

# Reasonable Expectations of International Cohabitants

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# Context

- Cohabitation on the rise for decades
- Marriage is no longer the only common way to structure adult intimate relationships
- Limited legal responses
- No Property division between cohabitants is most Western states

# Prevention of economic exploitation of one by the other

- Ontario Law Reform Commission : “when two persons have lived together in a relationship of some permanence, interdependence, and emotional importance to both of them, and that partnership comes to an end, the law should ensure a fair sharing of the assets that they acquired during the time they were together, a fair disposition of the family home”
- Cost of opportunity, specially for women - Cynthia Lee Starnes, “the explanation for the costs of mothering is simple enough: women who do the cooking, the laundering, the tutoring, the shopping, the chauffeuring, the bed-time story-reading, and the bathroom cleaning invest time and energy at home that limit their opportunity to invest in other things”

# Judicial and Legislative Response

- Extension of the remedies available for married couples in Australia, New Zealand, Hungary (Hungarian Civil Code, art. 685/A)
- Assimilation (Slovenia, Croatia...)
- Opt out systems (Canada, Ireland...)

# A confusing situation in private international law

- Piecemeal approach : « les concubins se passent de la loi, la loi se passent des concubins » (Bonaparte) - no specific characterization
- No conflict of law rule (except in ex-Yugoslavia – common nationality or common residence)
- ECJ 2019 Weil v. Gulacsi – distinction between “matrimonial property” and “dissolution of a property relationship arising out a de facto (unregistered) partnership” (in Hungary) – no analogy
- How to address property rights based claims at the end of the relationship? How to protect the weakest cohabitant?

# Fundamental rights of cohabitants

- No status – no right to continuity
- No registration (or crystallisation) – no recognition
- EHRC – Protection of cohabitants' right to family life (Johnston 18 dec. 1986)
- ECJ 2018 – Banger - enhancement of unregistered partners' entry and residence rights

# Inadequacy of the regulation of the 2016/1104 regulation

- Art. 3 of 'Council Regulation (EU) 2016/1104 : "registered partnership' means the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation"
- Applicable law in the absence of a choice (art. 26) : In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created

# A model based on the 2016/1103 Matrimonial Regimes Regulation?

- Art. 26 (1) : In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:
  - (a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that
  - (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that
  - (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances

# Possible use of the exception clause

- Art. 26 (3) By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:
  - (a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and
  - (b) both spouses had relied on the law of that other State in arranging or planning their property relations