive law.[128]

In France on the other hand, no such *ex ante* determination has been made. In the absence of such an abstract definition, judges and practitioners alike bear the responsibility of determining whether a given foreign partnership should be recognised as the equivalent of the French PAC's.

Once the hurdle of equivalence is passed, another difficulty arises which has already been mentioned in relation to same-sex marriage. The

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application of foreign law (Art. 23-2).

126For France: Hammje, (fn. 76) at p. 490; Callé, (fn. 31), at p. 1668; Kessler, Reconnaissance des partenariats étrangers: les enseignements de la loi du 23 juin 2006, *AJ Famille*, 2007/1, (23), at p.25; H. Peroz, (fn. 51), at p. 403, n° 13. In Belgium: van Boxstael, *Code dip. Premiers commentaires*, 2010, 113, n° 57; Barnich, Les droits du conjoint survivant et du cohabitant légal survivant. Questions de droit international privé, in: Van Gysel (ed.), *Conjugalité et décès*, 2011, 145-160, at p. 153. Likewise in Sweden for the partnership, see Bogdan, (fn. 54) at p. 4.

127Art. 515-6 French Civil Code.

128Barnich has also argued that equivalence should be accepted for foreign partnerships which meet the definition of Art. 58 of the Belgian Code, Barnich, (fn. 126) at p. 158.

application to specific consequences of the partnership, of another law than the law of the country of origin, could result in a substantial modification of the partnership as initially created. The partnership could entail less or more effects than contemplated under the law of the State of origin. In the example of the Dutch same-sex partner living in France, whose entitlement in the estate of his deceased partner is governed by French law, this will lead to a clear 'downsizing' of the Dutch partnership, as under French law partners only have minimal succession claims. Conversely, if two persons have concluded a partnership in France and move to Belgium, the succession claims will be governed by Belgian law which grants more rights than French law.[129] [130] It has been argued that if the law of origin of the partnership does not grant the surviving partner any inheritance right, this choice should be respected even if the law applicable to the inheritance rights affords some protection to the surviving partner.[131]

In an extreme case, the law declared applicable could simply ignore the institution of the partnership – leaving partners unprotected. Some legislators have anticipated the problem and provided a fall-back solution. This is the case in Belgium for the issue of the matrimonial assets of the partners. When questions of matrimonial assets arise in relation with third parties, the Belgian legislator has deviated from the application of the *lex loci registrationis* and preferred the application of the normal rule.[132] It may be that the law applicable under this rule does not allow same-sex partnership. In order to deal with this vacuum, the law provides a fall-back provision in favour of the *lex loci registrationis*.[133] Likewise, the German legislator has adopted a specific rule which grants the surviving partner the benefit of the application of the law of the country of origin if the law applicable to the inheritance does not give the surviving partner any right.[134]

3.2.2. Second approach: law of the host country

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129 See Art. 745*octies* of the Belgian Civil Code, introduced by the Act of 28 March 2007.

130 The draft Regulation on successions to the estates of deceased persons could bring clarity. The first draft issued by the Commission in October 2009 did not make any reference to the position of partners. Its Art. 19 provided that the law applicable would govern "the eligibility of the heirs and legatees, including the inheritance rights of the surviving spouse..." A more recent version of the draft Regulation goes further: the new Art. 19(2)(b) also includes a reference to the "inheritance rights of the surviving spouse or partner ...".

131 See Bucher, (fn. 55) at p.195-196, n° 553. See the criticism by Goldstein, (fn. 3) at p. 332-333.

132 To be found in Art. 54 Belgian Code.

133 Art. 60-3 *in fine* Code.

134 See Art. 17 b para. 1 sent. 2 EGBGB and the comments by Martiny, Private international law aspects of same-sex couples under German law, in this book at § 3.3.1. See the criticism of this solution by Goldstein which deems it to be "excessive", Goldstein, (fn. 3) at p. 331-332. According to Goldstein, "*De notre point de vue, il s'agit d'une illustration extrême d'un rattachement généralement critiquable de toute l'institution à la loi du lieu d'enregistrement*" (at p. 332).

In a limited number of countries, the preference is given to another approach: the consequences of same-sex partnerships are exclusively subject to local law, without consideration of the law of the country where the partnership was concluded.

When dealing with local partnerships, this does not make much difference when compared with the former method. The difference appears, however, when one deals with foreign partnerships. Since only local law is taken into account, foreign partnerships will also be governed by local law, no matter where they have been concluded.

The clearest illustration of this approach is to be found in England. As is well known, under the 2004 Civil Partnership Act, a registered partnership formed abroad and capable of being recognised in England,[135] will be subject to a process of "conversion".[136] Section 215 of the CPA indeed provides that "[t]wo people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship...". Accordingly, two persons having concluded a PAC's under French law, will be deemed to have entered a civil partnership. The relation will generate the same effects as a Civil Partnership concluded in England.[137] As we have already seen, the same approach, which is in conformity with the very strong *lex fori* favour of England in family law matters, applies to same-sex marriages concluded abroad.[138]

The English method leads to a 'rewriting' of the partnership. Same-sex partners who move to England after having concluded a partnership in Finland, may find that their partnership produces fewer rights than in the home jurisdiction. On the other hand, partners bound by a French *pacte civil de solidarité* will also be treated as bound by a civil partnership. They will therefore find out that their partnership generates more effects in case of a breakdown than if they had stayed in France.

In Germany, the rule is slightly more sophisticated: the starting point is that the foreign partnership is governed by the law of the country of registration.[139] However, Art. 17b para. 4 EGBGB provides that the consequences of a foreign partnership may not exceed those provided by

135This supposes that the relationship is either listed in Schedule 20 of the Act or meets certain conditions (which are listed in section 214).

136As noted by Norrie, Recognition of Foreign Relationships under the Civil Partnership Act 2004, *J. Priv. Intl. L.* 2006, 137-167, at p. 161.

