FRANCE 2

International surrogacy arrangements: a need for judicial cooperation?

International Judicial Cooperation in Civil Matters – European Family Law

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Once upon a time, there was a marvelous couple, Mr A and Mrs O, who had just got married and wanted to raise a family. They lived in a wonderful land called France. They had just received an envelope from the hospital notifying them of the results of the medical examinations that Mrs O had undertaken to ensure that she would have no difficulty in getting pregnant. Unfortunately, the results were negative and it was confirmed that Mrs O was sterile. The couple fell into despair until Mr A remembered a possible solution… surrogacy. They had heard about this before but did not know exactly what it was.

A surrogacy arrangement is a contract under which a woman (called the surrogate/gestational mother) agrees to carry a child - either altruistically or in exchange for payment – for a third party (a single parent or a couple, called the "intended parent(s)") and to relinquish the child to such person(s) at birth. It can be carried out with or without a donor (in the former case, either by involving both partners through embryo implant or through a donation from the fertile partner in the couple). An international surrogacy arrangement is one that involves more than one country of habitual residence, nationality or domicile of the intended parents, donors and gestational mothers. Such arrangements have developed in the last few decades, firstly due to the evolution of the 'family concept' - which has shifted from traditional heterosexual married couples to single parents, step-families, legal formalisation of relationships outside marriage or same-sex couples- and secondly, to the increase of the international mobility of persons as a result of globalisation. Even in situations that do not allow such parents/couples to have children themselves, they are still willing to become parents and therefore resort to surrogacy which has become an alternative to adoption.

It is likely that recourse to surrogacy arrangements will continue to grow in the coming years as a result of globalisation and changes in the 'family' structure[1].

Surrogacy has become an issue of international interest as it creates uncertain or "limping" parentage for the child (as a result of two States answering the question "who is/are your parent(s)?" in different ways) and consequently brings about difficulties for all stakeholders in the surrogacy arrangement (the child, the intended parent(s) and the surrogate)[2].

[1] For example in the UK (most accurate figure as it is linked to requests for parental orders (PO)), 75 POs were granted in 2008 and 149 in 2011 (Crawshaw, 2013).

[2] There are also other crucial policy concerns which are less visible: for example, issues of gender equality, reproductive freedom, exploitation, globalisation (the use of reproductive technologies has become an act of consumerism in a global market), health policy and regulation but these issues will not be addressed in this report as they go beyond family law concerns.

Family law does not evolve nor change at the rhythm of social and scientific progress and in the area of surrogacy this is also the case. At international level there are currently no international laws which make provisions for the rights of parentage whether from the perspective of the intended parents, the surrogate or most importantly the child. Indeed there is no instrument which allows for the recognition of international surrogacy arrangements in another State, following an administrative or judicial procedure in a State where such agreements are lawful. At European level, there is neither a harmonised solution nor a specific tendency. However all Member States seem to agree on the necessity to give legal parentage to children born under surrogacy arrangements.

Equally, as there is currently no harmonised private international law regulation on surrogacy *per se,* and regarding the question of which law governs the various legal issues arising in connection with such cross-border surrogacy, which is of pivotal importance, any individual Member State forum would apply its own national choice of law rules to the facts and circumstances of a particular case, on a case by case basis.

Considering the importance of this theme, studies are being carried out at EU level[3] aiming at considering the possibility of a European Union (EU) level response to the legal difficulties posed by surrogacy, as well as work at international level[4] to assess whether a convention between States could regulate the issues raised by surrogacy arrangements.

As views have not yet been harmonised and until specific regulations are set up, which may take time considering the controversial nature of surrogacy, judicial cooperation in this matter becomes crucial to protect the interests of all stakeholders.

Such cooperation has already started under the impulse of the European Court of Human Rights (E.C.H.R.) which put forward the prevailing idea of the 'child's best interests' to settle some of the issues raised by surrogacy. However, this cooperation is yet to be developed since this step does not solve all the issues encountered, especially that of parentage. This cooperation would support Judges to handle and/or determine a case that comes before them. Before discussing such possible solutions, it seems appropriate to address firstly the issues raised by international surrogacy arrangements which come about because of the plurality of solutions adopted by States at both EU and international level.

[3] A comparative study on surrogacy regimes in EU Member States, European Parliament, 2013.

[4] Several reports have been published by the Permanent Bureau of the Hague Convention since March 2011 "The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements" This work is still ongoing : http://www.hcch.net

I. The typical situations resulting from surrogacy arrangements that entail a need for judicial cooperation

Mrs O and Mr A decided to look into surrogacy to gain a better understanding of its pros and cons and take a decision in full awareness of all the possible risks they would be running.

A. Issues raised by surrogacy arrangements from a civil and particularly family law perspective

In the context of cross-border surrogacy, disputes potentially requiring court determination may arise pertaining to any one or more of the following issues:

1) Contractual issues

Contractual issues may arise at any point in the sequence of events inherent to the practice of surrogacy, from the point of initiation of the negotiation to the point of physical transfer of the child to the intended parents and the transfer in law of legal parenthood.

Firstly, during the process of negotiation of the contractual terms between the surrogate mother and the putative intended parents, with or without an intermediate surrogacy service provider, judges may be involved, if required under their respective laws, to verify the capacity or eligibility of the parties to enter into the transaction.

This check on the intent of the intended parents, which is not common to all countries, seems relevant as the absence of such can create a real danger that the children born through unregulated surrogacy arrangements may be exposed to child abuse or child trafficking[5].

