SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

Collana diretta da Ilaria Queirolo e Alberto Maria Benedetti

33

SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

ESSAYS IN EUROPEAN AND INTERNATIONAL PRIVATE LAW

LAURA CARPANETO, FRANCESCA MAOLI, ILARIA QUEIROLO (edited by)

Towards Universal Parenthood in Europe

CONTRIBUTORS

BEATRIZ AÑOVEROS TERRADAS; LEONTINE BRUIJNEN; LAURA CARPANETO;OTTAVIA CAZZOLA CARMONA; TSVETELINA DIMITROVA; MARTINA DRVENTIĆ BARIŠIN; CRISTINA GONZÁLEZ BEILFUSS; EWA KAMARAD; THALIA KRUGER; FRANCESCA MAOLI; BORIANA MUSSEVA; MONICA NAVARRO MICHEL; FRANCESCO PESCE; ILARIA QUEIROLO; TINE VAN HOF, ANNA WYSOCKA-BAR; MIRELA ŽUPAN

EDITORIALE SCIENTIFICA
NAPOLI

This volume has been published and financed within the framework of the EU co-funded project UniPAR – Towards Universal Parenthood in Europe (JUST-JCOO-AG-2023- 101137859) and with the financial support of the University of Genoa (Department of Political and International Science).

This deliverable is funded by the Justice Program of the European Commission under the Grant Agreement no. 101137859. Views and opinions expressed are however those of the authors only and do not necessarily reflect those of the European Union or the European Commission. Neither the European Union nor the granting authority can be held responsible for them.

Via San Biagio dei Librai 39
Palazzo Marigliano
80138 Napoli
www.editorialescientifica.com
info@editorialescientifica.com

ISBN 979-12-235-0504-5

SCRITTI DI DIRITTO PRIVATO EUROPEO ED INTERNAZIONALE
Essays in European and International Private Law

Diritto privato, diritto europeo e diritto internazionale rivelano intrecci via via più significativi, chiamando docenti e studiosi dei diversi settori a confrontarsi e a collaborare sempre più intensamente. Da tale proficua osmosi scientifica origina la collana "*Scritti di diritto privato europeo ed internazionale*", con la quale si persegue l'obiettivo di raccogliere opere scientifiche – a carattere monografico e collettaneo – su temi di attualità in un'ottica interdisciplinare ed in una prospettiva di valorizzazione della stretta connessione tra le discipline coinvolte. Tale obiettivo trova un riscontro nelle specifiche competenze dei Direttori e dei membri del Comitato scientifico.

In "*Scritti di diritto privato europeo ed internazionale*" sono pubblicate opere di alto livello scientifico, anche in lingua straniera, per facilitarne la diffusione internazionale. I Direttori approvano le opere e le sottopongono a referaggio con il sistema del "doppio cieco" ("*double blind peer review process*"), nel rispetto dell'anonimato sia dell'autore, sia dei due revisori.

I revisori rivestono o devono aver rivestito la qualifica di professore ordinario nelle università italiane o una qualifica equivalente in istituzioni straniere. Ciascun revisore formula una delle seguenti valutazioni: a) pubblicabile senza modifiche; b) pubblicabile previo apporto di modifiche; c) da rivedere in maniera sostanziale; d) da rigettare. La valutazione tiene conto dei seguenti criteri: i) significatività del tema nell'ambito disciplinare prescelto e originalità dell'opera; ii) rilevanza scientifica nel panorama nazionale ed internazionale; iii) attenzione alla dottrina e all'apparato critico; iv) adeguato aggiornamento normativo e giurisprudenziale; v) rigore metodologico; vi) proprietà di linguaggio e fluidità del testo; vii) uniformità dei criteri redazionali. Nel caso di giudizio discordante fra i due revisori, la decisione finale è assunta di comune accordo dai Direttori, salvo casi particolari ove venga nominato tempestivamente un terzo revisore. Le schede di referaggio sono conservate in appositi archivi.

CONTENTS

CONTRIBUTORS

Beatriz Añoveros Terradas, Universitat de Barcelona

Leontine Bruijnen, Universiteit Antwerpen

Laura Carpaneto, Università degli Studi di Genova

Ottavia Cazzola Carmona, Universitat de Barcelona

Tsvetelina Dimitrova, Sofia University "St. Kliment Ohridski"

Martina Drventić Barišin, Josip Juraj Strossmayer University of Osijek

Cristina González Beilfuss, Universitat de Barcelona

Ewa Kamarad, Uniwersytet Jagielloński

Thalia Kruger, Universiteit Antwerpen

Francesca Maoli, Università Telematica San Raffaele Roma

Boriana Musseva, Sofia University "St. Kliment Ohridski"

Monica Navarro Michel, Universitat de Barcelona

Francesco Pesce, Università degli Studi di Genova

Ilaria Queirolo, Università degli Studi di Genova

Tine Van Hof, Universiteit Antwerpen

Anna Wysocka-Bar, Uniwersytet Jagielloński

Mirela Župan, Josip Juraj Strossmayer University of Osijek

Francesca Maoli, Università degli Studi di Genova

PREFACE

The goal of the Series of Essays '*Scritti di diritto privato europeo ed internazionale*' is to disseminate the results of academic research at European and international level, and to contribute to the national and international scientific debate, with methodological rigor and openness to multi and intra-disciplinary approaches.

The debate surrounding filiation in the contemporary context is certainly stress-testing the methods and rules of Private International Law, in their interrelation with Human Rights Law and, inevitably, with the different ways in which society reacts to new procreative techniques such as maternal surrogacy and assisted procreation. In the European Union, there are many different approaches on the matter on behalf of domestic rules, both from the perspective of substantial Family Law and of Private International Law. From the perspective of EU Law, this situation may create obstacles to the exercise of free movement rights of children and their families and infringe/undermine Human Rights. From this, the decision of the European Commission to present the Proposal for a Regulation COM(2022)695. However, until the new instrument is adopted, the effective and coherent application of the EU *acquis* is at times dependent on the operation of domestic law.

The UniPAR project, co-funded by the European Commission, aimed at improving the effective and coherent application of the EU *acquis* by *i)* identifying parenthood issues arising in connection to existing EU secondary law, also considering the possible impact of the future Parenthood Regulation at the EU level; *ii)* analyzing how parenthood is dealt with in the (PIL) domestic law in six jurisdictions, also on the basis of sample cases; *iii)* discussing the issues with stakeholders, and by developing final Conclusions and Reccomendations. The present contribution contains the results of the aforementioned research activities.

Ilaria Queirolo
November 2025

LAURA CARPANETO, FRANCESCA MAOLI AND ILARIA QUEIROLO*

THE PROTECTION OF RIGHTS OF THE CHILDREN BORN FOLLOWING AN INTERNATIONAL SURROGACY AGREEMENT IN (EU) PRIVATE INTERNATIONAL LAW

CONTENT: 1. International surrogacy agreements: the human rights and private international law implications – 2. The children's rights implications of surrogacy – 3. The private international law implications of surrogacy – 4. Surrogacy in the EU: the state of the art. – 5. Conclusions.

1. *International surrogacy agreements: the human rights and private international law implications*

Surrogacy is the practice through which a woman agrees to become pregnant, to give birth to a child and to give that child to a couple or to a single person after birth who will become the legal parents of the child[1]. In traditional surrogacy, the surrogate mother is also the biological mother and has, therefore, a genetic link with the baby. In "gestational" surrogacy, the surrogate mother has no genetic link with the baby. When the surrogacy agreement between the surrogate mother and the intended parent/parents envisages a compensation, surrogacy is qualified as commercial. On the contrary, when a mere contribution of the expences occurs during pregnancy, surrogacy is qualified as altruistic.

Surrogacy gives rise to a rich global market: it has been calculated that the children born by recourse to this practice per year are a number between 20.000 and 30.000 (but official data are lacking)[2] and in the so-

*The Article is the result of joint work of the Authors. However, para. 1 and 2 shall be attributed to Francesca Maoli, para. 3 shall be attributed to Ilaria Queirolo, para. 4 and 5 shall be attributed to Laura Carpaneto.

[1] See PREJUDO PRIETO DE LOS MOZOS P., *Surrogacy*, in BASEDOW J., RUHL G., FERRARI F., DE MIGUEL ASENSIO P., *Encyclopedia of Private International Law*, Cheltenham, 2017, p. 1691-1697; TRIMMINGS K., SHAKARGY S., ACHMAD C., *Research handbook on surrogacy and the law*, Cheltenham, 2024.

[2] In 2023, the global surrogacy market size was valued 14,95 billion of US dollars; it is expected to grow up to 99,75 billion US dollars by 2033. Europe is expected to grow the fastest during the forecast period. Furtermore gestational surrogacy through in vitro ferilization is expected to hold the largest share of the global surrogacy market and such market is expected to interest mainly the 38-39 age group. See https://docs.un.org/en/A/80/158.

called "Rolls Royce" jurisdiction (i.e. in those jurisdiction where commercial surrogacy is allowed and is expensive) a surrogacy agreement, facilitated by intermediaries, may reach an average cost 100.000 US dollars[3].

It is not impossible to have access to surrogacy in those legal orders admitting such practice, problems may arise when parenthood[4] of the intended parents need to be recognized in the State where the family wants to live[5]: when parenthood is not recognized, a limping situation exists.

As it result from the 2025 Report of the UN Special Rapporteur on violence against women and girls, the global market of surrogacy is giving rise to a very alarming situation.

The Report shows the different manifestations of (economic, psychological, physical, reproductive) violence against women and girls deriving from the existence of the global surrogacy market and the increased risk of human trafficking and of forced reproductive labour that women and girls face[6].

---

[3] Official data are available, however in the 2018 Un Special Rapporteur reporteur on the sale and sexual exploitation of children, including child prostitution, child pronography and other child sexual abuse material, available at https://docs.un.org/en/A/HRC/37/60 at p. 9, where abusive practices are disclosed, reference is made to a surrogacy attorney admitting that, through a criminal organization, she was selling babies at 100.00 US dollars.

[4] Parenthood, biological and legal parentage and filiation are terms used to describe the relation between a child and their parents. Differences among the three concepts may be envisaged (see BAINHAM A., *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions*, in GILMORE S. (eds), *Parental Rights and Responsibilities*, London, 2017, p. 159) and in a children rights perspective filiation should be probably used. In the present paper, the term parenthood is used coherently with the title of the UniPAR project.

[5] With the word "recognition", reference is here made to the procedure by which the civil status of surrogacy established abroad is accepted in the receiving State, involving private international law rules (regulating all three aspects of jurisdiction, applicable law and recognition).

[6] See Report of the UN Special Rapporteur on violence against women and girls, its causes and consequences. The different manifestation of violence against women and girls in the context of surrogacy, 14 July 2025, available at https://www.ohchr.org/en/documents/thematic-reports/a80158-different-manifestations-violence-against-women-and-girls-context.

Given that the practice of surrogacy is on the rise worldwide and a rise to the bottom is ongoing, the report calls for an eradication of surrogacy in all its forms and for the adoption of a internationally binding instrument prohibiting all forms of surrogacy[7].

The Report rejects the validity of previous solutions proposed with a view to decrease the risk of the trafficking of women and girls in surrogacy arrangements[8].

"Compromise solutions" accepting, to a certain extent, the practice of non commercial surrogacy have been proposed in 2018[9] and 2019[10] thematic reports of UN Special Rapporteur on the sale and sexual esploitation of children, including child prostitution, child pornography and other child sexual abuse material.

At global level, a relevant instrument aimed at finding solutions for the protection of children's rights in surrogacy is provided by the so-called "Verona principles"[11] elaborated under the aegis of the International Social Service and published in 2021, focusing on children's rights in relation to the adults involved in the agreement and also on the role of the intermediaries.

The above soft law instruments are compromisory in nature since they try shape a surrogacy model compatible with *de minimis* safeguards for the protection of the weaker parties involved and, among them, of the children in particular.

After few years since their adoption, such compromises seems to be not anymore acceptable given the situation pictured in the 2025 Report, which therefore recommends to work on an international instrument prohibiting surrogacy.

The Report also expressly acknowledges the importance of the private international law perspective, which in this field necessarily complements the human rights one. More precisely, the Report recommends to oppose the recognition of the status of children born following surrogacy agreements abroad and to consider the children born out of surrogacy agreements, left behind their biological mother, as unaccompanied minors.

---

[7] See para. 69.

[8] See para. 69.

9 The 2018 report is available at https://docs.un.org/en/A/HRC/38/47.

10 The 2019 report is available at https://docs.un.org/en/A/74/162.

11 The Verona Principles are available at https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy

However, it further clarifies that, in the meantime, "(w)hen deemed to be in the best interests of the child (…), the partner of the biological father could be allowed to adopt the child" with a view to avoid normalization of surrogacy and maintaining original parentage[12].

The Report concludes that the eradication of surrogacy by virtue of a ban of such practice in an international instrument and by virtue of the systematic opposition to recognize the status of children born following a surrogacy agreement is the only acceptable solution, whilst different solution are unacceptable.

However, the UN Special Rapporteur is aware of the fact that such a goal cannot be reached in the short/middle term. Meanwhile, therefore, parentage shall be established to a certain extent and, however, in a way that it does not make surrogacy a normal practice and to maintain the original parenthood.

It is in this "transition" from the ongoing reality to the eradication of surrogacy that private international law rules are expected to play a relevant role. In this light, the role of (EU) private international law rules i considered, focusing on the protection of children rights, is here considered.

2. *The children's rights implications of surrogacy*

The practice of surrogacy has implications on the rights of all persons involved: (i) the adults involved (i.e. intended parents, surrogate mother and gamete donors, if any), (ii) the children born following the surrogacy agreement, but also (iii) the children who are already in the family of the intended parents and of the surrogate mother as well as (iv) the future generations of children[13].