137Before the adoption of the Act, the situation was muddled under English law, it was difficult to predict whether English courts would afford recognition to foreign partnerships, see Tan, (fn. 35) at pp. 449-452 and pp. 455 ff. Ms Tan referred to the question as "an unchartered area for English private international law", at p. 455. See on the same subject: Murphy, The Recognition of Same-Sex Families in Britain: the Role of Private International Law, *Intl J. L. Policy & Fam.* (2002 - vol. 16, pp. 181-201).

138In California, the same approach is followed. Under Section 299.2 of the Family Code of California, a registered partnership or another legal union that was validly formed in another jurisdiction between two persons of the same-sex will be recognised as a "domestic partnership" provided it is "substantially equivalent to a domestic partnership".

139See Art. 17b para. 1 EGBGB.

German law.[140] Even though it has been argued that this limitation should only come into play when a partnership may generate under foreign law consequences which are completely unknown under German law or would endanger an existing marriage,[141] this provision means in effect that, as is the case in England, a foreign partnership may not have other effects than those provided for under German law.[142] [143] In contrast to the rule adopted under English law, the German '*Kappungsgrenze*' seems to work only to reduce the effects of foreign partnerships. The rule does not seem to work the other way around and allow a foreign partnership to produce more effects than provided for under the law of the country of origin. Account should, however, be taken of an additional provision which is made for matters relating to maintenance and to succession, which remain governed by the general conflict of laws rules. The rationale of this special treatment is apparently to guarantee that all partnerships will generate effects in those fields. As a whole, a foreign partnership may therefore generate more effects when the partners reside in Germany than in the country of origin.[144]

The same position seems to have been adopted in Finland, where section 13 of the Partnership Act provides that the legal consequences of a foreign registered partnership are those of a local registered partnership. As a consequence, foreign partnerships may not have 'stronger' effects than the legal effects granted to Finnish partnerships. It has, however, been reported that this rule only applies to reduce consequences generated by foreign partnerships which produce more effects than partnerships under Finnish law. If on the other hand, the foreign partnership generates less far-reaching effects than the partnership under Finnish law, partners will not be able to enjoy additional effects after moving to Finland.[145]

3.2.3. Third approach: analogy with marriage

Switzerland stands out when considering the effects of partnerships:

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140 On the constitutional reason for this 'capping limit', see Thorn, The German conflict of law rules on registered partnerships, in: Boele-Woelki/Fuchs (eds.), *Legal recognition of same-sex couples in Europe*, 2003, 159, at p. 165.

141 Thorn, (fn. 140), at p. 165.

142 On the difficulty of comparing the effects a partnership may entail under German and foreign law, see Martiny, (fn. 103), at p. 12 and Martiny, Private international law aspects of same-sex couples under German law, in this book at § 3.3.2.

143 It seems that the approach taken by Luxembourg goes in the same direction. Under the new Art. 4(1) of the Law of 9 July 2004 on partnerships (inserted by the Law of 3 August 2010), foreign partners may register their partnerships in Luxembourg, provided they comply with the requirements of Art. 4 of the law. According to Wiwinius, the result is that the foreign partnership will be granted the same effects as a Luxembourg one (Wiwinius writes: "*L'inscription au répertoire civil permet ainsi d'assimiler le partenariat étranger au partnerariat luxembourgeois*" - Wiwinius, *Le droit international privé au Grand-Duché de Luxmebourg*, 3rd ed., 2011, at p. 383, n° 1834).

144 The rationale of this special treatment is apparently to guarantee that all partnerships will generate effects in those fields - see Martiny, (fn. 103), at p. 11.

145 Mikkola, Finnish Report, Report to the XVIIth Congress of International Academy of Comparative Law, Utrecht, 2006, at p. 4.

instead of subjecting those effects to the law of the country of origin or to Swiss law, the Swiss legislator has chosen to apply by analogy the conflict of law rules devised for marriage. It is interesting to note that this choice was driven by the realisation that application of the *lex loci registrationis* could hinder the cross-border mobility of partners.[146] As a consequence, there is no single rule governing the consequences of partnerships. Rather, partners are subject to different rules depending on the consequence concerned.

As with the first model, questions arise when a law is applied to the partnership, which is different from the law under which the partnership was created. So it is that Swiss law may be applied to the matrimonial assets of partners as the law of the common residence of the partners. In practice, partners will therefore enjoy the rights and obligations provided for by Swiss law, even if this means extending the consequences of the partnership further than possible under the law of the country of origin. Although Swiss law does not make any allowance for a distinction between 'strong' and 'weak' partnerships, it has been suggested that when under the law of the country of origin, the foreign partnership only produces limited effects, the application of Swiss law should be corrected to avoid distorting the nature of the partnership.[147] This could for example entail that if the partnership breaks down, the partners would only be entitled to a reduced form of maintenance if it appears that under the foreign law, partners are not entitled to full fledge maintenance. This makes for a complex balancing exercise, which involves comparing the effects of partnerships under Swiss law and the law of the country of origin. Bucher has for example suggested that if it appears that under the law of the country of origin, the partnership does not have any automatic effect on the assets of the partners, the application of Swiss law should be qualified and the preference given to the application of general rules of Swiss contract law instead of the specific rules relating to matrimonial property.[148]

4. OUTLOOK

What can be concluded from the preceding overview? Certainly, one will have noted the complexity of the questions reviewed so far. This is certainly far from specific to same-sex relationships. Cross-border family law matters can be very complex, even when the relevant conflict of laws rules have been unified. The rapid evolution of the legal rules in the field of same-sex relationship adds, however, a new dimension to the inherent complexity.[149]

146 Bucher, (fn. 55), at p. 193, § 544.

147 Bucher, (fn. 55), at p.194 ff, § 548 ff.

148 Bucher, (fn. 55), at p.195 ff, § 550.

149 In that respect, experience has shown that from a practical perspective, it is easier to avoid working with closed lists of legal systems: the system in the Scandinavian countries, where access to partnership is made easier for the nationals of some countries whose laws also allow partnership, has been found overly cumbersome, since the list of countries was included in the law, see the observations of Bogdan, (fn. 54) at p. 4.