At this stage, the judge is present but his role depends on the content of existing legislation on surrogacy. For example, in Greece, the role of the judge in approving surrogacy agreement applications is limited. There is little or no discretionary power and court procedure takes the form of a more formal bureaucratic procedure than discretionary assessment of the motivations behind the surrogacy agreement.

A counter example is South Africa where the judge is protector of the law and of the interests and rights of all the parties involved in the surrogacy arrangement. The judge will ask about the true reasons for choosing the method of surrogacy to have a child and search for a close relationship of mutual respect and appreciation among the parties.

[5] Huddleston v. Infertility Center of America, Pennsylvania, Superior Court, 1995: a case in which 6 weeks after delivery, the child died as a result of repeated physical abuse.

During the lifetime of the contract, there are a number of circumstances and contingencies that might create friction in the contractual agreement between the parties and have an impact on the future welfare of the children: if, for example a child suffers from some disability or other condition, in which case serious problems with the surrogacy arrangement might arise, or in the case of prematurity or multiple births, as the intention of the commissioning parents is often to have only one child. These contingencies will necessarily have an impact on the attribution of parenthood if the parents change their mind and refuse to take responsibility for the child.

At the end of the contract i.e. on due 'delivery', the contract may also be challenged. The parties may raise the issue of its enforceability before the courts.

Moreover, with respect to contracts, globalisation of surrogacy has entailed the worrying development of DIY (*do it yourself*) surrogacy arrangements, which have been established largely through the internet. These arrangements remain entirely unregulated, are often illegal and are fraught with difficulties; which was illustrated in the CW v NT case[6] in England. In this case the surrogate mother changed her mind and refused to hand over the child as planned. This led to a dispute before the UK courts over the terms of the agreement. The court was left to decide where the child should live and, on the facts, held that the child should live with his birth mother rather than the commissioning parents.

As far as private international law is concerned, there is no harmonised rule allocating jurisdiction in the surrogacy context[7]. Therefore for disputes pertaining to such contractual issues, each country will apply its own national rules to determine jurisdiction allocation, on a case by case basis.

The other issues relate directly to the status that can be given to the stakeholders: the intended parents, the child and the surrogate.

2) Parental civil status

Demographic, societal and scientific developments have converged in recent decades to make the question of whom the law should identify as the parents of a child a more complex and challenging question than ever before. In surrogacy, the answer to this question is crucial as it confers legal parenthood to person(s) in respect of a child born or to be born under a surrogacy agreement which ties in with the related attribution of parental rights and

[6] England and Wales High Court (Family Division) 33 - CW v NT & Anor, 21 January 2011.

[7] Council Regulation (EC) n°44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters ('Brussels I Regulation') shall not apply to the status of legal capacity of natural persons (art.1.2(a)).

responsibilities.

Parenthood from a biological perspective presupposes a genetic link between child and parents who must be causally responsible; whereas social parenting is defined and constrained by social norms (by law) and, for some people, parenthood should be established on the basis of intentions (private affair) rather than biology or genetics.

From the legal perspective, there is a widely varying approach among States to such fundamental questions as whether a sperm donor should be a legal parent or how the law should treat a person who has carried a child but has no genetic link to that child. This becomes more complex when surrogacy and parenthood relate to same sex partners as only a few States have passed legislation in this respect.

In States that either prohibit surrogacy or make no express provision for it, the general rule of attributing legal parentage applies – *i.e. generally that the woman who gives birth to a child is the legal mother of the child by 'operation of law' (that is automatically by virtue of the* ***mater semper certa est*** *principle) and the father is presumed to be the husband of this woman.* In such States, where the parties informally use surrogacy, the child ends up being cared for by someone with whom it has no legal connection. This creates a number of difficulties in relation to acquiring and carrying out parental responsibility, maintenance provisions and inheritance laws.

In order to remedy these situations, courts in some Member States[8] have been using adoption or other family measures subsequent to surrogacy arrangements (parental orders) while others have refused to do so, on the basis of public policy[9].

Similar difficulties arise when parties move to a State where surrogacy arrangements are more readily facilitated and/or available and when the rules on legal parenthood in the two countries are mismatched. For example, in some States[10], the intended mother can be automatically regarded as the legal mother while in most other countries the legal mother is the one who gave birth. In such cases, as the intended parents wish to have their rights of parentage, already acquired in the birth State, recognised in the State in which they will live, they have to start a process from scratch in the State of domicile.

There are no means by which internationally mobile parents can ensure that parental rights acquired in one State can be recognised in their State of habitual residence[11].

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[8] Austria, Belgium, Denmark, Italy, Ireland, The Netherlands, Sweden and the UK.

[9] France

[10] Ukraine, Russia or the state of California.

[11] Brussels II bis does not apply to the establishing or contesting of a parent-child relationship (art.1.3a) '*it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental*

Similar difficulties can arise in relation to fatherhood, as well as the recognition of two parents of the same sex.

Some States have accommodated these difficulties through judicial deliberations and/or through the publication of pre-emptive governmental advice[12]while others have initially refused to do so.

3) Child status

With regards child status, the United Nations Convention on the Rights of the Child[13] and the European Convention on Human Rights confirm a child's right to parentage, a right to know their parentage and a right not to suffer adverse discrimination on the basis of birth or parental status, the right of the child to have his or her best interests regarded as primary consideration in all actions concerning him/her, as well as the child's right to acquire a nationality and to preserve his or her identity.