In following a child-oriented approach, children (born following a surrogacy agreements, as well as affected by it as in the case of the already existing children as well as children to be born) shall be considered as independent right-holders and shall have their best interests as a primary

12 See para. 70, lit. g).

13 FENTON-GLYNN C., *Surrogacy and the "best interests principle"*, in TRIMMINGS K., SHAKARGY S., ACHMAD C., *Research handbook on surrogacy and the law*, cit., p. 53.

consideration[14], not only when a court has to decide on parenthood concerning a child born out of surrogacy as well as when a State is devising legislation to regulate or not surrogacy arrangements[15].

In this respect, the first issue to consider is whether (purely) commercial surrogacy constitutes sale of children and, in the affirmative, whether the children have the "right not to be sold" by virtue of surrogacy.

The definition of what a sale of children is has been provided by Art. 2 of the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (hereinafter, OPSC), which considers sale of children "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any form of consideration".

Three elements need to occur for a sale of child to take place: (i) the transfer of a child, which may include both a physical transfer as well as a legal transfer of a child; (ii) the payment and (iii) the payment made in exchange for the transfer of the child (meaning that the payment is done by reason of the transfer).

Under international law[16], therefore, being sold is in itself a serious wrong, even if not accompanied by further wrongs (such as forced labour or sexual exploitation)[17].

---

[14] See Article 3 of the CRC.

[15] FENTON-GLYNN C., *Surrogacy and the "best interests principle"*, cit., p. 40. On the child rights perspective, see CHILD RIGHTS INTERNATIONAL NETWORK, *A Children's Rights Approach to Assisted Reproduction*, 2018, available at https://archive.crin.org/en/library/publications/discussion-paper-childrens-rights-approach-assisted-reproduction; WADE K., *The regulation of surrogacy: a children's rights perspective*, in *Child Fam Law Q.*, 2017, p. 113; DAMBACH M., CANTWELL N., *Child's right to identity in surrogacy*, in TRIMMINGS K., SHAKARGY S., ACHMAD C., *Research handbook on surrogacy and the law*, cit., p. 108; SINANAJ N., *Surrogacy and discrimination*, ibidem, p. 130.

16 UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 2018 Thematic Report on Surrogacy, A/HRC/37/60, available at. https://docs.un.org/en/A/HRC/37/60 and the 2019 Report on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements, A/HRC/37/60, available at https://docs.un.org/en/A/HRC/37/60.

17 On the differences between sale of children and trafficking of children and on the fact that the OPSC consider them different and separate conducts, the *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, 2009, p. 10. On the topic, see SMOLIN D., DE BOER-BUQUICCHIO M., *Surrogacy, intermediaries, and the sale of children*, in TRIMMINGS K., SHAKARGY S., ACHMAD C., *Research handbook on surrogacy and the law*, cit., p. 70.

Although the qualification of commercial surrogacy as sale of child is far from unanimous[18], as a matter of fact the three elements enlisted by Art. 2 of OPSC exists when a surrogacy agreement is concluded and the child is born.

The contracting States of the 1989 Convention on the rights of the Child (hereinafter CRC) – i.e. nearly all States, with the relevant exception of the United States – are under a duty to prevent the sale of child by taking "all appropriate national, bilateral and multilateral measures"[19].

On the other hand, the contracting States of the OPSC are under a duty to prohibit the sale of children (together with child prostitution and child pornography).

Beside the violation of the right of the child not to be sold and trafficked, other fundamental rights are challenged by surrogacy agreements (independently from the commercial or altruistic nature of the surrogacy agreement).

Firstly, it is implicit in the CRC the right of children to have a family, which is the natural environment for the growth and well-being of the children.

The children have also the right to preserve their identity, including nationality, name and family relations[20]. Moreover, the child's ability to preserve their identity, including their genetic, gestational and social origins, has a long-life impact on the child as well as on future generations[21].

Legal barriers sometimes prevent the child from discovering their genetic donors and/or surrogate mother, who may give been granted anonymity.

---

18 See the literature mentioned by See SMOLIN D., DE BOER-BUQUICCHIO M., *Surrogacy, intermediaries, and the sale of children*, cit., in footnotes 109, 110, 111 and 113. See also JOHNSON L., *Commercial Surrogacy is the sale of children? An Argument That Commercial Surrogacy Does Not Violate International Treaties*, in *Washington International Law Journal*, 2019, p. 701.

19 See Art. 35 of the CRC.

20 See O'CALLAGHAN E., *Surrogate Born Children's Access to Information About Their Origins*, in *International Journal of Law, Policy and The Family*, 2021, p. 1-19; see also WELLS GRECO M., *Surrogacy and Identity: Moving Beyond Genetics?*, in FREEMAN M., TAYLOR N. (eds), *Children's right to identity, selfhood and international family law*, Cheltenham, 2025, p. 110.

21 See Principle 11: Protection of identity and access to orogins, in the so-called "Verona principles", available at https://iss-ssi.org/storage/2023/03/VeronaPrinciples_25February2021-1.pdf.

However, under the CRC, States parties are under a duty to provide assistance and protection for the children deprived of some ora all elements of their identity, with a view to re-stablish them.

Identity also constitutes an element of the right to respect for private life enshrined in Article 8 of the ECHR. In the context under examination (although referring to a case of medical assisted procreation), the ECtHR has however highlighted that "[I]n determining the extent of the margin of appreciation [of States, *ndr*], a number of factors must be taken into account. When a particularly important aspect of an individual's existence or identity is at stake, the margin left to the State is limited. On the other hand, the margin of appreciation is wider when there is no consensus among Council of Europe member States on the relative importance of the interest at stake or on the best means of protecting it, particularly when the case raises sensitive moral or ethical issues. The margin of appreciation is also wider when the State has not adopted a legal or administrative measure to protect the individual's rights", as in the case at hand[22].

The practice of surrogacy also challenges the right to be immediately registered after birth, to have a name, to acquire nationality and the right to know and be cared for by his/her parents[23].

On the one hand, children should be registered without any discrimination related to the circumstances of birth. But on the other hand, the registration should be as complete as possible (making it possible to know the date and place of birth, the surrogate mother, the intending parents as well as the persons providing the human reproductive material).

There is a risk, when surrogacy occurs, that children are not assigned a nationality or citizenship due to the differing jurisdiction of their parents and other parties nationality.

In international surrogacy agreements, given the large number of adults contributing to third-party reproduction, there is an increase probability for children to be linked to adults having different nationalities, it might be therefore controversial to establish the nationality of the child (and this might affect also the private international law aspects of the familiar relationship).

---

[22] ECtHR, X v. Italy, Application no. 42247/23, 9 October 2025, para 65-66.

[23] See Art. 7 of the CRC.

Particularly relevant is also the child's right to the highest attainable standard of health (art. 24 CRC): in order to reach such standard, it is necessary to know the medical history of biological or genetic parents.

In third party reproduction, it is possible that the identity of the biological or genetic parents is unknown. However, it should be possible for the child to have information about risks of heritable disease, as an example.

3. *The private international law implications of surrogacy*

As one of the most clear example of the effects of the interaction between human rights and private international law, once the child is born and has a genetic connection with one of the intentional parents, the traditional barrier of the public policy needs to be interpreted in light of the best interests of the child and parenthood with the genetic parent is recognized.

Following the ECtHR's opinion and case-law on this topic[24], States parties of the ECHR are not under a duty to change their legislation, but they shall provide a procedure establishing parentage of the intended parents not having a genetic link with the child.

A similar approach is envisaged also by the International Law Institute's resolution on human rights and private international law, where with specific reference to parentage, under art. 14 clarifies that "(i)n view recognition of a parentage relationship established in a foreign State, the best interests of the child should be taken into particular account in the assessment of the public policy of the State where recognition is sought"[25].

[24] ECtHR, advisory opinion of 10 April 2019, request n. P16-2018-001.

[25] The resolution is available here https://www.idi-iil.org/app/uploads/2021/09/2021_online_04_en.pdf. On its art. 14, see FERACI O., *Art. 14 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law: la circolazione transfrontaliera del rapporto di filiazione*, in *Diritti umani e diritto internazionale*, 2022, p. 585.

However, at least in the EU context[26], private international law rules may play a more ambitious role in this field and be shaped, interpreted and applied in such a way to take into stronger account the human (*rectius* children's) rights implications of surrogacy.

At international level, efforts are ongoing in order (i) to convince States to eradicate surrogacy, in light of the dramatic consequences that it has on the persons involved and, among them, on the children in particular and (ii) to envisage *de minimis* safeguards which needed to be respected, but no binding instruments have been adopted so far.

Under a children rights perspective, the eradication of surrogacy is not does not seem a feasible solution, at least in the short time: moving from the international level down to the individuals entering surrogacy agreements, it immediately become clear that the global market of surrogacy does not stop even in cases of emergency (such as for example the war in Ukraine)[27].

What it seems more feasible is for private international law rules to help in the transition and to be shaped, interpreted and applied with a view to direct the persons involved towards solutions which are compatible (as much as possible) with human rights law.

But this is not an easy task.

The first problem is the idea itself that private international law rules should be shaped, interpreted and applied in light of human rights law. Such an idea is far from universal and it is frequently opposed outside the European Union context.

The second problem is whether parenthood following a surrogacy agreement shall be regulated differently from "natural" parenthood as well as from parenthood deriving from recourse to Artificial Reproductive Techniques (ARTs) different from surrogacy.

One of the main argument for opposing the adoption of special rules for parenthood following surrogacy is that it gives rise to a discrimination between the children born this way in respect of the others.

---

[26] See S.M. CARBONE, C.E. TUO, *Gli strumenti di diritto dell'Unione europea in materia di famiglia e il Trattato di Lisbona*, in *Studi sull'integrazione europea*, 2010, pp. 301-324, P. IVALDI, C.E. TUO, *Diritti fondamentali e diritto internazionale private dell'Unione europea nella prospettiva di adesione alla CEDU.*, in *Riv. Dir. Int. Priv. e Proc.*, 2012, pp. 7-36; P. FRANZINA, *The best interests of the child as a concern of human rights and European private international law*, in (edited by) E. BERGAMINI, C. RAGNI, *Fundamental Rights and Best Interests of the Child in Transnational Families*, 2019, pp. 141-156.

[27] LONG J., *Intercountry surrogacy: an Italian and Ukrainian issue*, in *Uridicnij Visnik Povitrane i Kosmicne Pravo*, 2017, p. 98-102, available at https://www.law.nau.edu.ua.

The third problem relates to the approach to be followed: whilst it is true that the main problems encountered in practice relate to the phase of recognition of the public document or decision establishing parenthood after surrogacy, it shall be also considered that this is due to the fact that States are generally facing situations where the child is already born (the so called *fait accompli* cases), when recognition is the only solution compatible with the protection of the children's rights and with the best interests of the child principle.

For a private international instrument to effectively contribute to enhance the protection of children's rights a coordination between the different legal systems shall be realized before the child's birth (*ex ante* or *a priori* approach).

The compromise solution (which, as mentioned above, the 2025 Report is not anymore prepared to accept) is essential under the private international law perspective: it is necessary to converge towards the safeguards (or at least to some of them) envisaged by the soft law instruments now existing (the UN Special Rappporteur's reports as well as the ISS principles) and to consider them as de minimis uniform conditions for an international surrogacy agreement to be adopted and to be considered valid in the countries involved.

This solution would grant the "eradicatation" of (only) purely commercial surrogacy agreements, by opposing the recognition of the status of children born following such agreement, with the possibility for national court to consider them as "unaccompanied minors" as recommended by the 2025.

Whether this solution is feasible is far from sure.

On the one side, the pro-surrogacy jurisdictions, characterized by a very permissive approach, will have to become "inhospitale" and move towards significant limitations (making them less appealing jurisdictions in the global surrogacy market). On the other side, the no-surrogacy jurisdiction will be required to change their attitude and accept what is for them unacceptable[28].

Beside the mentioned difficulties, such a solution also hides the risk to accept a form of sale of children and, therefore, to "artificially" restrict the legal concept of it, with the consequence that such restriction may extend beyond surrogacy.

[28] As authoritatively pointed out, "(n)ations are not obliged to open themselves to foreign intending parents and doing so can overwhelm some nations with demand pressures and monetary inducements which could corrupt and undermine domestic systems"

A less ambitious compromise could be allowing commercial surrogacy just among countries that expressly allow commercial surrogacy[29]. In principle, there might be still an interest from the side of the intended parents to move from a State allowing surrogacy, to another State which might be more liberal or might grant more guarantees in terms of medical services or assistance as the other one. Beside this, the intended parents and the child will be surely granted continuity of status.

But such a compromise rebus sic stantibus seems not feasible as well. Why a permissive State should limit its market by allowing surrogacy only in those case where it is sure that the child born following the agreement will have no problem in being recognized the child of the intending parents, when this is already the case by virtue of the interaction between private international law rules and human rights law?

Furthermore, such approach would not really make steps forward in the protection of rights of children born following a surrogacy agreemen and it would reinforce the market.

4. *Surrogacy in the EU: the state of the art*

With reference to the practice of surrogacy, the attitude of the EU member States vis-à-vis is far from uniform: a study dated January 2025 shows that there are (i) States which are have introduced laws providing for altruistic surrogacy (such as Ireland, Greece, Cyprus and Portugal), in one State a proposal has been made, but it has not been approved yet (The Netherlands), (ii) States where surrogacy is explicitly banned (such as Bulgaria, Croatia, France, Germany, Italy, Lithuania, Malta, Slovenia and Spain), (iii) States where surrogacy is implicitly banned, since there are bans concerning ARTs which in fact amounts to a ban to surrogacy (Austria, Estonia, Finland, Hungary and Sweden) and (iv) States where surrogacy is not (yet) regulated[30].

The EU context is not different from the worldwide one: the attitude of governments vis-à-vis surrogacy varies significantly and it is also subject to changes. The only significant difference is that there is no Member State allowing (explicitly) commercial surrogacy.

---

[29] See Verona Principle, 18.3: States that permit surrogacy should limit access to surrogacy to intending parents from States that permit commercial surrogacy.

[30] See DE GROOT D., *Surrogacy: The legal situation in the EU*, 2025, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/769508/EPRS_BRI(2025)769508_EN.pdf.

This is not surprisingly if one consider that the EU context is special with regard to the children's rights approach as well as to the interaction between human rights and private international law rules.