That matters are not easy to grasp, derives mainly from the diversity of approaches and rules adopted by the States whose laws have been examined. Although diversity is, again, not unique to same-sex relationships, there is probably a much more diverse approach to those relationships than to any other family relationship today.

Another striking feature of the law today is the unsettled character of many questions. Although a notable evolution has occurred, with many national legislators adopting specific conflict of laws rules for same-sex relationships, many questions remain unresolved. Some of these questions pertain to the scope of application of international instruments. Others concern the difficult process of characterisation. When one succeeds in determining which law applies, questions may also arise when it appears that the law declared applicable does not recognise the relationship at hand. It is all in all a wonder that these many questions have not given rise to more case law.[150]

The diversity and lack of certainty may lead to important obstacles for same-sex partners. This is decidedly the case when the partners move from one country to another. Same-sex relationships are indeed, much more than other relationships, prone to face recognition problem when crossing borders. Recognition issues may arise in relation to a specific effect of a relationship – such as when a country will deny any effect to the choice of law made by two same-sex partners in another country, on the basis of the latter's private international law. The difficulties may be more serious when they lead to the application to one relationship of a law under which the partners have more or less rights, as this may modify the outlook of the relationship – such as when French same-sex partners move to Belgium and the surviving partner's claim is governed by Belgian law, which grants more rights to the surviving partner than does French law.

The problem becomes fundamental when the relationship as such is denied any effect – a difficulty which affects same-sex marriage more than partnership. All in all, there is a serious risk of limping relationships.

Limping relationships are certainly not new, nor are they specific to same-sex relationships. The phenomenon is probably as old as the first attempts to tackle cross-border family relationships. In many other contexts, family relationships are deeply affected by lack of recognition – it is enough to refer to the situation of many spouses whose divorce is not recognised in their country of residence because it is based on the unilateral decision of the husband. If there is something specific to same-sex relationship, it may even be that the plight of limping relationship is decreasing with time passing by. Indeed, as more and more States have introduced legal recognition for same-sex couples, this increases substantially the possibility for these relationships to be recognised abroad.[151]

150 See the German cases collected and made available at *www.lsvd.de/211.0.html#c1638*.

151 As noted by DE GROOT, Private International Law Aspects Relating to Homosexual

It remains that same-sex partners and spouses may be caught in a very difficult situation when their status is not recognised abroad. This explains why in many instances, partners have felt the need to consolidate their relationship from a legal perspective. Because of the doubts existing on recognition of a partnership concluded abroad, it is not uncommon for parties to conclude a new partnership locally - and to be advised to do so. This is a clear sign that parties are aware of the precarious status of their union.[152]

In many instances, partners will, however, be unable to consolidate their relationship and will instead face a complete denial of their status. As in other family contexts, this could lead to inextricable situations. Take the situation of two Dutch different-sex partners who have entered into a partnership under Dutch law. If these partners move to Germany, their partnership will not be recognised, as Art. 17b EGBGB only aims at same-sex partners.[153] The partners will further be unable to marry, both in the Netherlands and in Germany.[154] Finally, even dissolving the partnership requires a demonstration that life together has become unbearable. The partners may therefore be literally trapped in a relationship which may be difficult to export to the country of their new residence.[155]

Could one say that this delicate situation is regrettable, but that the persons concerned should have verified before moving to Germany, whether their status would be recognised? Certainly, there is room to say that in the field of same-sex relationships, the persons concerned are probably better equipped to anticipate recognition difficulties. Whereas a French man and a Tunisian woman getting married in Germany have no specific reason to suspect that their marriage will not be recognised in their respective home countries – save in the situation where the marriage is manifestly of convenience –, it may be argued that the perspective is different when two Italian men residing in Belgium, conclude a marriage there. In the latter case, it is not going too far to say that the persons concerned will at least have a vague suspicion that their union could be met with scepticism, or even hostility in their country of origin. In some countries, this was acknowledged when discussing whether or not to require that civil servants inform the partners of the risk of non-recognition

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Couples, *EJCL*, vol. 11.3 (2007) at p. 16.

152 According to Revillard, in many instances foreign partners chose to conclude a new partnership in France before buying a house or apartment there, Revillard, (fn. 96), at p. 461.

153 This issue is discussed in German literature. While some have argued that Art. 17b EGBGB only applies to same-sex relationships, other authors have suggested that this provision could also apply to partnerships between different-sex partners, see Martiny, (fn. 103), at p. 8-9 and Martiny, Private international law aspects of same-sex couples under German law, in this book at § 2.4.

154 In both countries, the ability to marry is governed by the national law of the spouses. Under Dutch law, partners bound by a partnership may not marry.

155 With due thanks to Prof. Ian Curry-Sumner (Utrecht) who gracefully shared this case with me.

when celebrating a same-sex union or registering a same-sex partnership.[156]

The heightened consciousness of same-sex partners should, however, be nuanced. Certainly, one may presume that same-sex partners getting married in Belgium or the Netherlands, are at least vaguely aware that their status could be questioned in countries where same-sex relationships are afforded no legal recognition whatsoever. The same probably applies when same-sex partners purposefully travel to a country to have their union registered because no such possibility is offered in the country where they reside.[157] This assumption cannot, however, be made when the recognition problem affects partners who have entered into a partnership in their home country and who afterwards travel to a country where some form of partnership also exist. This is precisely the situation of the Dutch same-sex partners living in Germany: the partners could reasonably assume that their Dutch law partnership would be recognised in Germany, *quod non*.