The determination of who has legal parentage of a child is therefore of crucial importance. It will affect the child's childhood as well as adulthood. In fact, from parentage derive the very important rights of nationality, citizenship, and the right to abode (residence). It determines the person(s) responsible for childcare and the person(s) responsible for providing for a child. Therefore legal uncertainty or 'limping" parentage can only be a disadvantage to the child.

Also, cases involving cross-border surrogacy make the situation more complex as the rules on parenthood are not harmonised.

For example[14], Mr B and Mrs A are Irish nationals and are habitually resident in England. They arranged for surrogacy with a US woman by implanting an embryo from Mrs A's egg and Mr B's sperm. The child would therefore be the couple's full biological child. They obtained a Court decision in the USA granting them parentage and extinguishing the rights of the surrogate mother and her husband. They also obtained a passport for the child and travelled to Ireland in the hope of registering their child with the Irish Authorities and obtaining Irish citizenship for him. The Irish Authorities refused to recognise the child as the child of Mr B and Mrs A and treated the surrogate mother and her husband as the parents. Therefore the child is unable to acquire Irish citizenship.

Another example is that of Mr C and Mr D, a same sex couple that entered into a surrogate

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responsibility, nor to other questions linked to the status of persons (recital 10)'.

[12] Belgium, Ireland and the UK.

[13] United Nations Convention on the Rights of the Child - 20 November 1989 – articles 2, 3, 7, 8, 9.

[14] Examples taken from an article by Anne-Dawson Cornwell "the Hague Convention on Surrogacy: should we agree to disagree? ABA Section of Family law 2012 Fall CLE Conference, Philadelphia- October 2012.

agreement in the USA using Mr D's sperm. They are both from a European country in which surrogacy is illegal and have been living in England for a period of one year. They retain their respective nationalities. In the USA, they obtained a pre-birth order and, on the birth of twins, a passport for each child. Neither of them can claim domicile in the UK to allow them to apply for a UK parental order and accordingly their claim for parentage of the children is not recognised within an EU Member State and their children are not able to obtain the nationality of any EU Member State.

As illustrated by the above examples, absence of parentage can potentially leave a child not only parentless but also stateless given that their birth registration documentation is not recognised beyond the country of birth. This scenario is particularly problematic when the child needs not just civil status travel documents (i.e. a passport) but also a visa to gain entry into the home country of the intended parent(s).

Another issue relates to the will of the child to find out its biological parentage when he/she reaches adulthood but to date, there is no provision in relation to this search.

4) The Surrogate mother's rights

In most jurisdictions, a mother who gives birth to a child (whether or not she has any biological connection with the child) is treated as the child's parent. But, women who are willing to act as surrogate mothers, whether for altruistic or commercial reasons, often wish to be assured that the rights of parentage ascribed to them at the birth of the child can be revoked and vested on the intended parent, without a long and complicated legal process and without any stigma of parental failure.

In Portugal, in the case of single gay men, for instance, the surrogate mother is legally recognised as the mother of the *infant*; this raises issues that can affect the welfare of the child particularly as this recognition imposes responsibility on the surrogate while the reality is that after the birth of the child, the surrogate mother does not wish to care for the child.

Therefore, solutions must be found to respect the will of both the gestational mother and the intended parents which should result in simplifying the procedure to extinguish parentage on the one hand, while establishing it on the other.

While making their research, they figured out the wide range of possibilities throughout Europe and even in overseas lands. This was a good opportunity for them as they would have a choice…but how should they make this choice?… they did not really assess

whether risks would be triggered when returning to their sweet homeland with their newborn baby.

B. National solutions regarding issues raised by surrogacy

Legal responses to surrogacy differ widely from one jurisdiction to the next. By extension, this disparity creates conflicts in cross-border situations, especially when intended parents attempt to avail themselves of a more attractive regime than that which applies in their home jurisdiction.

1) Legal responses to surrogacy differ widely from one jurisdiction to the next

As two scholars point out, countries may be grouped into the following categories: "surrogacy-friendly" jurisdictions, "neutral jurisdictions" and "anti-surrogacy" jurisdictions[15].

a) Some jurisdictions authorise surrogacy

In these countries, surrogacy can be legal and unregulated, allowed by judicial precedent or by statute. **In India**, surrogacy is practised on an unregulated basis. This means that the contract is the Law of the parties, being specified that the Ministry of Health has published non-binding National Guidelines applicable to clinics. Once the child is born, the birth certificate is issued in the name of the genetic parents. The intended parents are, therefore, considered as the legal parents of the child in the case of gestational surrogacy with genetic material from both of them. **In the State of California,** surrogacy is allowed by judicial precedent[16]. Surrogacy contracts are enforceable and legal parenthood is established according to an "intent based" approach. Proof of intention is matched with a pre-birth parentage order, declaring the intended parents as the legal parents of the child. **In many other American States, as well as in the United Kingdom or in Greece,** surrogacy is allowed by statute. Again, regulation by statute differs among "surrogacy-friendly" jurisdictions. In jurisdictions like the State of Illinois, provisions of the Gestational Surrogacy Act establish consistent standards and procedural safeguards, protecting all parties involved in the agreement and confirming the legal status of the children born[17]. In **jurisdictions like the**