On the one side, a clear will of the EU to protect children's rights is expressed in art. 3 TEU, where it is stated that inside the EU as well as in the relations with the rest of the world. On the other side, children's rights are expressed protected by art. 24 of the Charter of fundamental rights.

It shall however be considered that the recognition of parenthood is to a certain extent granted by the existence in the EU legal order of an implied rule deriving from the combination of market principles and the special treatment granted to EU citizens applies, allowing recognition in a Member States of a status established in another Member State, although such recognition is allowed within the limits strictly necessary to respect EU law principles above mentioned[31]. Such a rule has been applied in cases concerning parenthood (not yet in a case expressly dealing with parenthood following a surrogacy agreement)[32].

It shall be further pointed out that the European Parliament has repeatedly spoken out against the practice of surrogacy, pointing out that the practice is a form of slavery and discrimination against women on grounds of sex - being clearly incompatible with the Charter of Fundamental Rights, in particular her article 3. par. 2, p. c (prohibition to use the human body and its individual parts as a source of profit); article 5 par. 3 (prohibiting human trafficking); article 21 (prohibiting sex discrimination); article 23 (equality between women and men), and - especially from the point of view of the child - may be incompatible with Art.

[31] On this topic, see M.C. BARUFFI, *Cittadinanza dell'Unione e maternità surrogate nella prospettiva del mercato alla luce della giurisprudenza della Corte di Giustizia*, in PESCE F. (ed), *La surrogazione di maternità nel prisma del diritto*, Naples, 2022, p. 13; E. DI NAPOLI, G. BIAGIONI, O. FERACI, R. CALVIGIONI, P. PASQUALIS, *La circolazione dello status dei minori attraverso "le frontiere" d'Europa: intersezioni tra diritto dell'Unione europea e diritto internazionale privato alla luce della sentenza Pancharevo*, in *Papers di diritto europeo*, 2023, available at https://www.papersdidirittoeuropeo.eu/wp-content/uploads/2023/02/Di-Napoli-Biagioni-Feraci-Calvigioni-Pasqualis_Papers-di-diritto-europeo-2023-numero-speciale-special-issue.pdf.

[32] Judgment of the Court (Grand Chamber) of 14 December 2021 V.M.A. v Stolichna obshtina, rayon „Pancharevo", Case C-490/20.

7 (respect for private and family life) and art. 24 par. 3 (the child's right to maintain contact with both parents)[33].

But this does not mean that European citizens are not parties of commercial surrogacy agreements, it means only that such agreements are generally put in place outside the European boundaries, in foreign jurisdiction.

In 2022, a proposal for a regulation concerning the private international law issues deriving from cross-border parenthood and envisaging also rules on cooperation and the certificate of parenthood has been published[34]. It is the first instrument of private international law in civil matters which makes express reference to the goal of protection of human rights as a priority (before the traditional goals of certainty and predictability of solutions).

Recital 2 states that the Regulation "aims to protect the fundamental rights and other rights of children in matters concerning their parenthood in cross-border situations, including their right to an identity, to non-discrimination and a private and family life, taking the best interests of the child as a primary consideration". And it goes on stating that the Regulation "also" aims to provide legal certainty and predictability.

---

[33] European Parliament legislative resolution of 14 December 2023 on the proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood COM(2022)0695 – C9-0002/2023 – 2022/0402(CNS). See also European Resolution of 5 May 2022 on the impact of the war against Ukraine on women (2002/2633(RSP)), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0206.

[34] On the EU proposal, see MAGRONE E.M., *Un nuovo tassello verso il mutuo riconoscimento delle situazioni familiari: la proposta di regolamento UE in materia di filiazione*, in *Studi sull'integrazione europea*, 2023, p. 101; GONZÁLEZ BEILFUSS C., *La Propuesta de Reglamento Europeo sobre filiacion: principales retos*, in *Anuario Espanol de Derecho Internacitonal Privado*, 2023, pp. 151-170; VALKOVA L., *The Commission Proposal for a Regulation on the Recognition of Parenthood and Other Legislative Trends Affecting Legal Parenthood*, in *Rivista di diritto internazionale privato e processuale*, 2022, p. 854; BIAGIONI G., *Il parere motivato del Senato italiano sulla proposta di regolamento UE in tema di* filiazione, in *Quaderni di SIDIBlog*, 2023, p. 443; QUEIROLO I., *The proposed EU Regulation on Parenthood: A critical Overview of the Rules on Jurisdiction*, in *European Legal Forum*, 2024, p. 1; PESCE F., *The Law Applicable to Parenthood in the European Commission's Regulation Proposal*, ivi, p. 6; DOMINELLI S., *Recognition of Decision and Acceptance of Authentic Instruments in Matters of Parenthood undet the Commission's 2022 Proposal*, ivi, p. 11; MAOLI F., *The European Certificate of Parenthood in the European Commission's Regulation Proposal: on the "Legacy" of the European Certificate of Succession and Open Issues*, ivi, p. 26.

Despite such an express statement, the proposal of regulation does not seem to adopt a genuine child-centric approach, neither it seems to contribute to the transition towards the eradication of surrogacy.

The EU proposal has surely the merit of considering all problems of private international law arising out from cross-border parenthood and, in so doing, it is capable of granting with a high level of certainty continuity of the status of parenthood of children already born when the status has been established in one of the member State. However, this result – to a certain extent - is already granted by human rights law (and case-law) and with specific reference to the EU legal order, by the implied rule above mentioned.

Given the constraints art. 81.3 TFEU, the future of the proposal is far from certain: France and Italy have declared their opposition to it, with the consequence that it is already clear that the requirement of the unanimity of consents under art. 81.3 will not be reached and that the only possible way out would be the enhanced cooperation.

Furthermore, exploitation of surrogacy has been expressly included within offences concerning trafficking in human being, by the Directive 2024/1712 amending the Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims[35]. As a consequence, it is now necessary at least to try to distinguish between "exploitation" of surrogacy, which is a crime against humanity, and "non-exploitative" use of such practice, which – as pointed out above - is however still very controversial in the EU (allowed in few Member States and qualified a crime in others).

5. *Conclusions*

The EU is, today, an important *forum* for discussing and finding possible (PIL) solutions to surrogacy in cross-border situations, since (i) Member States show very diverse (even polarized) attitudes vis-à-vis surrogacy, which reflect in a regional context what it is the situation at global level, (ii) it is one of the goals of the EU to protect children's rights also in relation with the rest of the world, (iii) recently the an EU act of secondary legislation (i.e. the Directive 2024/1712 amending Directive

35 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, in OJ L, 2024/1712, 24.6.2024.

2011/36 on preventing and combating trafficking in human beings and protecting its victims) has qualified the exploitation of surrogacy as as an offence concerning trafficking in human being make (reacting to a certain extent to the alarming situation pictured some months later by the 2025 Report in the fight against the detrimental effects of the global market of surrogacy).

As mentioned, it is at the level of private relationships that the transition to eradication of surrogacy (or at least to the worst forms of it) shall be realized by converging towards the *de minimis* uniform safeguards for the practice of surrogacy.

In this respect, the proposal of regulation on parenthood is the starting point for further discussion, being its initial stage: the solutions proposed by the Commission in 2022 should perhaps be re-considered in light of the ongoing situation, where the risks of exploitations have been voiced and reported.

Parenthood following surrogacy agreements requires *ad hoc* private international law rules and, among these rules, there is a need to introduce specific *de minimis* safeguards which are necessary for the protection of children rights in surrogacy agreements .

Such safeguards could be shaped starting from the recommendations deriving from the existing soft law instruments, such as the Verona principles as well as the reports of the UN Special Rapporteurs and perhaps an efficient solution could be to characterize them as overriding mandatory provisions.

Under the aegis of the Hague Conference of Private International Law, not only it has been considered the possibility to adopt specific private interational rules dedicated to international surrogacy agreements, but a mechanism aimed at granting the protection of the fundamental rights of the persons involved in international surrogacy agreements "*a priori*" (i.e. before the birth of the child) has been expressely discussed during the work of the Experts' Group of the "parentage/surrogacy project"[36].

Whilst the work on the above project at global level is ongoing, analogous solutions could be considered also at regional level.

The EU is in the position to propose original solutions in this respect.

---

[36] For a description of the so-called "a priori approach", see the Final Report oft he Experts' Group on the Parentage/Surrogacy Project, 2022, p. 28 available at https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf.

In a different field, the EU has found a very innovative solution: reference is made to art. 29 of the Directive 2024/1760 on corporate social responsibility[37]. This rule, on the one side, enlists *de minimis* procedural standards (concerning, for example, limitation, procedural costs, disclosure orders) which Member State are required to implement in their legal orders in order to grant access to justice for victims of the negative impacts of the activities of corporations and, on the other side, qualifies as overriding mandatory provisions the national rules implementing the above safeguards anytime the law of a third country is found to be applicable following the application of the relevant conflict of laws rules.

The mechanism envisaged by art. 29 of the Directive 2024/1760 aims at granting effective access to a judicial remedy anytime a corporation might be responsible for the negative impacts on people and on the planet of its activity along the chain of value.

The application of a similar mechanism in the field of surrogacy could help: it is firstly necessary to envisage the common *de minimis* standards of protection of the rights of the persons involved and then it is necessary to qualify them (or the national rules implementing them, in the case such a rule is provided by in a directive) as overriding mandatory provisions.

In this "transition" phase, such a compromisory solution could make it possible (i) for an "acceptable" international surrogacy agreement to produce effects across EU countries and, at the same time, (ii) to discourage the worst forms of surrogacy and progressively to possibly eradicate them.

The efforts that such an approach impose to the Member States which have a restrictive approach shall not underestimated: they would be required to accept what they have regulated at domestic level as unacceptable. On the other hand, this solution is a very pragmatic one, which if proves to be efficient in practice, might be further considered also at global level.

---

[37] Reference is made to the Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance), OJ L, 2024/1760, 5.7.2024. On the Directive, see BONFANTI A. and M. FASCIGLIONE M., *La futura direttiva europea sulla corporate sustainability due diligence: un'introduzione*, in *Diritti umani e diritto internazionale*, 2023, p. 655; GRECO R., *Corporate Human Rights Due Diligence and Civil Liability: Steps Forward Towards Effective Protection?*, in *Diritti umani e diritto internazionale*, 2023, p. 5; BONFANTI A., *Corporate sustainability due diligence directive: a human rights-based assessment*, in *Rivista del commercio internazionale*, 2024, p. 857-893.

All in all, there are similarities between the field of corporate social responsibility and surrogacy: surrogacy, as highlighted in the 2025 Report, is a growing and rich market, which relies on its own "chain of value" and where violations of human rights occur.

A reaction is needed and private international law instruments can (rectius shall) surely play their role.

ANNA WYSOCKA-BAR AND EWA KAMARAD

JURISDICTION IN PARENTHOOD MATTERS: THE CURRENT STATE OF LAW IN THE EU MEMBER STATES AND SOLUTIONS PROVIDED FOR IN THE PARENTHOOD PROPOSAL

CONTENT: 1. Introduction. – 2. Jurisdictional rules in matters relating to parenthood in the EU Member States. –2.1. Jurisdictional rules in domestic statutes. – 2.2. Jurisdiction over parenthood being an incidental question. – 2.3. Jurisdictional rules in bilateral agreements. – 3. Jurisdictional rules in the Parenthood Proposal. – 3.1. General rules of jurisdiction in parenthood matters. – 3.2. Other grounds of jurisdiction – 3.3. Exclusion of jurisdictional agreements. – 3.4. Jurisdiction with respect to parenthood being an incidental question. - 4. Relationship between the Parenthood Proposal if adopted, domestic rules on jurisdiction in parenthood matters and those of bilateral agreements. – 5. Conclusions

1. *Introduction*

The lack of common private international law rules on matters of parenthood[1] became visible and debated across the European Union (EU) and beyond because of cases similar to the one which resulted in the judgement handed down by the Court of Justice of the EU (CJEU) in *Pancharevo*[2], followed shortly after by the order in *Rzecznik Praw Obywatelskich*[3]. These cases provide an illustration of challenges which families crossing borders face due to differences in substantive family laws of

[1] EU instruments on private international law do not cover private international law aspects of establishment and contesting of parenthood. For instance, pursuant to Article 1(4)(a) of the Brussels II *ter* Regulation, the establishment or the contesting of a parent-child relationship is purposefully excluded from the scope of application. As Recital (10) of its preamble explains this regulation "*should not apply to the establishment of parenthood, since that is a different matter from the attribution of parental responsibility* (…)".

[2] Judgment of the Court (Grand Chamber) of 14 December 2021 V.M.A. v Stolichna obshtina, rayon „Pancharevo", Case C-490/20.

[3] Order of the Court (Tenth Chamber) of 24 June 2022 Rzecznik Praw Obywatelskich v K.S. and Others, Case C-2/21.

EU Member States when it comes to establishment of parenthood[4] within to new family forms unknown to some legal systems (for example, co-motherhood).

In response to these challenges, European Commission (EC) has launched an initiative titled "*Recognition of parenthood between Member States*". Its aim was to ensure that parenthood, as established in one EU Member State, will be recognised across the EU so that children maintain their rights in cross-border situations, in particular when their families travel or move within the EU. A public consultation carried by the EC indicated, as already clear from the facts of the *Pancharevo* case, that respondents are familiar with instances where parenthood established in one Member State was not recognised in another. The aim of the initiative was to prepare a new regulation. As minutes from the meetings of the Expert Group suggest a comprehensive instrument on jurisdiction, applicable law, recognition of decisions and authentic instruments was being contemplated. It was also discussed whether the new regulation should cover surrogacy, as it is "*a controversial topic that raises ethical,*

[4] Terms "*parenthood*", "*filiation*" and "*parentage*" are used to describe the relation between a child and their parent or parents. See: CARPANETO L., *Legal parentage and private international law: the establishment, contestation and recognition of children's legal parentage*, in CARRUTERS J., LINDSAY B.W.M. (eds), *Research Handbook on International Family Law*, Cheltenham, 2024, pp. 12 ff. Even if another term would be more adequate, in this chapter the term "parenthood" is used as it is used in the proposal being discussed below.

societal and legal questions". In December 2022, the EC presented a proposal for a new regulation (Parenthood Proposal or Proposal)[5]. Its overarching aim is to ensure that the parenthood of a child established in one Member State is recognised across the EU, thereby promoting legal certainty, protecting the rights of children, and strengthening mutual trust between national legal systems[6]. If adopted, it would represent a significant step towards further uniformization of private international law within the EU.