Limping relationships are therefore not simply the responsibility of the persons concerned.[158] And it will be a meager consolation for the partners and spouses concerned to learn that decisional harmony[159] and the need to

156 See for the Netherlands, Pellis, Het homohuwelijk, een bijzonder nationaal product, *FJR*, 2002, 162-168. In other countries, legislator consciously adopted provisions which could give rise to limping relationships. This is the case for the countries where a choice was made to subject access to partnerships to the *lex loci registrationis*, without any consideration of the national law of the future partners – see in France where before the adoption of Art. 515-7-1 of the Civil Code, some commentators had suggested to only open partnerships to partners whose national law allow for such relation: Mayer, Les méthodes de la reconnaissance en droit international privé, in *Le droit international privé. Esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, 2005, at p. 568, § 41. This has not prevented legislator from adopting a rule linking access to partnership exclusively to French law, thereby creating the risk of limping relationships - which has been clearly stressed by French commentators, see Hammje, (fn. 76), at p. 486 and Callé, (fn. 31) at p. 1665.

157 See the *Wilkinson* case decided in 2006 by the English High Court, where two women residing in England, got married marriage in British Columbia before requesting recognition of their marriage in England - *Wilkinson v. Kitzinger*, [2006] EWHC 2022 (Fam), (July 31, 2006).

158 See, however, the comments made in the Explanatory Memorandum which was introduced before the Dutch Parliament, together with the Same-sex Marriage Act. The Dutch government indicated that "The question relating to the completely new legal phenomenon of marriage between persons of the same-sex concerns the interpretation of the notion of public order to be expected in other countries. Such interpretation relates to social opinion about homosexuality… As a result of this, spouses of the same-sex may encounter various practical and legal problems abroad. This is something for future spouses of the same-sex to take into account" (Kamerstukken II 1998/1999, 26672, nr. 3, p. 7-8, I - Wet Openstelling Huwelijk of December 21, 2000. Translation taken over from Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, in: Wintemute/Andenas (eds.), *Legal Recognition of Same-Sex Partnerships,* 2001, pp. 437, 464.)

159 Since Savigny it has been customary to point to decisional harmony as one of the key objectives of private international law – see *e.g*. Yntema, Les objectifs du droit international privé, *Rev. crit. dr. int. priv.* 1959, (1-29), at pp. 20-21 and Wengler, Les principes généraux du droit international privé et leurs conflits, *Rev. crit. dr. int. priv.* 1952, 595-622 and 1953, 37-60. According to Wengler, legislators should act on the

avoid limping relationships,[160] while still one of the overarching objectives of private international law, must today compose with other goals and objectives which may sometimes trump it.[161]

It remains that given the tendency of States to subject conflict of laws rules to substantive family law objectives, which are necessarily peculiar to local legislation, limping relationships seem unavoidable today. And this is true both on a global scale, if one considers the world at large where same-sex marriages and partnerships are still the exception, and at the European level.

What solutions could private international law offer for these difficulties? If one focuses on the recognition issue, several types of solutions may be contemplated. In the long run, it may be that same-sex couples could find support in human rights provisions and in European law. These international norms have indeed recently been called upon to support claim for cross-border recognition of family status.[162] It is certainly not excluded that a same-sex couple could in certain circumstances draw support from recent case law of the European Court of Human Rights and the Court of Justice to obtain recognition of its status.[163] The difficulty with this solution is, however, that it operates on an *ad hoc* basis. Partners will be required to make a case that denial of recognition constitutes a breach of say Art. 8 ECHR in view of the concrete circumstances and taking into account their legitimate expectations.[164] As far as the EU is concerned, the

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basis that "*le droit applicable doit être déterminé de manière telle que la solution soit, autant que possible, identique à celle donnée dans d'autres Etats, et en particulier dans ceux qui, à l'égard du même litige, affirment la compétence de leurs propres tribunaux*", at pp. 610-611.

160 Compare with the opinion of Holleaux, Die Grundbegriffe des internationalen Privatrechts. Ein Bericht zu dem gleichnamigen Buch von P. H. Neuhaus, *FamRZ* 1963, 635-638, 637. According to the learned French judge, problems caused by limping relationships were not to be overestimated: "*Daß sie (limping relationships) ein Übel sind, gibt jedermann zu, aber ein unvermeidbares und letzten Endes gar kein praktisch so fatales wie man manchmal zu meinen geneigt ist. Der bisweilen herrschende panische Schrecken vor hinkenden Verhältnissen ist eigentlich unberechtigt. Es leben tatsächlich unzählige Leute ganz gemütlich in hinkenden Familienrechtsverhältnissen. Katastrophale Fälle [...] sind wunderseltene Ausnahmen. Jedenfalls ist es bei vielen Gelegenheiten – besonders auf den Gebiet des Familienrechts – häufig eine weit bessere, menschlich gerechtere und auch sachgemäßere Lösung, ein hinkendes Verhältnis freimütig in Kauf zu nehmen, als aus abergläubischer Achtung vor einem theoretischen Entscheidungsgleichheitsideal zu einer vielleicht rechtstechnisch vertretbaren [...] aber nichtsdestoweniger faktisch ungerechten Lösung Zuflucht zu nehmen*".

161 As shown by Martiny, Objectives and Values of (Private) International Law in Family Law, in: Meeusen et al. (eds.), *International Family Law for the European Union*, 2007, 69, at p. 80-81.

162 As noted for example by Weiss-Gout/Niboyet-Hoegy, (fn. 27), at pp. 14-16.

163 A Luxembourg Court in fact drew in substance from Art. 8 ECHR to grant an application for a residence permit to a third country national who had married a Belgian national in Belgium. The Court found that denial of a residence permit would amount to a disproportionate and unjustified breach of family life : Administrative Tribunal of Luxembourg, 3 October 2005, *BIJ* 2006, 7, with critical comments by Kinsch ; also published in *Rev. dr. étrangers* 2009, 699.