[15] K. TRIMMINGS, P. BEAUMONT, "General report of surrogacy", in *International Surrogacy Arrangements*, Ed. By K. TRIMMINGS and P. BEAUMONT, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 384 et al.
[16] Supreme Court of California, *Anna Johnson v. Mark Calvert,* 5 Cal. 4th.84; 851 P. 2d 776 (1993).
[17] 2004 – 750 ILCS 47, available at http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2613&ChapterID=59 (last visited 2nd April 2015).In brief, the Act sets out eligibility criteria, imposes some standard terms and secures

United Kingdom, regulation of surrogacy is stricter[18]. Surrogacy contracts are unenforceable and only altruistic surrogacy is authorised, for medical reasons and for couples residing in the U.K. The intended parents have to apply for a parental order, when they both have a genetic link with the child, or for adoption.

b) Some jurisdictions do not expressly prohibit surrogacy without authorising it

This "grey" category includes both jurisdictions in which some types of surrogacy are performed and jurisdictions where surrogacy is, *de facto*, impossible to execute. Belgium, the Netherlands, Austria or Finland illustrate these different approaches.

Belgium does not have specific legislation in matters of surrogacy. Thus, parentage is established either by law, recognition, "possession d'état" or through adoption. Everyone admits that surrogacy agreements are null and void under Belgian Law[19] but a consensus is already in favour of altruistic surrogacy[20]. At least two hospitals provide for altruistic surrogacy, when it is justified by medical reasons. They have elaborated private guidelines fixing only eligibility criteria. **In the Netherlands**, commercial surrogacy is prohibited, as article 151b of the Penal Code makes it a criminal offence. Contrariwise, altruistic surrogacy is legal. However no special procedure exists towards transferring parentage from the surrogate mother to the commissioning parents. Under Dutch Family Law, the mother is the woman who gives birth to the child. Judicial intervention is necessary to establish the maternal bond *vis-à-vis* the intended mother[21].

In Austria, surrogacy is not expressly prohibited. However, the rules governing assisted reproduction exclude the use of surrogacy[22]. Likewise, according to applicable rules on affiliation, the mother is the woman bearing the child. As ovum donation is illegal, no

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affiliation of the children, via an organized transfer from the surrogate mother to the intended parents, once the child is born.

[18] See. Surrogacy Arrangements Act of 1985 (http://www.legislation.gov.uk/ukpga/1985/49) and the Human Fertilisation and Embryology Act of 2008 , (http://www.legislation.gov.uk/ukpga/2008/22/contents).

[19]Such a contract would have been considered as contrary to the "ordre public" clause and to the principle of non-availability of the human body.

[20] See Comité Consultatif de Bioéthique, Avis du 5 juillet 2004, relatif à la gestation pour autrui, at : http://www.health.belgium.be/internet2Prd/groups/public/@public/@dg1/@legalmanagement/documents/ie2divers/7972417_fr.pdf (last visited 1st April 2015, available only in French).

[21] There are basically three routes to establishing affiliation, depending on the marital status of the surrogate mother. If she is married, divestment of parental responsibility followed by adoption is necessary. If she is engaged in a civil partnership, the intended father has to recognise the child, followed by divestment of parental responsibility coupled with an adoption procedure. If the surrogate mother is not in a legal relationship, the recognition and divestment of parental responsibility establish parentage through the sole commissioning father, leaving space for adoption, if appropriate.

[22] According to the Law on Reproductive Medicine,

indication can rebut this presumption. Otherwise, anonymous birth is strictly circumvented. Even if a man can establish his paternity through recognition, the establishment of the maternal bond, in respect of the intended mother would have been blocked. Surrogacy is, *de facto*, impossible in Austria. **In Finland too,** surrogacy is not expressly prohibited, and one study reveals that it was carried out prior to 2007[23]. Today, applicable rules on assisted reproduction and affiliation do not allow surrogacy. Indeed, the Act on Assisted Fertility Treatment, which came into force on September 1st 2007, prohibits the use of assisted medical reproduction techniques if "there is a reason to presume that the child will be given up for adoption". The Adoption Act of 2012 prohibits granting adoption if any remuneration for the adoption has been given or promised. As a result, general rules on affiliation make commercial surrogacy illegal, while specific rules on medical reproduction exclude gestational surrogacy, be it commercial or altruistic.

c) Some jurisdictions expressly prohibit all forms of surrogacy

France, Germany, Spain or Bulgaria are good examples of "anti-surrogacy" jurisdictions. In such countries, surrogacy is prohibited. As a result, a surrogacy arrangement cannot produce any effect. Thus, **in France**, the prohibition of surrogacy was first decided by the *Cour de Cassation*, sitting in full session in a 1991 decision judging on the one hand that a surrogacy contract was null and void, while on the other, the subsequent adoption request by the intended parents should have been rejected, as it was one of the effects of the surrogacy arrangement[24]. Since then, the legislator has enacted several provisions prohibiting surrogacy both in Civil Law[25] and Criminal Law[26]. Surrogacy is especially deemed to be contrary to the principle of unavailability of personal status, which cannot be subject to private agreements, and the principle of non-merchantability of the human body.