Until the Parenthood Proposal is indeed adopted, either in the proposed shape or amended, domestic private international laws of the EU Member States will continue to apply. The aim of this chapter is to focus on one aspect, namely jurisdictional rules of domestic private international laws of the EU Member States and such rules as designed in the Parenthood Proposal. The rules on jurisdiction are of particular importance. They determine the authorities of which EU Member State are competent to establish or contest parenthood in cross-border situations, setting the framework for all subsequent questions of applicable law and recognition.

[5] Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM/2022/695 final. The Proposal together with the Explanatory Memorandum to it (Explanatory Memorandum) is available at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0695> accessed 1 September 2025. For the overview of the Proposal see: GONZALEZ BEILFUSS C., PRETELLI I., *Recognition of Status Filiationis wthin the EU and Beyond. The Proposal for a European Regulation on Filiation Matters – Overview and Analysis*, (2022/2023) Yearbook of Private International Law, 24, pp. 275-307; LUKU H., F*ree Movement, Children's Rights and National Identity in the EU Parenthood Proposal*, (2022/2023) Yearbook of Private International Law, 24, pp. 345-366; BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, Cambridge, 2024. The Proposal was also thoroughly analysed within the European Law Institute initiative "*Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695 final*". The report prepared within this project was at the stage of finalising when this chapter was written.

[6] See Explanatory Memorandum, p. 1.

2. Jurisdictional rules in matters relating to parenthood in the EU Member States

Due to the lack of unified EU or multilateral international agreements on parenthood matters, the jurisdiction in such matters is regulated in EU Member States[7] in their domestic statutes or bilateral agreements.

2.1. Jurisdictional rules in domestic statutes

The domestic law provisions are to be found either in separate private international law codifications[8] or statutes on civil procedure[9]. General jurisdictional rules apply and provide for the jurisdiction of the courts of a given state on the basis of domicile or habitual residence of the defendant (*actor sequitur forum rei* principle)[10]. Other general rules, like the one on *forum necessitatis*[11], come into play as well. Additionally, special jurisdictional rules apply. They all provide for alternative grounds of jurisdiction, so that each of them might grant jurisdiction to the courts of a given Member State in addition to the grounds listed in general provisions.

In Bulgaria, the special jurisdictional rules result from Article 9 of the Bulgarian Code of Private International Law, titled "*Jurisdiction in Matters Relating to Parenthood*". Bulgarian courts and other authorities have jurisdiction over proceedings for establishment and contesting of parenthood if the child or the parent, who is a party to the proceedings, is a Bulgarian national or is habitually resident in Bulgaria[12].

---

[7] In this Chapter solutions provided for in the EU Member States will be presented on the example of six EU Member States represented within *UNIPAR: Towards Universal Parenthood in Europe* Project: Bulgaria, Belgium, Croatia, Italy, Spain and Poland. Given the diversity of this group it might be perceived as representative for the EU. References are made to National Reports prepared within *UNIPAR* and included in this volume. For the solutions existing in other EU Member States see: European Commission, *Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States. Final report* (2022) available at <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/recognition-parenthood-between-member-states_en> accessed 1 September 2025.

[8] See National Reports on Bulgaria, Belgium, Croatia, and Italy, in this Volume.

[9] See National Reports on Poland and Spain.

[10] See National Reports on Bulgaria, Belgium, Croatia, Italy, Poland, and Spain.

[11] See National Reports on Belgium and Poland.

[12] See National Report on Bulgaria.

Pursuant to Article 61 of the Belgian Code of Private International Law, Belgian courts have jurisdiction if at the moment of introducing the claim the child has habitual residence in Belgium or the person whose link of lineage is invoked or contested has habitual residence in Belgium or the child and the person whose link of lineage is invoked or contested have the Belgian nationality[13].

In Croatia, there is a special rule for personal status matters in Article 47 Croatian Private International Law Act, which applies also to proceedings concerning establishment or contestation of maternity or paternity (Article 47(2)(4) of the Croatian Private International Law Act). It provides that in proceedings concerning the personal status of natural persons jurisdiction exists, in general, if the person whose personal status is in question has habitual residence in Croatia or is a Croatian citizen (Article 47(1) Croatian Private International Law Act). Additionally, in accordance with Article 51, jurisdiction in matters concerning the establishment or contestation of maternity or paternity exists if at least one party has habitual residence in Croatia, or if both the child and the person whose maternity or paternity is being established or contested are Croatian nationals[14].

In Italy, pursuant to Article 37 of the Italian Private International Law Act, jurisdiction is attributed to Italian courts over parenthood matters with cross-border implications if one of the parents or the child is an Italian citizen or resides in Italy. This provision seems to be interpreted in the broad sense, so that jurisdiction exists even if the parent who is an Italian citizen or resident in Italy is not the one involved in the proceeding[15].

In Poland, jurisdiction of Polish courts exist if the child has their domicile or habitual residence in Poland; or the claimant, if different from the child, has had, for at least one year immediately prior to the commencement of the proceedings, domicile or habitual residence in Poland; or the plaintiff, if he or she is not a child, is a Polish citizen and has had, for at least six months immediately before the commencement of the proceedings, his or her domicile or habitual residence in Poland; or the plaintiff and the defendant are Polish citizens (Art. 1103^2 § 1 of the Polish Code of Civil Procedure). Jurisdiction of Polish courts is exclusive if all parties to the proceedings are Polish citizens and have their domicile and

[13] See National Report on Belgium.
[14] See National Report on Croatia.
[15] National Report on Italy.

habitual residence in Poland (Article 1103^2 § 2 of the Polish Code of Civil Procedure)[16].

In Spain, pursuant to Article 22(d) of the Spanish Judicial Branch Act, jurisdiction exists in matters of, *inter alia*, parent-child relationship if a child or a minor is habitually resident in Spain at the time of lodging the claim or the claimant is Spanish or is habitually resident in Spain for at least six months before the claim is lodged[17].

The above shows that different combinations of jurisdictional grounds are used, however there are some common denominators. These grounds are of personal nature, as they refer to the child or a parent, parents or parties to the proceedings and their nationality, domicile, habitual residence or residence. If a time factor is clearly stated it is the time when the proceeding was initiated.

2.2. *Jurisdiction over parenthood being an incidental question*

Currently, the solutions of the EU Member States differ when it comes to jurisdiction for the purpose of establishing parenthood being an incidental question in proceedings on other matters. The question is whether a court of a Member State having jurisdiction, for instance, in a succession case or a maintenance case could determine for the purpose of these particular proceedings parent-child relationship between respectively the deceased and a child being a potential heir or the maintenance debtor and a child being maintenance creditor.

For instance, in Bulgaria this matter is clearly regulated. There is a provision, which states that the court that has jurisdiction over the main claim may also rule incidentally on the preliminary/incidental issue in Article 38(1) of the Bulgarian Code of Private International Law[18]. Similarly, in Italy the seized judicial authority who holds jurisdiction over a cross-border dispute "*may decide, incidentally, issues not within Italian jurisdiction but whose resolution is necessary in order to decide the case before him/her*" pursuant to Article 6 of the Italian Private International Law Act[19].

Quite conversely, in Poland there is a provision, which extends jurisdiction in matters of parenthood to claims connected to it. Article 1103^3

[16] National Report on Poland.
[17] National Report on Spain.
[18] National Report on Bulgaria.
[19] National Report on Italy.

§ 3 of the Polish Code of Civil Procedure provides that if the court has jurisdiction over a case that involves the determination of filiation, then the Polish court also has jurisdiction over other claims related to filiation. Please note however that there is no rule in the Code, which would address the question of jurisdiction with respect to incidental question, including for parenthood being such an incidental question in other proceedings[20]. It seems therefore that the court should assess its jurisdiction separately with respect to the incidental question. Similarly, in Belgium if a question of filiation arises as an incidental question in another case, jurisdiction over the question of filiation should be determined on the basis of the jurisdiction rules on filiation[21].

The Parenthood Proposal would bring uniformity among EU Member State in respect of jurisdiction over parenthood being an incidental question in other proceedings (see para. 3 below).

2.3. *Jurisdictional rules in bilateral agreements*

Jurisdictional rules on parenthood matters in the EU Member States are included not only in their domestic statues presented above but also in bilateral agreements on judicial cooperation and legal aid (bilateral agreements)[22]. In accordance with constitutional provisions on hierarchy of legal sources in the EU Member States who have concluded such agreements, these agreements generally take precedence over the provisions of domestic statutes[23].

In Bulgaria, international jurisdiction under bilateral agreements is not regulated uniformly[24]. In some of these agreements, jurisdiction is determined solely with reference to the child. For instance, in accordance with Article 25(6) of bilateral agreement between Bulgaria and Russia and Articles 20(3) and Article 26 of the bilateral agreement between Bulgaria and Cuba, the competent court is that of the contracting state of which the child is a national, or where the child has domicile or habitual

[20] National Report on Poland.

[21] National Report on Belgium.

[22] On bilateral agreements concluded by some of EU Member States, in the context of succession matters, see respective chapters included in DUTTA A., WURMNEST W. (eds), *European Private International Law and Member State Treaties with Third States. The Case of the European Succession Regulation*, Cambridge, 2019.

[23] National Reports on Bulgaria and Poland.

[24] National Report on Bulgaria.

residence[25]. In other Bulgarian bilateral agreements, jurisdiction is determined with reference to both the child and the parent. For instance, pursuant to Article 27 of the bilateral agreement between Bulgaria with Poland the competent court is that of the contracting party whose nationality the child holds. However, if both parties to the proceedings are domiciled in the territory of one of the contracting states, the court of that state also has jurisdiction[26]. There are also bilateral agreements, in which jurisdiction in matters relating to the establishment of parentage and legal relationships between parents and children lies either with the court of the state whose law is applicable, or with a court of the parties' common domicile. This is the case of the bilateral agreement between Bulgaria and Hungary[27].

Poland is also an example of an EU Member State having quite a rich network of bilateral agreements. Currently, Poland has such agreements with over 30 states[28]. They differ among themselves to a huge extent. Some bilateral agreements do not cover parent-child relationship matters (for example, the bilateral agreement with Egypt)[29], while others regulate only recognition and enfacement of decisions, including in family matters (for example, the bilateral agreement with China)[30]. Many contain both rules on recognition and enforcement of decisions and rules on jurisdiction and applicable law, including in family matters. These are bilateral agreements binding Poland with Hungary[31]; Bosnia and Hercegovina, Croatia, Montenegro, North Macedonia, Serbia, Slovenia (based on their succession to the agreement concluded between Poland and Yugoslavia

[25] National Report on Bulgaria.

[26] National Report on Bulgaria.

[27] National Report on Bulgaria.

[28] For the overview of Polish bilateral agreements in the context of family matters see: MOSTOWIK P., *Bilateralne umowy międzynarodowe o obrocie cywilnoprawnym z zagranicą* in MOSTOWIK P. (ed), *Międzynarodowe Prawo Rodzinne. Filiacja. Piecza nad dzieckiem. Alimentacja*, Warszawa, 2023, p. 537 ff. See also: SOŚNIAK M., *Les conventions conclues entre les pays socialistes sur le droit civil international et le droit international de la famille*, Collected Courses of The Hague Academy of International Law 1975, v. 144, p. 9 ff.

[29] Umowa między Rzecząpospolitą Polską a Arabską Republiką Egiptu o pomocy prawnej w sprawach cywilnych i handlowych, sporządzona w Kairze dnia 17 maja 1992 r., Dz. U. 1994 r. nr 34 poz. 126.

[30] Umowa między Polską Rzecząpospolitą Ludową a Chińską Republiką Ludową o pomocy prawnej w sprawach cywilnych i karnych, podpisana w Warszawie dnia 5 czerwca 1987 r., Dz. U. 1988 r. nr 9 poz. 65.

[31] Umowa między Polską Rzecząpospolitą Ludową a Węgierską Republiką Ludową o obrocie prawnym w sprawach cywilnych, rodzinnych i karnych, podpisana w Budapeszcie dnia 6 marca 1959 r., Dz. U. 1960 r. nr 8 poz. 54.

in 1960)[32]; Bulgaria[33]; Austria[34]; France[35]; Cuba[36]; North Korea[37]; Czechia, Slovakia (based on their succession to the agreement concluded

[32] Umowa między Polską Rzecząpospolitą Ludową a Federacyjną Ludową Republiką Jugosławii o obrocie prawnym w sprawach cywilnych i karnych, podpisana w Warszawie dnia 6 lutego 1960 r., Dz. U. 1963 r. nr 27 poz. 162. It was submitted that this bilateral agreement should be applied also in relations with Kosovo. See P. MOSTOWIK, *Bilateralne umowy międzynarodowe o obrocie cywilnoprawnym z zagranicą*, cit., p. 550.

[33] Umowa między Polską Rzecząpospolitą Ludową a Ludową Republiką Bułgarii o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych i karnych, podpisana w Warszawie dnia 4 grudnia 1961 r., Dz. U. 1963 r. nr 17 poz. 88.

[34] Umowa między Polską Rzecząpospolitą Ludową a Republiką Austrii o wzajemnych stosunkach w sprawach z zakresu prawa cywilnego oraz o dokumentach, podpisana w Wiedniu dnia 11 grudnia 1963 r., Dz. U. z 1974 r. nr 6 poz. 33.

[35] Umowa między Polską Rzecząpospolitą Ludową a Republiką Francuską o prawie właściwym, jurysdykcji i wykonywaniu orzeczeń w zakresie prawa osobowego i rodzinnego, sporządzona w Warszawie dnia 5 kwietnia 1967 r., Dz. U. 1969 r. nr 4 poz. 22.