164 See for the qualifications and caveats which limit the application of Art. 8 in this

duty to recognise only becomes relevant when the situation falls within the scope of European law – although the rise of European citizenship has made it much easier to justify application of European rules.

Further, States could still, both under human rights[165] and internal market standards,[166] resist recognition on various grounds. Finally the debate on whether the principle of recognition could ever achieve the status of a rule of European primary law is still open and therefore much too tentative to constitute the basis of a general solution.[167] Hence, this principle based avenue falls short of a general, rule-based solution and does not seem beneficial in the short run.

To achieve decisional harmony, the favourite method has always been for States to agree on common rules. This is the very '*raison d'être*' of the Hague Conference. Certainly, if the Member States of the EU or of the

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context, Kinsch, Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law, in: *Liber amicorum Kurt Siehr*, 2010, 259-275, at pp. 272-275.

165 As clearly demonstrated by the Wilkinson case decided in 2006 by the English High Court. In this case, a couple residing in England, had celebrated their marriage in British Columbia. A petition was filed in England, to have the marriage recognised as such (and not as a civil partnership under the CPA). The High Court carefully reviewed the arguments made under Art. 8, 12 and 14 of the ECHR to deny the petition: *Wilkinson v. Kitzinger*, [2006] EWHC 2022 (Fam), 31 July 2006. The Court noted in particular that the fact that the UK legislator had chosen to create a separate institution for same-sex relations, i.e. the civil partnership, and to deny same-sex partners the possibility to marry, did not as such constitute a direct interference with or intrusion upon with the private or family life protected under Art. 8 ECHR (at §§ 80 ff).

166 See the explanations of Fallon, Constraints of internal market law on family law in: Meeusen et al. (eds.), *International family law for the European Union*, 2006, 149, at p. 160-162, §§ 13-15. Fallon notes that a Member State could still refuse to give effect to a same-sex marriage celebrated in another Member State using the public policy ground, provided the host Member State shows that the "substantive laws of the State of origin and of the host State differ in such a radical way about the concept of matrimonial union" (at p. 178-179, § 31). Mankowski has also noted that even if a principle of recognition were to be accepted under EU law, this would not prevent Member States from calling upon their public policy exception to withhold recognition to a foreign same-sex marriage (Mankowski/Höffmann, Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?, *IPRax* 2011, 247-254, at p. 253).

167 Since the two groundbreaking contributions (Lagarde, Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures, *RabelsZ* 2004, 225 ff and Baratta, Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC, *IPRax* 2007, 5 ff), the debate has raged fiercely in the literature with contributions calling for the development of a new recognition paradygm (*e.g.* Lagarde, La reconnaissance mode d'emploi, *Liber amicorum Hélène Gaudemet-Tallon*, 2008, pp. 481-501; Romano, La bilatéralité éclipsée par l'autorité: développements récents en matière d'état des personnes, *Rev. crit. dr. int. priv.* 2006, pp. 457 ff.; Pamboukis, La renaissance-métamorphose de la méthode de reconnaissance, *Rev. crit. dr. int. priv.* 2008, pp. 514 ff) countered by more critical voices (see *e.g.* Mansel, Anerkennung als Grundprinzip des Europäischen Rechtsraum – Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts, *RabelsZ* 2006, pp. 651 ff. and Struycken, Co-ordination and Co-operation in Respectful Disagreement, *Collected Courses*, 2009, at p. 9 ff).

Hague Conference were to adopt a Regulation or Convention dealing with same-sex relations, this would go a long way towards alleviating the many instances where recognition is denied today.

However, this is, again, not a miracle solution. The first caveat is that one may wonder if it is justified to adopt international rules dealing with a specific family relationship, while leaving 'regular' marriages out. Same-sex marriages are meant to be the almost exact copy of 'classic' marriages. Is it then not peculiar to provide specific rules for the recognition of this type of marriage? Further, why should different-sex relationships be denied the privilege of recognition?[168]

In any case, it is unclear at this stage whether there would be enough support among States to consider the adoption of a new international instrument. Calls for international solutions are not new.[169] The Hague Conference has been considering whether or not to undertake work in this area since 1996.[170] Yet, the results seem meager so far.[171] The only existing instrument at this stage, the Convention of the CIEC, has received little support – even though it does not purport to create a comprehensive legal framework for cross-border same-sex relationships, but only (and wisely) deals with the recognition side.[172]

If one looks at the draft instruments proposed by the European Commission in relation to matrimonial property, it is striking that the text is very timid. Art. 5 § 2 of the Draft Regulation relating to the property consequences of registered partnerships provides that a Member State "may decline jurisdiction if [its] law does not recognise the institution of registered partnership".[173] It is true that Art. 18 of the same draft

168 It is true that different-sex marriages may already count on the 1978 Hague Marriage Convention. This Convention has, however, only be ratified by a limited number of countries. If practice reveals significant problems of cross-border recognition of marriages, work should be undertaken to promote the 1978 Convention as well.

169 See *e.g.* Boele-Woelki, De wenselijkheid van een IPR-verdrag inzake samenleving buiten huwelijk, *FJR*, 1999, 11-13 (calling for an intervention by the Hague Conference) and Erauw/Verhellen, Het conflictenrecht van de wettelijke samenwoning. Internationale aspecten van een niet-huwelijkse samenwoningsvorm, *Echtsscheidingsjournaal*, 1999, 150-161, at p. 160, nr. 41-42. See more recently, Weiss-Gout/Niboyet-Hoegy, (fn. 27), at pp. 21-23 – outlining two options for an intervention by the EU.

170 In the 1980's the Hague Conference already showed some interest for work around unmarried couples, see the various notes drafted by the Permanent Bureau in relation to issues of jurisdiction, applicable law and recognition of judgments relating to unmarried couples (the documents were produced in 1987, 1992 and May 2000). The most recent note was drafted by Harnois/Hirsch, Note on Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage, Including Registered Partnerships, Preliminary Document No 11 of March 2008, 60 p.