2) Disparities between jurisdictions generate conflicts in cross-border cases

Jurisdictions where surrogacy (especially a commercial one) is legal and not conditioned upon the pre-requisite of residence or nationality attract substantial numbers of intended parents originating from anti-surrogacy jurisdictions. Indeed, the fact that surrogacy is expressly

[23] http://ncbio.org/nordisk/arkiv/Salla-ppt.pdf (last visited 1st April 2015).
[24] Ass.Plen. 31 mai 1991, n°90.20-105, *Bull. A.P.,* n°4, p. 5 et s.
[25] Art. 16-7 of the Civil Code provides that "*any agreements relating to procreation or gestation for a third person are void*".
[26] Art. 227-12 and art.227-13 of the Penal Code, together with Art.511-24 of the Public Health Code.

prohibited in some countries creates flight to more understanding countries. As no International rules govern surrogacy we should not be surprised by cross-border conflicts between prohibitive and facilitative jurisdictions. Given the sensitivity of surrogacy, judges also have to solve conflicts regarding neutral jurisdiction.

a) Conflicts between prohibitive and facilitative jurisdictions: a closed door

Once a surrogacy agreement has been executed in a country where it is legal, the parent(s) nevertheless have to come back home, i.e. to a country they have left because surrogacy is illegal. It is on return that difficulties arise. The case for France is a perfect example.

In France, a surrogacy agreement and all of its subsequent effects is illegal. The illegality of surrogate motherhood is stated as a general principle, laid down in many branches of the Law. As a consequence, prosecutors may bring an action for nullity or transcription of any birth certificate revealing that the child is the product of surrogacy[27]. Neither a judgment nor a birth certificate can be transcribed under French law, from the moment it reveals surrogacy. Allowing such an act to produce any effect in France is contrary to public order[28]. Moreover, an intended mother cannot invoke any domestic regime, such as adoption or *possession d'Etat* in order to establish a maternal link[29]. More generally, birth as a result of a surrogacy agreement is considered as fraud. A prosecutor can therefore successfully contest the paternity of the father, even in cases where recognition is made in accordance with the foreign Law and French Law[30]. As a consequence, the whole situation created abroad is not recognised in France. This means that if a child can, nonetheless, live in France with his intended parents, the parents can only use the documents delivered abroad. In French law, a child born in the U.S. to French commissioning parents is seen as an American citizen, having an American birth certificate. A child born through surrogacy preserves his foreign status but cannot have any French status. A wall is erected between France and permissive jurisdictions.

b) Conflicts arising in neutral jurisdictions: still some tough issues to solve

It is not because surrogacy is not expressly prohibited in neutral jurisdictions that cross-border cases are easier to solve. In like situations, judges have to determine whether the fact that a child born via a surrogacy agreement can fit in with common general rules.

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[27] Cass. Civ. 1ère, 17 décembre 2008, Bull, civ. I, n°289. In this case, the Cour de Cassation judged that prosecutors have a responsibility to bring an action.

[28] Cass. Civ. 1ère, 6 avril 2011, Bull. Civ.I, n°72.

[29] Cass. Civ. 1ère, 6 avril 2011, Bull.Civ.I, n°70.

[30] Cass. Civ. 1ère, 13 septembre 2013, Bull.Civ.I, n°176.

Judges firstly face a political issue and Belgium illustrates this well. Over there, altruistic surrogacy for medical reasons, in accordance with the guiding principles enacted by the hospital where it is carried out, is tolerated. But does this mean that Belgian courts must welcome commercial surrogacy performed in another country where ethical standards are unknown or differ clearly from Belgian well-established principles, knowing that under Belgian law there is a general principle prohibiting commoditisation of the human body? How should a U.K. court react to British citizens going abroad, for example to India or Ukraine, while surrogacy is legal in the UK but submitted to stricter conditions? Is this form of law shopping a case for fraud?

Judges from neutral jurisdictions are, more generally, confronted with legal problems. Belgium, again, is a good illustration. In an action brought by an intended father regarding the recognition of a Ukrainian birth certificate, a Court of First instance must firstly determine whether the certificate is the product of fraud and whether recognition is compatible with public order[31], applying articles 23 and 27 of the Private International Law Code. Secondly, applying art. 62 of the Private International Law Code, judges have to determine if recognition was correctly carried out under Belgian domestic law as laid down by the Conflict of Law rule. If parentage of the intended father is established, should a Court accept a request for adoption by the intended mother? Indeed, applying common general rules, the birth certificate mentioning the intended mother as the mother of the child cannot be acknowledged under Belgian Law. Adoption under common general rules is the only way to establish motherhood. Do these rules fit with surrogacy?

Parties are placed in a precarious position and judges are confronted with dilemma. Judicial dialogue and cooperation therefore seem to be the way forward.

Now the situation became clearer for Mr A and Mrs O, so they decided to go to an exotic and mysterious land, called India, where they would have no difficulty in finding a generous woman who would accept to carry a child for them. The decision was taken and they flew to India. After a year, the baby was born. It was a beautiful girl called K. They then decided to return to their homeland and start their family life. While making all the necessary arrangements to be recognised as K's official parents, they came up against the French authorities who refused to complete the formalities, as they were not K's biological parents. Once again, Mr A and Mrs O were devastated… how could they make sure that

[31] Art. 18 and 21 of the Private International Law Code.

they would be able to officially care and provide for K?… Mrs O decided to go to the European Court of Human Rights because she knew that her case would be heard, as the interests of her child were at stake.

II. The typical situations resulting from surrogacy arrangements that lead to new solutions in settling the issues raised in the absence of harmonised legislation in this respect

A. De *lege lata*: judicial dialogue and fundamental rights as a means to resolving the most critical issues

The fundamental rights approach offers solutions to protect the child's identity and family life in the case of cross-border surrogacy. This can be seen from national decisions and from the recent judgements of the European Court of Human Rights. Moreover, fundamental rights protected by the European Union also create a framework for surrogacy in Europe.