[36] Umowa między Polską Rzecząpospolitą Ludową a Republiką Kuby o pomocy prawnej w sprawach cywilnych, rodzinnych i karnych podpisana w Hawanie dnia 18 listopada 1982 r., Dz. U. 1984 r. nr 47 poz. 247.

[37] Umowa między Polską Rzecząpospolitą Ludową a Koreańską Republiką Ludowo-Demokratyczną o pomocy prawnej w sprawach cywilnych, rodzinnych i karnych, podpisana w Phenianie dnia 28 września 1986 r., Dz. U. 1987 r. nr 24 poz. 135.

between Poland and Czechoslovakia in 1987[38]); Vietnam[39]; Ukraine[40]; Lithuania[41]; Belarus[42]; Latvia[43]; Russia[44]; Estonia[45] and Romania[46].

Polish bilateral agreements differ even when it comes to the way the material scope of the jurisdictional rule is described, for instance, expression like "*the determination and denial of paternity or maternity*" (agreements with Hungary and Latvia), "*determination or denial of the parentage*" (agreements with North Korea and Belarus), "*determination or denial of a child's descent from a specific person*" (agreement with Vietnam) "*determination and denial of the parentage of a child and the acknowledgement of a child*" (agreements with Ukraine, Estonia, and Romania) or generally "*relations between parents and children*" (agreements with Russia and Cuba) are used. Additionally, agreement with Lithuania mentions also "*the determination of the parentage of a child on the basis of mutual declarations*".

---

[38] Umowa między Polską Rzecząpospolitą Ludową a Czechosłowacką Republiką Socjalistyczną o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych, pracowniczych i karnych, podpisana w Warszawie dnia 21 grudnia 1987 r., Dz. U. 1989 r. nr 39 poz. 210.

[39] Umowa między Rzecząpospolitą Polską a Socjalistyczną Republiką Wietnamu o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych i karnych, sporządzona w Warszawie dnia 22 marca 1993 r., Dz. U. 1995 r. nr 55 poz. 289.

[40] Umowa między Rzecząpospolitą Polską a Ukrainą o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych sporządzona w Kijowie dnia 24 maja 1993 r. Dz. U. 1994 r. nr 96. poz. 465.

[41] Umowa między Rzecząpospolitą Polską a Republiką Litewską o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych, pracowniczych i karnych, sporządzono w Warszawie dnia 26 stycznia 1993 r., Dz. U. 1994 r. nr 35 poz. 130.

[42] Umowa między Rzecząpospolitą Polską a Republiką Białoruś o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych, pracowniczych i karnych, sporządzona w Mińsku dnia 26 października 1994 r., Dz. U. 1995 r. nr 128 poz. 619.

[43] Umowa między Rzecząpospolitą Polską a Republiką Łotewską o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych, pracowniczych i karnych, sporządzona w Rydze dnia 23 lutego 1994 r., Dz. U. 1995 r. nr 110 poz. 534.

[44] Umowa między Rzecząpospolitą Polską a Federacją Rosyjską o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych, sporządzona w Warszawie dnia 16 września 1996 r., Dz. U. 2002 r. nr 83 poz. 750.

[45] Umowa między Rzecząpospolitą Polską a Republiką Estońską o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, pracowniczych i karnych, sporządzona w Tallinie dnia 27 listopada 1998 r. Dz. U. 2000 r. nr 5 poz. 49.

[46] Umowa między Rzecząpospolitą Polską a Rumunią o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, sporządzona w Bukareszcie dnia 15 maja 1999 r., Dz. U. 2002 r. nr 83 poz. 752.

In many agreements the jurisdiction lies with the authorities of the contracting party of the child's nationality, as well as with the authorities of the contracting party of the child's domicile (agreements with Hungary, North Korea, Vietnam, Ukraine, Belarus, Latvia, Russia, Estonia, Lithuania). Agreement with Romania additionally mentions child's residence, and the one with Cuba – child's habitual residence. Some agreements provide for a special solution. This is the case of the agreement concluded with Yugoslavia. The jurisdiction lies with the courts of the contracting party of the child's nationality (Article 29(1) in conjunction with Article 28 of the agreement concluded with Yugoslavia). If however both parties are resident in the territory of one of the contracting parties, the courts of that party also have jurisdiction (Article 29(1) in conjunction with Article 28 of the agreement concluded with Yugoslavia). The agreement concluded with Czechoslovakia provide that the authorities of both contracting parties have jurisdiction. In accordance with Article 11 read in conjunction with Article 10 of the agreement with France jurisdiction lies with the courts of the contracting party in whose territory the parents and children are domiciled. If the parents or one of the parents are domiciled in the territory of one contracting party and the child is domiciled on the territory of the other contracting party, jurisdiction lies with the courts of the latter. Pursuant to Article 49 read in conjunction with Article 29 of the bilateral agreement with Austria, in matters concerning legal relations between parents and children, including matters concerning "*the origin of a child born in wedlock*" and "*the determination of the parentage of a child born out of wedlock*" the jurisdiction lies with the courts of the contracting party of which the person or one of the persons involved in the proceedings concerning their status was a national at the time the proceedings were instituted or in whose territory, at the time of the commencement of the proceedings, the person or all the persons involved in the proceedings concerning their status had their domicile or habitual residence, provided that they were nationals of one of the contracting parties or were stateless.

Bilateral agreements are silent as to incidental question, including jurisdiction over parenthood being an incidental question in another proceeding.

In case the Parenthood Proposal is not adopted, bilateral agreements will continue to apply. Importantly, these rules might continue to apply even if the Parenthood Proposal is adopted (see para. 3 of this chapter – below).

3. Jurisdictional rules in the Parenthood Proposal

Chapter II "*Jurisdiction*" of the Parenthood Proposal consists of 9 articles. Articles 6-10 provide basis for jurisdiction of the courts[47] of the EU Member States and will be subject to comments below. These rules seem to be less controversial than other rules of the Proposal, for example on recognition of foreign decisions, but still they should be discussed and proposals for significant amendments may be formulated.

Articles 11-14 concern procedural mechanisms (namely, seising of a court, examination as to jurisdiction, examination as to admissibility and lis pendens). These rules mirror their counterparts in other EU regulations, and therefore, will be purposefully omitted in this chapter as not specific to the Parenthood Proposal[48]. Article 15 „*Right of children to express their views*" also concerns the procedural aspects of the proceeding itself and will not be analysed[49].

---

[47] The proposal provides for the definition of "a court" in Article 4(4). The notion does not cover civil status registrars, who register births or receive declarations on acknowledgement of paternity. Consequently, jurisdictional rules of the Proposal are not addressed to civil status registrars. See BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 14. Their competence will be governed by domestic laws. In order to avoid any doubts as to the application of these jurisdictional rules to civil status registration, this should be clear stated in the future legal act.

[48] See Articles 17-19 Brussels IIb Regulation and respective comments by M. ŽUPAN in GONZÁLEZ BEILFUSS C., CARPANETO L., KRUGER T., PRETELLI I., ŽUPAN M. (eds), *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)*, Cheltenham, 2023, p. 185 ff. See also Article 29 Brussels Ia Regulation on lis pendens and comments by LAW S. in REQUEJO ISIDRO M. (ed.), *Brussels I bis. A Commentary on Regulation (EU) No 1215/2012*, Cheltenham, 2022, p. 466 ff.

[49] This provision was criticized as not "*well-suited to all proceedings for the establishment of parenthood*" – see European Group for Private International Law, *Observations on the Proposal for a Council Regulation in matters of Parenthood: Meeting of September 2023 (text adopted on 6.12.2023)* available <https://gedip-egpil.eu/wp content/uploads/2023/06/Observations-on-the-Proposal-for-a-Council-Regulation-in-matters-of-Parenthood.pdf> accessed 1 September 2025 and as of an unclear "*usefulness* (…) *in parenthood matters*" - see BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 33.

3.1. General rules of jurisdiction in parenthood matters

The Proposal establishes a set of alternative grounds of jurisdiction in matters relating to parenthood in Article 6. Jurisdiction may lie with the courts of the Member State of the child's habitual residence, the child's nationality, the habitual residence of the respondent, the habitual residence or nationality of either parent - at the time the court is seized; or the place of birth of the child. Each of these criteria independently confers jurisdiction, what most probably was aimed at providing flexibility to address the wide variety of cross-border family situations[50].

Habitual residence of the child is understood as the place where the child has established a stable and regular integration into a social and family environment. This concept prioritises factual connections over formal legal status, ensuring that the competent forum reflects the child's actual daily life, relationships, and social integration rather than merely formal or administrative ties. The proposed regulation does not provide a definition of habitual residence but relies on established interpretations developed in EU family law and the case law of the CJEU[51]. Habitual residence of adults (parents, respondent[52]) should also be understood as already established by the CJEU[53]. The concept is consistent with its use in other instruments, such as Brussels IIb Regulation[54], which employs

[50] Recital (39) of the Parenthood Proposal.

[51] Recital (40) of the Parenthood Proposal. See also: Judgment of the Court (Fifth Chamber) of 8 June 2017, OL v PQ, Case C-111/17 PPU; Judgment of the Court (Third Chamber) of 2 April 2009, A, Case C-523/07; Judgment of the Court (First Chamber) of 22 December 2010, Mercredi v Chaffe, Case C-497/10; Judgment of the Court (Third Chamber) of 9 October 2014, C v M, Case C-376/14; Judgment of the Court (First Chamber) of 15 February 2017, W and V v X, Case C-499/15; Judgment of the Court (Fifth Chamber) of 28 June 2018, HR v KO, Case C-512/17; Judgment of the Court (First Chamber) of 17 October 2018, UD v XB, Case C-393/18; Judgment of the Court (Fourth Chamber) of 12 May 2022, W. J. v L. J. and J. J., Case C-644/20.

[52] It is suggested in the literature that habitual residence or nationality of a person, whose parenthood is at stake should be used as a ground of jurisdiction. See BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 22.

[53] See, for example, judgment of the Court (First Chamber) of 16 July 2020, EE, Case C-80/19; judgment of the Court (Third Chamber) of 25 November 2021, IB v FA, Case C-289/20; judgment of the Court (Third Chamber) of 1 August 2022, MPA v LCDNMT, Case C-501/20.

[54] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019.

habitual residence as a central connecting factor in determining jurisdiction for cross-border family matters[55].

Also nationality (of the child or either parent) is one of the alternative grounds of jurisdiction provided in Article 6. This criterion reflects the traditional importance of nationality in civil law traditions, where personal and family status has often been tied to the individual's citizenship[56]. Whether a person is a national of a given state "*should be left to national law, including, where applicable, international conventions, in full observance of the general principles of the Union*"[57]. Recital (41) seems to suggest that for the purpose of establishing jurisdiction "*a child or a parent possessing multiple nationalities" should be perceived as a national "of any of the Member States whose nationality he or she possesses* (…)[58]."

The Proposal also recognises the place of "birth of the child" as a ground of jurisdiction. This connecting factor has a long usage in private international law and can be perceived as an objective and – in most cases - easily verifiable criterion. Unlike habitual residence, which requires a factual assessment of social integration, the place of birth in most cases is a fixed and indisputable fact, thereby enhancing legal certainty. It also has some weaknesses – the most important one being the fact that it does not have a lasting proximity to the child, especially in the case when it is neither child's place of habitual residence, nor country of nationality[59].

In the context of parenthood, this criterion could be seen as valuable in cases where neither habitual residence nor nationality can be relied upon, providing a subsidiary ground of jurisdiction as a safeguard against

---

[55] NÍ SHÚILLEABHÁIN M., *Adult habitual residence in EU private international law: an interpretative odyssey begins*, in *Journal of Private International Law*, vol. 21, 2025, pp. 30-67; PFEIFFER M., *Habitual residence and nationality as personal law connecting factors in European private international law*, in CARRUTHERS J. M., BOBBY L. W. M., *Research Handbook on International Family Law*, Cheltenham, 2024, pp. 53-71; LAMONT R., *Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law*, in *Journal of Private International Law*, 2007, vol. 3, pp. 261-281; ROGERSON P., *Habitual Residence: The New Domicile?*, in *International & Comparative Law Quarterly*, vol. 49, 2000, p 86-107.

[56] See PFEIFFER M., *Habitual residence and nationality as personal law connecting factors in European private international law*, cit., pp. 53-71; RAITERI M., *Citizenship as a Connecting Factor in Private International Law for Family Matters*, in Journal of Private International Law, 2014, vol. 10, pp. 309-334.

[57] Recital (41) Parenthood Proposal.

[58] Recital (41) Parenthood Proposal.

[59] See BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 26.

jurisdictional gaps (for example, in complex cross-border scenarios involving stateless children or displaced families). In the Parenthood Proposal this criterion is however not of subsidiary nature, but equally alternative to other grounds of jurisdiction. In such case it seems not in line with the underlying principle of proximity to the child, and thus should rather be omitted as alternative ground of jurisdiction[60].

3.2. *Other grounds of jurisdiction*

3.3.1. Jurisdiction based on the presence of the child

Where jurisdiction (within the EU) cannot be determined on the basis of the general rule included in Article 6, the Proposal provides for subsidiary jurisdiction based on the child's presence in an EU Member State (Article 7). This criterion ensures that a Member State in which the child is physically present can act as a competent forum, enabling proceedings to commence promptly even in situations where the link between the child and the EU is not intensive enough to establish jurisdiction based on Article 6. By linking jurisdiction to the child's actual presence, Article 7 prioritises the immediate protection of the child's rights and welfare, offering a practical solution to avoid delays or gaps in access to justice. As recital (42) explains this rule should allow the exercise of jurisdiction "*in respect of third-country national children, including applicants for or beneficiaries of international protection such as refugee children and children internationally displaced because of disturbances occurring in their State of habitual residence*". This provision is modelled after Article 11(1) Brussels IIb Regulation, however modified as the requirement that "*the habitual residence of a child cannot be established*" is missing[61]. Jurisdiction based on the presence of the child in a Member State, in cases the child is habitually resident in a third state and substantial connection with the EU is missing as none of the grounds listed in Article 6 is located in

[60] See: European Group for Private International Law, *Observations on the Proposal for a Council Regulation in matters of Parenthood: Meeting of September, cit.*, p. 2. The Group considers the pertinence of place of birth as jurisdictional ground as „*doubtful*".