171 In April 2011, the Council on General Affairs and Policy of the Conference invited the Permanent Bureau to continue to follow developments in the area of "jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples" (Conclusions and Recommendations of the Council on General Affairs and Policy, April 2011).

172 The Convention has been signed by Spain and Portugal and has only been ratified by Spain.

173 Proposal for a Council Regulation, 2011/0058 (CNS)

regulation makes it impossible for Member States to use their public policy exception on the ground that their law "does not recognise registered partnerships". This limitation may, however, be of little use if partners do not succeed in vesting jurisdiction in a court.

The Divorce Regulation adopted in 2010 does not go much further.[174] Its Art. 13 provides that courts of Members States are not required to pronounce a divorce if the marriage is not valid according to the local law. Although this provision could probably be used in other contexts as well, it seems to open up the possibility for States to refuse to entertain a petition for divorce filed by same-sex partners.[175] One may further note that the EU work in the field of free movement of persons has been quite timid when it comes to same-sex relationships, leaving it to Member States to decide whether to grant free movement rights to such relationships.[176]

It therefore seems illusory or at least premature to expect much from thorough cooperation between States in the form of a new international instrument.[177] Even if one were to focus on adaptation of existing instruments so that they could apply to same-sex relationships, it is unlikely that much support could be found.

What is left if one excludes international solutions? What remains is work on the national rules dealing with same-sex relationships. Much can be done at this level, even taking into account the probable resistance of some States. A first recommendation is certainly that States should not hesitate to act. While it is understandable that some countries hesitated to adopt specific conflict of law rules in a first stage, when same-sex

174 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*OJ*, L 343/10 of 29 December 2010).

175 One should further note that the recent Maintenance Regulation No 4/2009 (OJ L 7/1 of 10 January 2009) remains silent on the question whether it may be applied to same-sex relationships. The Draft Succession Regulation provides in Art. 1 (3)(a) that it does not apply to "family relationships and relationships which are similar in effect".

176 Art. 2 §2b of Directive 2004/38 provides that "the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State..." must be considered a family member but only "if the legislation of the host Member State treats registered partnership as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State" – excluding partnerships registered outside the EU. Directive 2003/86 is even more timid since it only provides family reunion for the "spouse" (as defined in Art. 1§ 1a) and leaves the right to family reunion for the unmarried partner to the legislation of Member State (Art. 4 § 3). For an analysis of Regulation 2004/38 and 2003/86, see Bell, Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union, *European Review of Private Law* 2004, vol. 12(6), pp. 613-632 and more recently, Gérard/Parrein, Seksuele geaardheid: een begrip in het Europese en Belgische vreemdelingenrecht?, *T. Vreemd* 2009, pp. 291-306. The same hesitation can be seen in the caveat made in Art. 9 of the European Charter of Fundamental Rights whose Art. 9 only protects to the right to family life "*in accordance with the national laws governing the exercise of these rights*".

177 One may add that the GEDIP never reached an agreement on the subject – see the meeting reports of the meetings held starting in 1999 in Oslo, available at *www.gedip-egpil.eu/gedip_reunions.html*.

partnerships and marriages were still fairly new,[178] such a timidity has no justification anymore. Experience has indeed shown that the absence of conflict of law rules brings about serious difficulties. The difficulties and possibilities of conflict of law rules in the field of same-sex relationships have been well explored. Legislators cannot therefore hide behind the novelty of the questions to refuse to legislate. Certainly in countries where same-sex relationships enjoy some form of legal recognition, work should be undertaken to offer a conflict of laws framework for such relationships. In other countries, the basic question should be addressed whether and to what extent foreign same-sex relationships deserve recognition.[179]

If one considers the countries where same-sex relationships have received some form of legal recognition – which are much more likely to act than States where such relationships are left 'outside the law' -, States are well advised no to limit themselves to one general rule when considering how same-sex relationships should be handled in the conflict of laws. As with different-sex relationships, there are many different aspects arising out of marriages and partnerships. If anything, the comparative overview has shown that these aspects may call for a specific treatment. Without going as far as the Dutch example,[180] preference should be given to a system where access to a legal status and effects of the status are governed by separate rules. When looking at the consequences of a long term relationship, one should not forget that such a relationship may have an impact on many different subjects. While it may not be appropriate to attempt to devise a rule for all possible questions – take the vexed question of whether partners may conclude gifts[181] - there is ample room to consider adopting a system combining a general rule with specific rules dealing with particular issues, such as divorce or alimony.

If work is made of specific conflict of laws rules dealing with same-sex relationship, a first question which arises is whether to go for a unitary system or to adopt different rules for different types of same-sex relationships. Some countries have adopted a broad approach, treating identically all same-sex relationships. This is the case in England and Germany. In a limited number of countries, a distinction is made according to the nature of the same-sex relationship. The latter approach may be justified in view of the differences which still exist between same-sex

178 As happened in France and in Belgium. It is striking that the French legislator did not intervene when modernising the PAC's in 2006. No specific provision on the cross-border aspect was included in the act of 23 June 2006 modifying the PAC's, even though a report had suggested to subject the PAC's to the *lex loci registrationis*, see Granet-Lambrechts, Trente-deux propositions pour une révision de la loi du 15 novembre 1999 relative au pacs, *Dr. famille*, 2005, 11 ff.

179 It cannot be excluded that in some countries, a radical position could be adopted, which denies any effect to such foreign same-sex relationships even if the partners are both foreigners. This could *e.g.* be the case in Hungary. It is, however, submitted, that such position will be exceptional. Further, even a blatant refusal to recognise same-sex relationships is better than uncertainty over the fate of such relationships.

180 Which probably boasts the most elaborate collection of conflict of laws rules dealing with same-sex relationships. Such a sophisticated system may prove impossible to achieve in countries where same-sex relationships are only reluctantly accepted.