1) The best interests of the child brought about factual harmonisation even before the ECHR decisions.

The best interests of the child are a principle that was recalled by judges in many European countries even before the recent decisions of the European Court of Human Rights.

In Italy where surrogacy is forbidden, procreative tourism raises a problem when national authorities are confronted with decisions issued by foreign jurisdictions. On this subject, the Civil **Court of second instance of Bari** (Italy) took a very progressive decision in 2009[32] protecting the best interests of the child. In this case, the intended parents, an English man and an Italian woman, signed a surrogacy contract with an English woman who gave up her parental rights over the two children she gave birth to. British authorities recognised the intended parents as legal parents. The civil court of Bari accepted the claim of the Italian mother who wanted to be mentioned as the intended mother on the children's birth certificate in addition to the genetic parents who were on said certificate as required by Italian law. This decision was based on the best interests of the child recognising the intended mother as the legal mother. Moreover, the Court considered that surrogacy does not contradict international public order as it is permitted in some other Member States.

Similarly, **Belgium** provides many examples of decisions giving priority to the child's best

[32] 13.2.2009; Corte di Appello di Bari.

interests. On the one hand, in domestic cases, Belgian judges have agreed to grant adoption when surrogacy is gestational and altruistic and when it serves the interests of the child, no matter how illegal a convention is, as long as the adoption is founded on "fair basis"[33]. On the other hand, in international cases, when it comes to recognising birth certificates established abroad, the child's best interests "neutralise" the illegality of the surrogacy arrangement if the paternity of the biological father can be established by rules of acknowledgement of paternity. For instance, in the Hanne and Elke case[34], altruistic surrogacy took place in Ukraine between a Ukrainian surrogate mother and Belgian intended parents, who were the biological parents. The court acknowledged the birth certificate as valid and established a legal parental link with the father. Concerning the maternal link, it was established through adoption, considering that it was in the best interests of the child to have parentage with his genetic mother.

2) *Recent European Court of Human Rights case law on surrogacy fosters the evolution of national positions*

a) Analysis of ECHR decisions

The European Court of Human Rights has recently indicated that the best interests of the child, covered by article 8 of the Convention, must take precedence.

- **Mennesson v. France and Labassee v. France**[35]

In the two similar decisions, the European Court of Human Rights held that France could not deny legal recognition of parentage established in the American States of California and Minnesota through surrogacy.

In the **Mennesson v. France case,** the European Court of Human Rights examined the refusal to grant legal recognition in France to a parent-child relationship that had been legally established in California. The embryo, produced using the sperm of Mr Mennesson, was implanted in another woman's uterus. Mr and Mrs Mennesson had been recognised as the parents of twins, Valentina and Fiorella, by a Californian judgement. The French authorities nevertheless considered that the surrogacy agreement was unlawful and denied any

[33] Art. 344.1 Civil code: "*All adoptions have to be founded on fair basis and, if it concerns a child, they cannot take place outside of his/her best interests and respecting the fundamental rights that are recognised as his/hers by international law*".

[34] Court Antwerp, 22nd April 2010: case Hanne and Elke.

[35] European Court of Human Rights, June 26th 2014, Mennesson v France and Labassee v France (n° 65192/11 and n° 65941/11)

registration in the French birth register of the children. Consequently, the twins could not register for school, inherit from Mr and Mrs Mennesson under the status of children or stay on French territory after their majority.

The Court decided that there had been a violation of *article 8* of the European Convention on Human Rights concerning the children's right to respect for their private life. According to the Court, article 8 implies that everyone "*should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship*". The decision of the court was particularly based on the fact that the twins born through surrogacy were in a state of legal uncertainty and had been deprived of a component of their identity in relation to their parentage. The court underlined that the intended father was also the biological father which created a particular link with the children.

- **Paradiso and Campanelli v. Italy**[36]

In the **Paradiso and Campanelli v. Italy case**, which is not final, the European Court of Human Rights based its argumentation on the best interests of the child for a child born through surrogacy in Russia and unrecognised under Italian law when arriving in Italy.

In this case, a surrogacy contract was agreed upon between an Italian couple and a Russian woman through the intermediary of a Russian company. The Russian surrogate mother gave birth to a child resulting from in vitro fertilisation. The Italian authorities refused to transcribe the birth certificate issued by the Russian authorities mentioning the intended parents as the parents of the child because they were not the biological parents. This couple had broken Italian law on adoption and had ignored the prohibition of surrogacy arrangements. As the intended parents could not be legally considered as parents under Italian law, the court declared a state of abandonment of the child who was subsequently entrusted to the social services.

The European Court of Human Rights found that article 8 of the convention had been violated for the following three reasons:

First of all, the Court considered that the State must take into consideration the best interests of the child, no matter how the parent-child relationship had been established. In the case in point, it was nevertheless specified that the Italian authorities should not return the child to the intended parents since he had developed emotional ties with the foster family. **Then**, the court considered the family life criteria. The court deemed family life as a de *facto* matter that had

[36] European Court of Human Rights, January 27th, 2015, Paradiso and Campanelli v. Italy (case n°25358/12).

not been taken into account by the Italian authorities. This aspect of family life resulted from the fact that the intended parents acted towards the child as if they were its parents even if they had no biological link with the child and spent very little time with him. **To finish**, the Court emphasised the fact that it is necessary to ensure that a child is not disadvantaged on grounds of citizenship or identity because he or she was born through surrogacy. In this case, the Court used the fact that the child had not been given a new identity for two years to consider that he was at a disadvantage.

b) Developments following the ECHR decision.