[61] See: BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 24-25.

an EU Member State, might be exorbitant[62]. Hence, it would be advisable to align Article 7 with its counterpart - Article 11 Brussels IIb Regulation.

3.3..2. Residual Jurisdiction

Residual jurisdiction is supposed to operate as the safeguard within the Proposal's jurisdictional framework. It comes into play when Articles 6 and Article 7 does not allow for establishing a competent forum. In such circumstances, residual jurisdiction should ensure that the case does not fall outside the reach of judicial protection within the EU. Similar provision with respect to parental responsibility can be found in Article 14 of the Brussels IIb Regulation.

Given above, Article 8 of the Parenthood Proposal could be seen as complementary with respect to Articles 6 – 7, if not the provision on forum necessitatis provided for in Article 9. EU instruments on private international law containing jurisdiction rules provide for two different and rather mutually exclusive solutions. Some regulations (Brussels Ia Regulation[63], Brussels IIb Regulation) provide for rules on "residual jurisdiction" and are based on the assumption that the system of jurisdictional grounds of a given regulation is not of exclusive nature, meaning that domestic jurisdictional rules of the EU Member States may still come into play in cases clearly indicated by the regulation, as "residual". Others

[62] See: BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 24-25.

[63] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, pp. 1–32.

(Maintenance Regulation[64], Succession Regulation[65], Property Regulations[66]) provide for forum neccessitatis as they are based on the assumption that the system of jurisdictional grounds of such regulations is of exclusive nature, meaning that domestic rules are replaced completely by the rules of a given regulation. The Parenthood Proposal seems to try to combine both approaches, by proving for "residual jurisdiction" (Article 8) – on the one hand and including a provision on forum neccessitatis (Article 9) – on the other. Applying both approaches in practice would mean that a court of an EU Member State should first apply the regulation, then – in case it cannot assume jurisdiction based on Article 6 and Article 7 – it should turn to its own domestic jurisdictional rules, then – in case it cannot assume jurisdiction based on its domestic jurisdictional rules – it should "come back" to the regulation to apply Article 9 on forum necessitatis. This would be a very challenging task.

Given the above, it seems advisable that the EU legislator decides on one of the approaches. The one providing for exclusivity of jurisdictional rules of a given regulation, supplemented with forum neccessitatis seems to be more and more present in the EU private international law and suitable also for parenthood matters. In such case Article 8 should simply be deleted[67].

---

[64] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ L 7, 10.1.2009, pp. 1–79.

[65] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, pp. 107–134.

[66] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016 pp. 1–29 and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, pp. 30–56.

[67] See European Group for Private International Law, Observations on the Proposal for a Council Regulation in matters of Parenthood: Meeting of September 2023, cit., p. 2. The Group noted that rules provided for in Articles 6-7 are complemented by forum necessitatis provision. In such case „*the residual application of the national rules* (…) *as provided for in Article 8, seems to go too far, and does not reflect the exhaustivity of jurisdictional rules in most recent regulations*".

3.3.3. Forum Necessitatis

As already noted, the Proposal introduces forum necessitatis in Article 9, offering an exceptional ground of jurisdiction where no court of a Member State would otherwise be competent. According to this provision, a court in a Member State may hear a case if proceedings cannot reasonably be brought or conducted in a third State with which the case is closely connected, and if the dispute has a sufficient connection with that Member State.

By its nature, *forum necessitatis* has an exceptional scope, which ensures that it will not undermine the predictability of the jurisdictional framework. The inclusion of *forum necessitatis* reflects the EU's commitment to guaranteeing access to justice even in extraordinary circumstances[68]. It acknowledges that reliance on the general connecting factors may, in rare cases, still leave families without any viable forum[69]. Situations of armed conflict, political instability, or the absence of functioning judicial institutions in the relevant third State illustrate the practical necessity of this rule[70].

This approach is not novel. Article 9 of the Proposal is inspired by equivalent provisions in other instruments (Maintenance Regulation[71], Succession Regulation[72] and Property Regulations)[73]. The presence of such provisions across different fields demonstrates the coherence of the approach: ensuring a safety valve for access to justice while maintaining the primacy of general jurisdictional grounds.

As already mentioned, the rule on forum necessitatis does not seem to work well with rule providing for residual jurisdiction as the one in Article 8 of the Proposal. If the courts of an EU Member State could assume jurisdiction based on their own domestic rules, it would be hard for a court in another EU Member State to verify that "no court of a Member State" has jurisdiction, while it is the prerequisite for the application of Article 9. Hence it would be advisable to leave Article 9 in the Proposal provided that Article 8 on residual jurisdiction is deleted and the future

---

[68] SZPUNAR M., PACUŁA K., Forum of necessity in family law matters within the framework of EU and international law, in Polski Proces Cywilny, no. 4, 2021, pp. 565-568.

[69] See BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 26.

[70] Explanatory Memorandum to the Proposal, p. 14.

[71] Article 7 Maintenance Regulation.

[72] Article 11 Succession Regulation.

[73] Article 11 Property Regulations.

regulation does not leave any space for domestic jurisdictional rules in parenthood matters.

3.3.4. Exclusion of jurisdictional agreements

A distinctive feature of the Proposal is the exclusion (or rather omission or non-inclusion) of party autonomy in determining jurisdiction. Unlike some other areas of private international law, parties are not permitted to confer jurisdiction on a court of their choice. The limitation on party autonomy is justified by the unique nature of parenthood as a legal institution. Parenthood affects a child's civil status and fundamental rights, rather than representing a mere contractual arrangement between adults. As such, legal certainty and the protection of children take precedence over the private preferences of the parties. Ensuring that jurisdiction is determined according to objective criteria, rather than by private will, preserves the integrity of the legal system and safeguards the child's interests[74].

4. Jurisdiction with respect to parenthood being an incidental question

The Proposal addresses incidental question in Article 10. If an outcome of proceedings before a court of an EU Member State depends on the determination of parenthood being an incidental question, the courts of that EU Member State may decide on the determination of parenthood. Recital (45) of the Parenthood Proposal gives the following example of such case: "*if the object of the proceedings is, for instance, a succession dispute in which the parent-child relationship between the deceased and the child must be established for the purposes of those proceedings, the Member State having jurisdiction for the succession dispute should be allowed to determine that question for the pending proceedings, regardless of whether it has jurisdiction for parenthood matters under this Regulation.*" The determination on the incidental question in such case can produce effects only within the given proceeding and is not binding on other courts in other proceedings.

---

[74] Explanatory Memorandum, p. 13. See also: See BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, cit., p. 23-24.

Article 10 of the Parenthood Proposal is not a new concept. A similar provision on jurisdiction with respect to parental responsibility being an incidental question in another proceeding is included in Article 16(1) and 16(2) of the Brussels IIb Regulation.

By allowing the court hearing another case to address parenthood as incidental question, the Proposal promotes procedural efficiency, avoids fragmentation of proceedings, and ensures coherent adjudication. It also reinforces the child-centred approach, as a single forum can comprehensively consider various aspects of the child's legal situation.

4. *Relationship between the Parenthood Proposal if adopted, domestic rules on jurisdiction in parenthood matters and those of bilateral agreements*

The Explanatory Memorandum indicates Article 81(3) TFEU as the legal basis for the new regulation[75], which would require unanimous consent among EU Member State as to the Proposal. If, due to lack of unanimity, the Parenthood Proposal is adopted within the mechanism of the enhanced cooperation as already happened with respect to other instruments (Divorce Regulation[76] and Property Regulations), certain EU Member States will apply the new regulation as "participating Member States" and some will not[77].

Assuming that the Proposal is adopted on the basis of Article 81(3) of the TFEU and provides for "residual jurisdiction" of the EU Member States (Article 8), domestic jurisdictional rules on parenthood matters of the EU Member States will continue to apply and a court of an EU Member State will be able to turn to these rules in case no court has jurisdiction pursuant to the new regulation. Conversely, these domestic rules will

[75] Explanatory Memorandum, p. 6.

[76] 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, 29.12.2010, pp. 10–16.

[77] Denmark in any case will not be bound by the new regulation, while Ireland will have a choice either to be bound or not pursuant to – respectively – Protocol 22 and Protocol 21 to the Treaty on the Functioning of the European Union - Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Protocols, Annexes to the Treaty on the Functioning of the European Union, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, Tables of equivalences, OJ C 202, 7.6.2016, pp. 1–388. See also: Explanatory Memorandum, p. 6.

become of no use, if Article 8 is deleted and the new regulation contains jurisdictional rules of exclusive nature.

Article 66 "Relationship with existing international conventions" of the Parenthood Proposal explains the relation between the new regulation and bilateral agreements. The regulation "*shall not affect the international conventions to which one or more Member States are party at the time when this Regulation is adopted and which lay down provisions on matters governed by this Regulation*" (Article 66(1)). However, "*as between Member States*" the regulation will "take precedence over conventions concluded exclusively between" Member States "*in so far as such conventions concern matters governed by this Regulation*" (Article 66(2)).

Both paragraphs of Article 66 of the Parenthood Proposal read together make it clear that the regulation "*shall not affect*" the application of bilateral agreements to which, apart from an EU Member State, at least one third state is a party to. The meaning of the expression "*shall not affect*" with respect to existing international conventions was explained in the CJEU's judgment in OP case[78]. This expression means that "*those conventions are to apply in the event of there being concurrent rules with*" a given regulation[79]. Hence, bilateral agreements containing rules in parenthood matters concluded by an EU Member State with a third state will continue to apply pursuant to Article 66(2). This would be the case, for instance of bilateral agreements between Bulgaria and Cuba or the one between Poland and Ukraine. Bilateral agreements concluded exclusively between two EU Member States, for instance the one concluded between Bulgaria and Poland, will give precedence to the Regulation.

If, due to lack of unanimity, the Parenthood Proposal is adopted within the mechanism of the enhanced cooperation, some Member States will constitute the so called "*non-participating Member States*". In such case, for the purpose of application of Article 66 "*Relationship with existing international conventions*" these "*non-participating Member States*" should be treated just as third states. In such case bilateral agreements concluded by a Member State with a third state, as well as a bilateral agreement concluded between a "*participating*" EU Member State and a "*non-participating*" one will continue to apply. Obviously, such agreement will continue to apply in a given "*non-participating*" EU Member State. What is more, it will continue to apply also in the participating EU

[78] Judgment of the Court (Third Chamber) of 12 October 2023, OP, Case C-21/22.

[79] Judgment of the Court (Third Chamber) of 12 October 2023, OP, Case C-21/22, para. 26.

Member State being party to it, as this agreement will constitute an international convention concluded with a third state within the meaning of Article 66(2)[80].

5. *Conclusion*

First of all, to limit the number of different private international law regimes applicable in EU Member States to parenthood matters, it is needless to say that it would be advisable that the Parenthood Proposal was adopted, and – additionally – was adopted on the basis of Article 81(3) TFEU (and not within the enhanced cooperation mechanism). The more EU Member States will be bound by the new regulation, the lesser practical importance of bilateral agreements in place in different EU Member States. This - of course – would require unanimity among EU Member States and is a political decision of the EU Member States.

Secondly, the Proposal as it was published in December 2022 requires certain changes, also with respect to its jurisdictional rules. Most importantly, it seems advisable that the future regulation adheres to the approach already seen in other EU instruments on private international law, for instance Maintenance Regulation, and provides for exclusivity of its jurisdictional rules, meaning that there is no space left for the domestic jurisdictional rules for parenthood matters. Consequently, Article 8 "*Residual jurisdiction*" should be deleted.

Thirdly, remaining rules on jurisdiction also require carful reconsideration, for instance Article 6 "General jurisdiction", which provides for many alternative grounds of jurisdiction, including the place of "birth of a child", which in many cases might reveal lack of adequate degree of proximity between the forum and a child or Article 7 which risk to grant EU Member State exorbitant jurisdiction in cases a child is habitually resident outside of the EU and the case could be decided in the state of habitual residence.

[80] See: WYSOCKA-BAR A., *Enhanced cooperation in property matters in the EU and non-participating Member States*, in 2019 ERA Forum 20, p. 187–200.

BORIANA MUSSEVA AND TSVETELINA DIMITROVA

APPLICABLE LAW TO PARENTHOOD

CONTENT: 1. Introduction. – 2. Overview of several national legal systems. – 3. The Proposal for a Council Regulation in matters of parenthood. – 4. The Challenges. – 5. Conclusions.

1. *Introduction*

The issue of determining the applicable law to parenthood in cases with cross-border implications usually remains in the shadow of the question of recognising parenthood established in another state. If a foreign birth certificate is recognised, the parent - child relationship is recorded in the population registers, and this is sufficient for the requested state to accept the existence of parenthood also on its territory. In these most common cases, the authorities (civil status officers) do not determine the applicable law independently through conflict-of-law rules.

The existing Union law already obliges the Member States to recognise the parenthood of a child as established in another Member State for the purpose of the rights deriving from Union law, in particular on free movement[1]. The recognition of the core rights deriving from the family law is still governed by the law of each Member State. Harmonising recognition rules alone is not sufficient to ensure the necessary legal certainty and predictability for cases involving an international element arising from matters of parenthood. Even if these procedures are unified, unresolved issues in determining the applicable law for parenthood in cross-border cases can still raise questions. Such is the case where judicial proceedings are initiated to establish or contest parenthood, as well as where parenthood constitutes a preliminary issue in relation to other matters, such as parental responsibility, maintenance, succession, and others. To truly safeguard families' rights across Member States and ensure that children's parenthood is consistently recognised and protected, comprehensive and uniform EU rules are needed - not only on recognition and jurisdiction but also on applicable law. This is the main value-

[1] Judgment of the Court of 14 December 2021, V.M.A. ./. Stolichna obshtina, rayon „Pancharevo", Case C-490/20.

based justification for the proposal for a Council Regulation on jurisdiction, applicable law and the recognition of decisions and acceptance of authentic instruments in the matters of parenthood and on the creation of a European Certificate of Parenthood of 2022[2].