181 See the observations by Peroz, (fn. 51) at p. 407, No 28.

partnerships under national laws. One may think of the divide between partnerships closely modeled on marriage and partnerships which still remain a pale copy thereof. For the latter category, it is more difficult to accept that access to the partnership is subject to another rule than the consequences of the partnership.[182] The obvious difficulty when adopting a fragmentary approach is to fine tune the dividing line between the two categories. Belgium and the Netherlands, which have both chosen to reserve a different treatment to same-sex marriages and partnerships, have encountered difficulties when dealing with this question. The criteria retained in Art. 2(5) of the Dutch WCP are broadly similar to those of Art. 58 of the Belgian Code of Private International Law. In both countries, the test retained has sometimes proven difficult to apply.[183] [184]

If one focuses on partnerships, the next question is whether to stay true to the application of the law of the country of origin, i.e. the *lex loci registrationis*, which is the current standard. Certainly, in the early days of same-sex partnerships, this solution seemed the only one acceptable given the limited number of countries where such relationship was recognised.[185] The rapid spread of this form of relationship has, however, greatly reduced the problem. It is therefore useful to enquire whether application of the rules crafted for different-sex marriages is warranted. Given the evolution of substantive law in many countries, it is certainly more realistic today to expect an alignment, albeit limited, on conflict of laws rules crafted for different-sex relationships. One may for example wonder whether it is necessary to have specific rules limiting access to same-sex marriages or partnerships, different from those in force for classic marriage. The threat of marriage or registration tourism, if it ever was convincing, has lost much of its credibility in view of the wider acceptance of same-sex relationships in a greater number of countries. Hence, rules limiting access specifically for partnerships could be disposed of. Similarly, when looking at termination of same-sex relations, it may probably be acceptable today to modify the safety provisions adopted when very few countries gave legal effects to same-sex relationships, and which provided an unconditional forum for dissolution to all those couples

182 As noted by Bucher, (fn. 55), at p.187, § 521.

183 In Belgium, the circular letter issued by the Minister of Justice in May 2007 has given rise to one difficulty in relation to the Dutch same-sex partnership. According to the circular letter, a registered partnership should be recognised as marriage in Belgium if it sufficiently approximates marriage. Such equivalence is, however, denied for the Dutch same-sex partnership, as Dutch same-sex partners may also opt for marriage. The result is that two same-sex spouses married in the Netherlands, will be subject to the rule drafted for partnership and not to the conflict-of-laws rules covering marriage. As a consequence, when one inquires which law applies to the effects of such relationship, application will be made of Dutch law and not of Belgian law as would be the case for other marriages (under Art. 48 of the Code).

184 See also difficulty in France where the recently adopted rule (Art. 515-7-1) does not define the partnerships covered. Hence a question has arisen as to whether the rule may be applied to same-sex marriages. Peroz raises the question without giving an answer: Peroz, (fn. 51), at p. 402, No 11.

185 This is in fact the main argument used by Devers to justify application of the *lex loci registrationis*, see Devers, (fn. 3), at pp. 201-206, §§ 319-329.

who had registered their partnerships in the forum.[186] As has been noted, the fact that more and more countries have introduced a form of registered partnership means that one could limit the application of this safety forum to those partners who have shown that they are unable to dissolve their relationships outside the forum.[187]

Is it realistic to expect a further alignment on rules crafted for 'classic' marriages, both as far as jurisdiction and applicable law are concerned? This would satisfy those commentators who have never warmed up to the widespread application of the *lex loci registrationis* – which has been called "militant".[188] Although the Swiss example shows that a country which has resisted opening marriage to same-sex partners, has nonetheless adopted conflict-of-laws rules drawing in large part from those applicable to marriage,[189] it is probably illusory to think that States will adopt conflict rules which are identical or even broadly similar to conflict rules used for 'traditional' marriages.[190]

A move towards rules more in line with those applicable for different-sex relationships would indeed face both technical and political obstacles. On the technical side, experience has shown that these rules would not be viable without additional nuances and exceptions. When dealing with access to partnership, one would need to introduce nuance to the strict application of the national law of the partners (or the law of the domicile) for fear of limiting too fiercely access to partnership. Likewise, the rule dealing with the consequences of a same-sex partnership would need to include a mechanism to deal with the case of where the applicable law does not recognise partnership.

Contemporary private international law provides tried and tested mechanisms which offer solutions for these problems. The issue of the 'unworkable' primary rule which could affect the rule dealing with the consequences of a same-sex partnership could easily be solved by adopting a sophisticated rule based on the so-called '*Kegel*'*sche Leiter*'. One could contemplate a provision using as primary connecting factor the law of the habitual residence of the partners and the law of the common nationality as a subsidiary connecting factor. The law of the state of registration could be applied if both the law of the common residence and of the common nationality prove unsatisfactory because they do not make

186As it is the case in the Netherlands. See Art. 4(4) of the Dutch Code of Civil Procedure, which provides that "*Met betrekking tot het geregistreerd partnerschap zijn het eerste tot en met het derde lid van overeenkomstige toepassing, met dien verstande dat de Nederlandse rechter steeds rechtsmacht heeft indien het geregistreerd partnerschap in Nederland is aangegaan*".

187The residuary forum would be downgraded to a '*forum necessitatis*', as has been suggested by Curry-Sumner, Private International Law Aspects of Homosexual Couples: the Netherlands Report, *E.J.C.L.* vol. 11.1 (2007) at p. 17.

188See *e.g.* Goldstein, (fn. 3), at p. 266: "*Ce rattachement exorbitant découle donc franchement d'une politique orientée et militante*".

189See the Art. 65a to d of the Swiss Private International Law Act of 1987, as amended.