After the recent ECHR decisions, national courts and administrative authorities have adapted their positions to take the best interests of the child into account.

In Spain, following the ECHR decisions, a circular was issued on July 11 2014 re-establishing the 2010 more liberal circular on recognition of foreign decisions that had been censured by the Spanish Supreme Court in February 2014[37]. Furthermore, in December 2014 the Minister of Justice stated that an amendment to the Spanish Law on Civil Registries, currently before Parliament, would be proposed in order to make sure that the recent decision of the ECHR was taken into account. **In France**, a circular of 25 January 2013 from the Minister of Justice anterior to the ECHR decisions directed the administrative authorities to grant citizenship certificates to children even if they were suspected of being born through a surrogacy arrangement. In a decision of 12 December 2014[38], the Conseil d'Etat, confirmed the validity of this circular. In these decisions, referring to article 8 ECHR, stating that the fact that a child was born abroad as a result of a surrogacy agreement could not deprive that child of French nationality if the child is entitled to such nationality on the basis of the relevant provisions in French law. **In Germany**, the Federal Court of Justice unexpectedly decided to recognise a Californian decision naming two intended fathers as the legal parents of a child[39]. The Court, relying on Article 8 ECHR and on the MENNESSON decision, followed the best interests of the child which was to recognise his legal parentage established in the USA.

It is an interesting example of judicial cooperation, through dialogue between the ECHR and national courts.

[37] 6th, February, n°835/2013, see also, 11th, February 2015 (5 to 4 votes).

[38] C.E., 2ième et 7ièmess. Section, *Association Juristes pour l'enfance*, n°367324,366989,366710,365779, 367317 et 368861.

[39] Bundesgerichtshof, decision of 10 December 2014.

3) The European Union contributes to the regulation of surrogacy through fundamental principles

There is only one EUCJ decision directly dealing with surrogacy. Nevertheless, European principles can contribute to providing a general frame work for surrogacy in the European Union.

- **EUCJ case law directly dealing with surrogacy: the rights of the intended parents**

In response to a question referred to the EUCJ by Irish and English courts, the EUCJ clarified maternity rights for surrogate parents in 2014 stating that EU law and especially the Pregnant Workers Directive do not require that a mother who has had a baby through a surrogacy arrangement should be entitled to maternity leave or its equivalent[40].

- **The freedom of movement of patients and its possible application to surrogacy arrangements**

Even if the E.U. do not specifically regulate surrogacy, the freedom of movement of patients could nevertheless be applicable to situations where intended parents are citizens or legal residents of an EU Member State and choose to go through surrogacy in another Member State where the practice is allowed, such as in Greece, which is the only country today.

Today, there is no case law directly concerning the freedom of movement related to surrogacy within the EU but many cases deal generally with the freedom of movement of patients, based on article 34 TFUE concerning freedom of movement of goods and 56 TFUE concerning freedom to provide services. Moreover, under Directive 2011/24 patients from one Member State can be treated medically in another. Nevertheless, it is not clear if surrogacy can be considered as medical treatment.

The Court recognised the best interests of Mrs O's child, which came as a great relief for Mr A and Mrs O… but still they understood that the battle was not yet over…they had to ensure that they would not face other issues in their homeland. Having gone through this experience themselves, they also wanted to make sure that no one else would face the difficulties they had faced and decided to search for a solution that would ensure that no child would be left without parentage … after a thorough search, they came to the agreement that the best solution was to address the question to judges all around Europe who were best placed to understand the stakes and find the most suitable legal solution.

[40] Z v A Government Department C-363/12; CD v ST C-167/12.

B. *De lege feranda*: judicial and administrative cooperation as a means to achieving an orderly and ethical inter-country operational system for surrogate motherhood

The fundamental rights approach based on judicial dialogue offers a case by case solution in cross border surrogacy, protecting personal status (citizenship) and the relationship of the child (with his biological father). However, human rights alone are not, as such, sufficient to create a comprehensive legal framework for international surrogate motherhood. Inter-country agreement must take over and discussions are currently underway. As this process is only just beginning, it seems important to highlight the added value brought by judicial cooperation.

1) Regulating cross-border surrogacy through recognition of foreign situations?

Recognition of foreign situations is a new type of methodology which was first discussed in literature in the field of foreign civil partnerships[41]. The diversity of new legislation in this field led to the conviction that, due to the absence of any universal acceptance, each national partnership was not exportable. The heterogeneity of domestic responses prevents the emergence of a general category presenting sufficient common characteristics conducive to the construction of a bilateral choice-of-law rule. The only solution was for courts or administrative bodies to extend forum law prospectively to parties wishing to create a partnership, based on a sufficient link with the jurisdiction, and then, to recognise the effects of foreign partnerships already created elsewhere, as long as they were valid, according to the law of the place of creation, notwithstanding the usual conflict rules in the field of personal status[42].

Conceived as a transitory solution specific to the case where an institution is insufficiently widespread, the recognition of foreign situations methodology was, nevertheless, extended, in the case law of supranational European Courts, in relation to perfectly well-known institutions such as the transmission of family name[43] or adoption, for which choice-of-law solutions had long existed. Thus, in the Wagner and J.M.W.L. v. Luxembourg case, the E.C.H.R. ruled that the adoption of a Peruvian child in Peru according to Peruvian Law by a single citizen of Luxembourg should be recognised in Luxembourg even if the Luxembourg choice-of-law rule

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[41] See, H. MUIR-WATT, "*European federalism and the new utilitarism*", 82 Tul. L. Rev.1983 (2008).