The comparative legal analysis conducted in the Member States participating in the UniPAR project reveals that these countries apply different conflict-of-law rules in matters of parenthood. Additionally, some of these Member States are bound by bilateral legal aid treaties that contain specific and varying rules compared to their national laws. If these treaties are between EU Member States that would be bound by the forthcoming regulation, it is highly likely that such treaties will cease to apply. However, mutual legal aid treaties that exist between EU Member States and third countries, or between Member States and Member States not participating in enhanced cooperation, if applicable, would remain in force even if such a regulation is adopted.

In the context of the proposed EU regulation on parenthood, it is important to compare the suggested framework with existing national provisions and with the bilateral treaties on legal aid currently in place. Such a comparison can reveal whether the proposed regulation will introduce a truly novel and potentially complex regime or whether it will align with and build upon established national legal traditions. Additionally, even if it proves to be new and unfamiliar, it is important to analyse to what extent it would operate effectively and in combination with the other private international law instruments of EU law as well as with broader EU family law policies and fundamental rights protections, which are known and applied with an understanding of their basic concepts and institutions by the different Member States.

2. *Overview of several national legal systems*

The objective of the following comparative analysis is to examine the conflict-of-law rules for parenthood in various jurisdictions and to identify the primary connecting factors, their scope, and corrective mechanisms designed to protect the child's legal interests.

[2] COM(2022) 695 final of 7 December 2022.

2.1. *Introductory remarks*

The conflict-of-law rules on parenthood are marked by considerable diversity across the Member States. The National Reports presented in the preceding chapters of this volume provide a detailed overview of the domestic legal frameworks. Building on this material, the present section offers a comparative survey of the conflict-of-law rules on parenthood, identifying the connecting factors employed, the scope of the applicable law, and the corrective devices used to safeguard the effective establishment of parenthood. This comparative perspective shows that, across jurisdictions, the applicable law to parenthood varies drastically.

2.2. *National approaches*

2.2.1. *Austria*

The conflict-of-law rules governing the applicable law to parenthood in Austria are envisaged in the Austrian Private International Law Act[3]. It provides (§ 21) that the requirements for the legitimacy (Ehelichkeit) of a child and for its contestation shall be assessed according to the *personal status* (*Personalstatut*) which the spouses had at the time of the child's birth or, if the marriage was dissolved earlier, at the time of the dissolution. In case the spouses had different personal statuses, the personal status of the child at the time of birth shall be decisive. § 23 adds that the requirements for the legitimation of a child born out of wedlock through a declaration of legitimacy shall be assessed according to the personal status of the father; if the declaration of legitimacy is applied for only after the father's death, then according to the father's personal status at the time of his death. If, according to the child's personal status, the consent of the child or of a third person to whom the child is bound in a family-law relationship is required, then this law shall also be decisive in that respect. § 24 further stipulates that the effects of the legitimacy of a child, as well as the effects of a declaration of legitimacy, shall be assessed according to the personal status of the child. In more recent case law, the

[3] Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz), §§ 21 – 27 (Kindschaftsrecht), available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002426.

Constitutional Court of Austria has highlighted the tensions of this framework in light of new family forms.

In a 2022 decision concerning co-motherhood, the Court held that the conflict rules must be interpreted in conformity with constitutional equality guarantees, acknowledging that "*the law of parentage cannot be applied to female couples in a more restrictive manner than to opposite-sex couples*"[4].

2.2.2. *Belgium*

Belgian Code of Private International Law takes as approach in determining the applicable law to filiation the principle of nationality. Article 62 provides that "*the establishment or contestation of the link of lineage with a person shall be governed by the law of the State of that person's nationality at the time of the child's birth or, if the establishment results from a voluntary act, at the time such act is carried out.*"[5].

The scope of this law is defined broadly: Article 63 specifies that it governs issues such as who is entitled to establish or contest filiation, the burden and standard of proof, the consequences of possession of status, and the limitation periods[6].

Moreover, Belgian law contains an "escape clause" in Article 19, allowing the court to resort to another law that is more closely connected with the case whenever the designated law bears only a tenuous link. This structure illustrates a predominantly nationality-based model, tempered by corrective mechanisms (including public policy exception and special rules on sham acknowledgment of children)[7] to ensure a closer connection in individual cases.

2.2.3. *Bulgaria*

Under the Bulgarian Code of Private International Law (CPIL), the applicable law to parenthood is, as a rule, the law of the child's nationality

[4] WODNIANSKY-WILDENFELD V., *Co-motherhood: The Austrian Constitutional Court on the Law of Parentage,* in EAPIL Blog, 4 November 2022, available at: https://eapil.org/2022/11/04/co-motherhood-the-austrian-constitutional-court-on-the-law-of-parentage.

[5] See the National Report on Belgium, in this Volume.

[6] Ibid.

[7] Ibid.

at the time of birth (Article 83(1) CPIL)[8]. This rule is, however, complemented by a corrective clause in favour of the child: under Article 83(2) CPIL, the law of the child's habitual residence at the time of establishment or the law governing the personal relations between the parents at birth may be applied whenever more favourable to the child.

Furthermore, Bulgarian law admits *renvoi* in matters of parentage, but only insofar as the third State's law allows the establishment of parenthood (Article 83(3) CPIL).

Acknowledgment of parenthood enjoys a particularly flexible regime, reflecting the *favor validitatis* principle, since it is valid if it conforms either to the national law of the affiliator, to the national law of the child, or to the law of the child's habitual residence at the time of acknowledgment (Article 83(4)–(5) CPIL)[9].

Additionally, Bulgarian PIL rules on parenthood are supplemented by several legal aid treaties which provide that generally, establishment or contestation of parenthood shall be governed by the law of the state of which the child is national, i.e. nationality criterion. Historically, the first legal aid treaties contained different connecting factors. In the bilateral relations with Hungary, two treaties on legal assistance were concluded. The first, signed in 1953[10], provided in Article 24 that, in the establishment of paternity, *"the law of the state of which the person alleged to be the father of the child was a national at the time of the child's birth shall apply. If the alleged father died before the birth of the child, the law of the state of which he was a national at the time of his death shall apply. If the nationality of the alleged father at the time of his death or at the time of the child's birth cannot be established, the law of the state of his last known nationality shall apply."* This treaty was replaced in 1967, when a new agreement was concluded[11], which introduced in Article 22 a different connecting factor – the nationality of the child: *"In cases concerning*

[8] See the National Report on Bulgaria.

[9] **Кодекс на международното частно право** (Bulgarian Code of Private International Law), SG No. 42/2005, Article 83, available at: https://lex.bg/laws/ldoc/2135503651.

[10] Agreement between the People's Republic of Bulgaria and the Hungarian People's Republic on legal assistance in civil and criminal matters (ratified by the Presidential Office of the National Assembly by Decree no. 465 of 23 November 1953, published in "Notices of the Presidential Office of the National Assembly", Number 95 of 27 November 1953), Published in the State Gazette No. 38 of 11 May 1954.

[11] Agreement between the People's Republic of Bulgaria and the Hungarian People's Republic, Published in the Official Gazette, No. 29, April 11, 1967.

the establishment or contestation of paternity or maternity, the law of the Contracting Party of which the child was a national at the time of birth shall apply. In all other legal relations between parents and children, the law of the Contracting Party of which the child is a national shall apply.". Around the same time, Article 25 of the Legal Aid Treaty with Romania[12] followed the same approach, using the nationality criterion for establishing or contesting parenthood. The Legal Aid Treaty with Poland[13] briefly specifies in Article 26 that the establishment and contestation of paternity and maternity, shall be governed by the law of the Contracting Party of which the child is a citizen. Similarly, Article 22 of the Legal Aid Treaty with Mongolia[14] adopts the same connecting factor for determining the applicable law regarding the establishment and contestation of parenthood - the law of the state of the nationality of the child.

The Legal Aid Treaty with Russia[15] (Article 25) provides that the contestation and establishment of paternity or maternity and for the establishment of the birth of a child from marriage shall be decided in accordance with the law of the Contracting Party of which the child is a national at the time of birth. The legal relationship between a child born out of wedlock and his or her mother or father shall be determined by the law of the Contracting Party of which the child is a national. If the child is a national of one Contracting Party and resides in the territory of the other Contracting Party and the law of that Party is more favourable to the child, the law of that Contracting Party shall apply.

---

[12] Agreement between the People's Republic of Bulgaria and the Romanian People's Republic on legal assistance in civil, family and criminal matters, Published in the State Gazette, No. 18 of 1 March 1960.

[13] Agreement between the People's Republic of Bulgaria and the Polish People's Republic on legal assistance and legal relations in civil, family and criminal matters (Ratified by Decree No. 172/7.IV.1962, published in the Gazette of Notifications, no. 31/17.iv.1962, entered into force on 20 April 1963), published in the State Gazette, no. 37 of 10 May 1963.

[14] Agreement between the People's Republic of Bulgaria and the Mongolia People's Republic on mutual legal assistance in civil, family and criminal matters (ratified by decree no. 1127 of 24 December 1968, entered into force on 10 April 1969), published in the State Gazette, no. 88 of 14 November 1969.

[15] Agreement between the People's Republic of Bulgaria and the Union of Soviet Socialist Republics on legal assistance in civil, family and criminal matters (Ratified by Decree No. 784 of the State Council of April 15, 1975 - State Gazette, No. 33 of 1975. In force since January 18, 1976), Promulgated in State Gazette, No. 12 of February 10, 1976, amended in State Gazette, No. 17 of February 28, 2014.

Historically, the provision of Article 37 of the Legal Aid Treaty with the German Democratic Republic[16] (which has since been terminated) also provided that the law of the Contracting State whose nationality the child acquired at birth shall apply to the establishment or contestation of paternity (maternity), as well as to the establishment of whether the child is the product of a particular marriage. Para 2 of Article 37 further governed that as regards the form of the recognition of paternity (maternity), it shall be sufficient to comply with the law of the Contracting State in whose territory the recognition took place.

The same principle of the child's nationality is reflected in Article 36 of the Legal Aid Treaty with the Czech Republic[17], in Article 26 of the Legal Aid Treaty with Cuba[18], and in Article 24 (1) of the Legal Aid Treaty with Vietnam[19]. Similarly, the Legal Aid Treaty with North Korea[20] stipulates in Article 20 that the establishment or contestation of the origin of a child shall be decided under the law of the Contracting Party of which the child is a national.

This framework demonstrates a dual approach, where the Bulgarian Private International Law emphasizes a child-friendly, flexible approach to parentage, prioritizing the most favorable legal regime, while the legal aid treaties primarily focus on the nationality of the child as the determining factor for establishing parentage.

---

[16] Agreement between the People's Republic of Bulgaria and the German Democratic Republic on legal cooperation in civil, family and criminal matters (ratified by Decree no. 2126 of the Council of State of 29 November 1978 - SG, No. 96 OF 1978 in force from 12 October 1979)

[17] Agreement between the People's Republic of Bulgaria and the Czechoslovak Socialist Republic on legal assistance and regulation of relations in civil, family and criminal matters (ratified by Decree no. 538 of the State Council of April 15, 1977 - SG, No. 34 of 1977 in force from January 6, 1978), published in SG, no. 20 of March 14, 1978.

[18] Agreement between the People's Republic of Bulgaria and the Republic of Cuba on legal assistance in civil, family and criminal matters (ratified by decree no. 1959 of the State Council of 2 November 1979 - SG, no. 90 of 1979 in force from 25 July 1980), Published in SG, No. 85 of 31 October 1980

[19] Agreement on legal assistance in civil, family and criminal matters between the People's Republic of Bulgaria and the Socialist Republic of Vietnam, Published in the State Gazette, No. 69, September 4, 1987.

[20] Agreement between the People's Republic of Bulgaria and the Democratic People's Republic of Korea, Published in the State Gazette, No. 15 of 20 February 1990.

2.2.4. *Croatia*

In Croatia, the conflict-of-law rules on parenthood are set out in Article 41 of the Private International Law Act[21]. The provision establishes a list of connecting factors to be assessed at the moment when proceedings for the establishment or contestation of maternity or paternity are initiated. As a main rule, the applicable law is that of the child's habitual residence. However, where this is required by the best interests of the child, the law of the State of the child's nationality or, alternatively, the law of the State of which the persons whose maternity or paternity is at issue are nationals may apply.

In short, for both the establishment and the contestation of parenthood, the decisive law at the time of initiating the proceedings will be either (i) the law of the child's habitual residence, or (ii) by way of exception in the child's best interests, the national law of the child or of the parent concerned.

2.2.5. *Czech Republic*

Under Czech private international law, the designation and denial of parenthood is in principle governed by the law of the State into whose jurisdiction the child has been born. Section 54(1) of the Act on Private International Law[22], however, provides corrective connecting factors: if the child has multiple nationalities at birth, Czech law applies, and if required by the best interests of the child, the law of the mother's habitual residence at the moment of conception may be used. Moreover, if the child habitually resides in the Czech Republic, Czech law can be applied in the child's best interests (Section 54(2)).

As regards acknowledgment, the Act adopts a flexible approach by accepting validity if the declaration conforms to the law of the State where it occurred. Likewise, a foreign judicial or out-of-court settlement

[21] See the National Report on Croatia.

[22] Act No. 91/2012 Coll. on Private International Law, Section 54, available at: http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf.

denying one parenthood and designating another is sufficient to be recognised as valid, provided it was rendered under the law of the forum State (Section 54(3))[23].

2.2.6. *Estonia*

Under Estonian private international law, filiation is governed primarily by the law of the child's residence at the time of birth (§ 62(1) Law of Private International Law)[24]. However, the statute allows significant flexibility: parentage may also be established or contested under the law of the parent's residence, and acknowledgment is valid if it complies with that law (§ 62(2)). In addition, the child is granted the right to contest filiation under the law of the State of their residence at the time of contestation (§ 62(3)).

This multi-layered regime reflects a clear orientation towards ensuring effective establishment of parentage through several alternative connecting factors.