190Some commentators have advocated such a move, see *e.g.* de Groot, (fn. 151), at p. 16.

any allowance for same-sex partnership.[191] This could at least in part obviate the need for the technique of 'adaptation', which requires to examine whether there exists an 'equivalent' institution in the law declared applicable.

If the adoption of these nuances to the conflict-of-laws rules seems too complex, one could also contemplate a mixed system, whereby access to the partnership would remain subject to the *lex loci registrationis*, while the consequences would be subject to a complex rule including fall back provisions dealing with cases where the law declared applicable does not know the partnership or marriage.

While technical solutions are available to deal with the difficulties which would arise if States were to decide to abandon the *lex loci registrationis*,[192] such a move remains difficult to contemplate for another reason: bringing same-sex relationships closer to different-sex relationships would 'promote' same-sex partnerships to quasi-equivalent of marriage. The alternative to the *lex loci registrationis* would indeed bring the conflict of laws treatment of same-sex relationships much more in line with the rules applicable to other forms of family relationships and, primarily, marriage. The *lex loci registrationis* system on the other hand offers the advantage of keeping same-sex partnerships at a larger distance from different-sex relationships.

That a further alignment on rules crafted for 'classic' marriages, both as far as jurisdiction and applicable law are concerned, appears, at this stage, out of reach, is evidenced by the fact that the question whether a marriage should be considered a marriage for private international law purposes when the two spouses are of the same-sex is still highly debated in some countries.[193] It is true that it does not seem coherent to accept in

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191 In the words of Jessurun d'Oliveira, the *lex loci registrationis* would be used "*comme voiture-balai*": Jessurun d'Oliveira, (fn. 36), at p. 95.

192 An additional technique worth considering is the mechanism of renvoi: this is particularly relevant since the conflict of laws rules adopted by States vary widely. Renvoi would help promote decisional harmony. Indeed, the application of the *lex loci registrationis* principle as a recognition rule does not necessarily allow a smooth recognition. The reference to the law of the country of origin may indeed, as is the case in Belgium or France, be understood as a mere reference to the substantive provisions of the law of origin, without any possibility to take into account the conflict of laws provisions (in France, Art. 515-7-1 refers to the "*dispositions matérielles*" of the law of the country where the relationship was registered). This could possibly lead to a quirk in the recognition process. Take the example of two partners, one of whom possesses the Belgian nationality, who have registered their partnership in Switzerland. According to Art. 65c-2 of the Swiss Act, these partners have elected to submit their partnership to Belgian law. Once the partners move to Belgium, their partnership will be deemed to be governed by Swiss law, even though they had made a clear choice for Belgian law. This problem is avoided in the Netherlands, which has made a clear choice to allow renvoi, see in particular Art. 5(2) (for the personal relationships) and Art. 7(2) (for the assets) *Wet Conflictenrecht Geregistreerd Partnerschap*.

193 Such as France - compare *e.g.* Fulchiron (who denies the existence of equivalence – Fulchiron, (fn. 26), at p.1254) and Callé, (fn. 31), at p. 1663, who argues that same-sex marriages should be treated as such. Callé rightly notes that this would not entail

general that concepts of private international law must be interpreted broadly and in particular that the category of marriage also includes foreign marriages different from the local ones - *e.g*. marriages celebrated before a religious authority or polygamous marriage – and to deny at the same time that a same-sex marriage should be seen as a marriage. However, practice has shown a strong resistance to this type of argument. Identical treatment of same-sex and different-sex relationships for private international law purposes is therefore far away. One should therefore not be surprised that the comparative overview reveals that most countries have kept their first generation rules, at least for partnerships, with their insistence on application of *lex loci registrationis*.[194]

All in all, there is certainly room for evolution of the legal framework applicable to same-sex relationships. While the impetus for such an evolution will probably be given by a greater convergence of the substantive law framework,[195] States should resist as far as possible the temptation to model their conflict-of-laws rules too closely on their substantive law and the policy underlying it. The controversy which continues to surround the application of Art. 17b EGBGB to different-sex partnerships illustrates the perils of linking too closely conflict of law rules to substantive law provisions.[196]

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recognition of all foreign marriages or of all effects arising out of such marriages.

194This has somewhat reduced the recognition problem. As noted, if all States applied the *lex loci registrationis*, this would allow a much smoother recognition (see Weiss-Gout/Niboyet-Hoegy, (fn. 27), at p. 13.

195This may occur quite naturally. When France modified the legal regime for its partnership in 2006 and moved (albeit slightly) in the direction of making it stronger, this already solved a number of problems : by making its PAC's more 'institutional', it was made clear that France would be less tempted to use its public policy exception to avoid recognising foreign partnerships which go further. See in this sense Kessler, Reconnaissance des partenariats étrangers: les enseignements de la loi du 23 juin 2006, *AJ Famille*, 2007/1, 23, at p. 24-25.

196It has been argued that Art. 17b of the EGBGB only considers partnerships which are similar to the one introduced under German law. As a consequence, registered partnerships between two persons of different sex would not be subject to the special rule introduced in Art. 17b (see to that effect, Martiny, Private international law aspects of same-sex couples under German law, in this book at § 2.4. This view has, however, been challenged. See *e.g*. R. Wagner, Das neue Internationale Privat- und Verfahrensrecht zur eingetragenen Lebenspartnerschaft, *IPRax* 2001, 281 at p. 292 arguing that Art. 17b should be applied to different-sex partnerships. Compare with Thorn, (fn. 140), at pp. 160-161 who argues that it may be possible to apply Art. 17b "by analogy" to different-sex partnerships. Some doubts have even been expressed concerning the possibility to apply Art. 17b to same-sex partnerships whose legal consequences do not go as far as the comparable German institution because they do not create a personal, family law commitment between the partners. Compare with the view accepted in Swiss law, where Art. 65a ff are deemed to be applicable to different-sex partnerships, Bucher, (fn. 55) at p.186, § 517 and p. 190, § 533.