[42] Such a methodology has been applied by the French legislator for civil partnership, see art. 515-7-1 Civil Code.

[43] See, for example, ECJ, October 2nd, 2003, Garcia Avello v. Etat Belge, Case C-148/02, also ECJ.,October 14th, 2008, Grunkin Paul v. Standesamt Niebull, Case C-353/06.

would have designated Luxembourg Law[44]. The shift from a plenary adoption to a simple one, resulting from the fact that the exequatur procedure could not be successful because the Peruvian court had applied Peruvian Law, failed to respect family life. Refusal of recognition was an unwarranted interference in the family relationship, between the mother and the child, which Ms Wagner had legitimately believed to be valid.

Scholars have now systematised the recognition of foreign situations as a method based on the premise that protection should be given to a situation or a status which has arisen validly elsewhere, even if the governing law does not conform with the forum's domestic regime, as soon as it is necessary to neutralise the negative "effect of the frontier" on long term personal relationships[45]. This methodology is founded on the respect for personal identity, in harmony with the gradual transformation of substantive European Law and favours the continuity of pre-established situations fostered under foreign systems, in the context of heightened international mobility. As a result, the recognition of foreign situations can be applied even if no judgment or public act was involved in its creation. Using this method, the judge becomes a guarantor of the balance between individual identity and collective identity, as he still has to establish criteria for importing a situation within his jurisdiction.

In our opinion, the recognition of foreign situations methodology seems appropriate to the issues raised by cross-border surrogacy. In this area, facts precede the law. The surrogacy arrangement is exposed to the adverse effects of the border, and a forum court has to question faith and credit due to the foreign act. The crucial issue lies within the conditions wherein the situation has been created.

2) Recognition of foreign situations using judicial and administrative cooperation

Regulating cross-border surrogacy through the recognition of foreign situations methodology implies specifying conditions from which a judge from a restrictive or prohibitive country should recognise legally created surrogate motherhood in order to draw conclusions for the case he has to settle. In this respect, judicial and administrative cooperation may help forum courts. The experience gained from the Hague Convention of 29 *May 1993 on Protection of Children and Co-operation in Respect of Inter*-Country Adoption ("Hague Convention") offers some interesting perspectives.

The Hague Convention set up a framework for international adoption and was based upon the

[44] June 28th, 2007 (n°76240/01), §. 117-136., Rev. Crit. Dr. Int. 807, note KINSCH.

[45] The literature is impressive. See especially, P. LAGARDE, "Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjonctures" 68 RabelsZ 225 (2003) ; G.-P. ROMANO, " La bilatéralité éclipsée par l'autorité", 95 Rev. Crit. Dr. Int. 457 (2006).

premise that combating international child trafficking requires "*strict control over the activities of intermediaries which should meet the criteria defined for them*"[46]. Important similarities are therefore apparent between regulating international adoption and cross-border surrogacy[47]. However, a simple extension of the Hague Convention to international surrogacy would not be appropriate. As Hannah Baker says, the Hague Convention is based on a legal and cultural consensus about adoption, which is absent in the case of surrogacy[48]. In any case, some aspects of the Hague Convention are not compatible with surrogacy[49].Transferable lessons from the Hague Convention result from its regime. The text safeguards against abuse by regulating intermediaries, fixing a series of ethical standards and appropriate behavior and establishing a network of Central Authorities which supervise accredited bodies. Most of all, the Hague Convention provides for recognition of an adoption by the receiving State, only insofar as the adoption process in the State of origin satisfies a list of criteria. Thus, the State of origin has to anticipate recognition of the adoption by the receiving State, by following a procedure which guarantees the acceptability of the adoption and the consequences attached thereto[50]. Cooperation between Central Authorities ensures that a decision or a measure to be taken by a competent authority, known to produce an effect in another State, is not adopted without its acceptance.

This is an interesting scheme for an operational system regulating cross-border surrogacy: fixing ethical standards or eligibility criteria, which, when satisfied and certified by an authority (judicial or administrative)in the country where surrogacy takes place, could provide a judge with a sufficient basis to recognise surrogacy, in order, for example, to establish parentage through the intended parents. Formalising communication between the forum court and the authorities of the country where the situation has been created, through a Central authority network, fosters the emergence of an orderly and ethical cross-border surrogacy mechanism.

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[46] Report on Inter-country Adoption drawn by J.-H.-A. VAN LOON ("Van Loon report"). Prel.Doc.n°1 of April 1990 – Proceedings of the Seventeenth Session, tome II, p.11-119, at para 95.

[47] abuse of practices attracting international attention, vulnerability of some parties involved in the process etc.

[48] "A possible future instrument on International surrogacy arrangements: are there lessons to be learnt from the 1993 Hague Inter-country Adoption Convention?" In International Surrogacy arrangements: Legal regulation at the International Level, ed. by K. TRIMMINGS, P. BEAUMONT, *op. cit*. p. 361-375, at. 364.

[49] For example, the Hague Convention prohibits commercial adoptions (art. 4.3), requires that the consent of the mother must be given after the birth (art. 4.4) and forbids any contract between potential adopters and the biological parents (art. 29).

[50] See, H. MUIR WATT, D. BUREAU, *Droit international privé,* t. 1, PUF, coll. Themis, at 632.