2.2.7. *France*

Under current French law, the conflict-of-law regime applicable to parenthood is not codified in a single private international law statute but is inferred from a combination of Civil Code provisions on filiation, case law, and draft codification projects[25].

French private international law on parentage is codified in Articles 311-14 to 311-17 of the Civil Code. Article 311-14 establishes the general rule that filiation is governed by the personal law of the mother at the time of the child's birth, while Article 311-15 ensures that, if either parent and the child are habitually resident in France, possession of status will

---

[23] See also: Office for International Legal Protection of Children (UMPOD), *Establishing and denying paternity in the international context*, available at: https://www.umpod.cz/web/en/establishing-and-denying-paternity-in-the-international-context.

[24] Law of Private International Law (Estonia), RT I 2002, 32, 191, § 62, available at: https://www.riigiteataja.ee/en/eli/513112013009/consolide.

[25] GALLANT E., *Parentage under the French Draft PIL Code - Part 1*, *EAPIL*, 31 October 2022, available at: https://eapil.org/2022/10/31/parentage-under-the-french-draft-pil-code-part-1/.

produce all its consequences under French law, regardless of the otherwise applicable foreign law. Voluntary recognition of parenthood is also facilitated, as Article 311-17 provides that such recognition is valid if it complies either with the personal law of the author or with that of the child[26]. These provisions illustrate a model centred on nationality and habitual residence, combined with corrective devices ensuring effective establishment of filiation.

In practice, however, French courts have accepted the operation of *renvoi* in parenthood cases, notably in a 2020 decision of the Cour de cassation where German conflict rules remitted to French law[27]. At the same time, *ordre public* operates as a limit, especially in surrogacy cases: while biological paternity is recognised, the intended mother's parentage is often refused automatic recognition, requiring adoption or additional proceedings in line with the case law of the European Court of Human Rights[28].

2.2.8. *Germany*

The German conflict-of-laws rules on parentage are contained in Articles 19, 20 and 23 of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB)[29]. They were introduced by the 1997 Child Law Reform Act and have applied to children born on or after 1 July 1998.

German PIL (Art. 19(1) EGBGB) provides three alternative connecting factors, to be used in the manner that most readily secures the child's legal parentage: (i) the child's habitual residence, (ii) the national law of the parent(s) concerned (with Art. 5 EGBGB resolving multiple/unknown nationality and substituting habitual residence for stateless persons), and (iii) the law governing the general effects of the mother's marriage (Art. 14 EGBGB), assessed at the child's birth (or the husband's

[26] Code civil, arts. 311-14 to 311-17, version consolidée, available at: https://www.legifrance.gouv.fr.

[27] CUNIBERTI G., *French Supreme Court Accepts First Degree Renvoi in Parenthood Matters*, EAPIL, 10 March 2020, available at: https://eapil.org/2020/03/10/french-supreme-court-accepts-first-degree-renvoi-in-parenthood-matters/.

[28] See, inter alia, ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no. P16-2018-001, 10 April 2019.

[29] https://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html.

death, if earlier). German doctrine mitigates instability by recognising parentage already officially recorded under previously applicable law[30].

The consents required for a declaration concerning parentage (e.g., acknowledgment of paternity) are governed (Art. 23 EGBGB) by the child's national law at the time of the act (with habitual residence stepping in for stateless/undetermined nationality and effective nationality rules via Art. 5 EGBGB).

Legal parentage may be contested (Art. 20 EGBGB) under any law by which it exists pursuant to Art. 19. For the child, Art. 20 (second sentence) adds a protective mechanism: the law of the child's habitual residence at the time of the action is always available. Public policy and special mandatory rules (e.g., measures against sham acknowledgments; see §1600(1) no. 5 BGB) operate as limits/corrections where appropriate.

2.2.9. *Italy*

In the Italian system, the private international law rules on parenthood are laid down in the Italian PIL Act (Law 218/1995)[31]. According to Article 33 of Law 218/1995, the parenthood of a child with cross-border elements is determined by the child's national law at birth, or, if more favourable, by the national law of one of the parents. If the applicable law does not permit establishment or contestation of parenthood, Italian law applies as a fallback[32]. The same provision further clarifies that if parenthood is acquired under one of the parents' national laws, contestation can only follow under that law, unless it does not permit contestation - in which case Italian law steps in[33].

Unilateral recognition (recognition by a parent's declaration) is governed by Article 35 of Law 218/1995, which provides that such recognition is valid if it is made in accordance with either the national law of the parent or of the child; where those laws do not allow recognition, Italian law prevails[34]. Italian public policy forms a limit: Article 16 of Law

---

[30] SAARLOSS B., *European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage*, in *European Papers*, 2023, p. 165-175.

[31] See the National Report on Italy.

[32] Ibid.

[33] Ibid.

[34] Ibid.

218/1995 allows refusal of a foreign law's application if it conflicts with fundamental principles of the Italian domestic legal order.

Renvoi is admitted in parenthood matters under a special rule: Article 13 of Law 218/1995 (on renvoi) operates only if the result is the application of a law that allows establishment of filiation[35].

2.2.10. *Luxembourg*

As the e-Justice portal explains, *"in Luxembourg, as regards legitimate filiation, the applicable law is, in principle, the law governing the marriage; that is, the common national law of the parents, failing which the law of their common domicile, failing which the law of the forum. … Everything relating to the establishment of natural filiation is, in principle, governed by the national law of the child"*[36].

2.2.11. *The Netherlands*

Dutch private international law on parentage is laid down in the Wet Conflictenrecht Afstamming (WCA, Conflict of Laws (Parentage) Act)[37].

Article 1(1) WCA contains a cascading rule for marital parentage: first, the law of the spouses' common nationality at the child's birth; failing that, the law of their common habitual residence; and if neither exists, the law of the child's habitual residence. The relevant nationality/habitual residence is assessed at birth (or, if the marriage was dissolved earlier, at dissolution). The choice of common nationality as the primary anchor reflects legislative concerns for stability and for alignment with the national laws of major migrant communities (e.g., Turkey and Morocco), while deliberately not favouring marital presumptions per se[38].

Parentage out of wedlock is addressed in distinct provisions. In particular, Article 3 provides that the national law of the mother determines

---

[35] Ibid.

[36] *European e-Justice Portal, "Which country's law applies? Luxembourg – 3.4.1 Filiation"*, Available at: https://e-justice.europa.eu/379/LU/which_countrys_law_applies?clang=en.

[37] *Wet Conflictenrecht Afstamming* (WCA), Law of 30 April 2003, Stb. 2003, 232, in force 1 May 2003, art. 1.

[38] SAARLOSS B., *European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage*, in *European Papers*, 2023, p. 131-143.

whether the woman to whom the child is born is the legal mother by dint of birth. If the mother has more than one nationality, the law according to which legal maternity exists *ex lege* must be chosen.

For acknowledgment of paternity (Art 4 WCA), the man's capacity/conditions are, in principle, governed by his national law; the Act then builds in protective correctives and alternative connecting factors (including the child's habitual residence and nationality). The consents of the mother and/or child are governed by their own personal laws (Art 4(4) WCA).

Annulment of acknowledgment is tied back to the law applicable to the acknowledgment itself (Art 5 WCA), with Dutch practice giving weight - where a foreign acknowledgment was recorded abroad - to the law actually applied by the foreign registrar in drawing up the instrument.

Where judicial establishment of paternity is sought (Art 6 WCA), the legislature did not replicate the broad cascade used for marital parentage. This has prompted human-rights-oriented corrections in case law: Dutch courts have held that if Art 6 would lead to a foreign law that does not allow judicial establishment of (non-marital) paternity, Article 8 ECHR and Dutch public policy require applying Dutch law instead. In this sense, *Gerechtshof Amsterdam* (2006) and *Gerechtshof 's-Hertogenbosch* (2008) treat the ordre public as a safety valve to ensure the child's right to establish legal ties is not illusory.

Article 8 WCA then allocates the effects of parentage to the law designated by the Act (Part I), ensuring that once a parent-child link is validly established, its status-related consequences are governed coherently by the same system of law.

2.2.12. *Poland*

The Polish conflict-of-law rules on parenthood are contained in the *Private International Law Act* of 2011 (PILA), supplemented by bilateral treaties on legal assistance (e.g. the 1961 Poland - Bulgaria treaty)[39]. According to Article 55(1) PILA, the determination and denial of parenthood - covering both fatherhood and motherhood - is governed by the child's national law at the time of birth, with the exception of acknowledgment. Article 55(2) PILA further provides that if the child's

[39] See the National Report on Poland.

national law at birth does not allow for judicial determination of fatherhood, the applicable law is the child's national law at the time of determination. Should this law also fail to provide for judicial determination, the public policy clause operates to exclude the foreign law and to apply instead a law that allows establishment of fatherhood. The applicable law governs in particular the presumption of paternity of a child born in marriage, the admissibility of actions to determine or deny paternity, the circle of persons with legal standing, and the effects of denial of parenthood.

Article 55(3) PILA addresses acknowledgment: the declaration of acknowledgment is governed by the child's national law at the time of acknowledgment. If this law does not provide for acknowledgment, the law of the child's nationality at birth applies, insofar as that law provides for acknowledgment. The declaration of acknowledgment of a conceived but unborn child (*nasciturus*) is subject to the mother's national law at the time of acknowledgment (Article 55(4) PILA). The law designated by Article 55(3) and (4) governs the legal nature of acknowledgment, the requirement of consent by the mother, the statutory representative, or the child, as well as the grounds for annulment or revocation of acknowledgment.

Other general provisions of the PILA interact with these rules. Article 2(1) ensures that Polish nationality prevails over any foreign nationality in cases of dual nationality, while Article 2(2) applies the law of the State with which a foreigner is most closely connected where multiple foreign nationalities are present.

Article 3(1) PILA applies the law of domicile or habitual residence to stateless persons or refugees.

Article 5(1) PILA permits *renvoi*: where the foreign law designated refers back to Polish law, Polish law is applied.

This structure demonstrates the Polish legislator's preference for the child's nationality at birth as the primary connecting factor, tempered by corrective devices (public policy clause, renvoi) and detailed rules for acknowledgment that safeguard the validity and effectiveness of legal parentage.

2.2.13. *Spain*

The conflict-of-law rule for parenthood in Spain is contained in Article 9(4) of the Spanish Civil Code (CC)[40]. This provision establishes a cascade of connecting factors: the child's habitual residence at the time of establishment of the parent-child relationship, failing that the child's national law at that moment, and in the absence of either, or if those laws do not allow the establishment of parenthood, Spanish substantive law applies. The rule is materially oriented, aimed at ensuring that parenthood is actually determined (*favor filii*), rather than leaving a child without legally established parentage[41].

Special rules address dual nationality. Article 9(9) CC provides that Spanish nationality shall prevail where a person holds it in combination with another nationality not recognised by Spanish law or international treaties. In the context of parenthood, however, scholars argue that the *favor filii* principle might justify giving effect to the more favourable law, even if Spanish nationality is present[42].

Finally, the scope of Article 9(4) CC is broad: it extends to substantive conditions and effects of parenthood, the presumption of paternity, attribution of status, admissibility of actions, standing, time limits, as well as evidentiary rules when they substantially affect the merits of the case. Importantly, Spain's plurilegal structure means that references to "Spanish law" may involve the application of autonomous community law (e.g. Catalonia), depending on the child's habitual residence.

2.3. *Comparative conclusions*

The comparative survey carried out within the UniPAR project demonstrates that the Member States adopt markedly different approaches when designing their conflict-of-law rules on parenthood.

A first line of division concerns the choice of the primary connecting factor. In several Member States, nationality remains the traditional and prevailing criterion. Belgium, Poland and Bulgaria, for instance, designate the child's nationality at birth as the main factor for determining the

[40] See the National Report on Spain.
[41] Ibid.
[42] Ibid.

applicable law. This reliance on nationality reflects the classical conception of personal status as being most closely tied to the law of allegiance. Yet, even within this group, nuances emerge. Polish law supplements the nationality criterion with subsidiary rules ensuring that parenthood can be judicially determined whenever possible, while Bulgarian law introduces a *"more favourable law"* clause, allowing the court to deviate from the strict *lex patriae* in the interest of the child. Belgium, for its part, refines the system through a so-called escape clause, empowering the judge to turn to another law that is more closely connected to the case when the designated law bears only a tenuous link.

Other Member States have shifted away from nationality and give preference to habitual residence as a more realistic marker of social integration. Spain and Croatia are representative of this orientation. Spanish law, while primarily relying on the child's habitual residence at the time of establishment, provides a cascade of subsidiary factors (nationality, and ultimately Spanish substantive law), thereby ensuring that parenthood can always be determined. Croatian law equally starts from the child's habitual residence but allows a corrective switch to nationality where this serves the child's best interests, thereby expressly elevating the *favor filii* principle into the conflict rule itself.

The comparative overview also reveals important differences regarding the substantive scope attributed to the applicable law. Belgian and Spanish private international law expressly extend it to matters such as standing, time limits, presumptions and evidentiary rules, thus pointing expressly at issues which might otherwise be classified as procedural. Polish and Bulgarian law also cover such substantive dimensions, whereas the Parenthood Proposal deliberately adopts a narrower scope, leaving aside the effects of parenthood. This discrepancy may become a source of friction when aligning domestic traditions with the future EU instrument.

Finally, it should be noted that bilateral legal aid treaties continue to play a significant role in several jurisdictions, Bulgaria being a prominent example. These treaties rely mostly on the nationality of the child at the time of birth. Their continued application, particularly in relations with third States, underlines the complexity of achieving complete uniformity in this field.

Taken together, the national regimes illustrate both diversity and convergence. Nationality remains deeply rooted in many systems, but habitual residence has gained ground, reflecting modern mobility patterns and

the focus on social reality. Corrective mechanisms - escape clauses, *favor filii* provisions, or public policy exceptions - demonstrate a common concern for avoiding rigid solutions that could jeopardise the child's rights. This landscape sets the stage against which the EU proposal must be assessed, as it aspires to bring coherence while respecting, or possibly reshaping, existing traditions.

3. *The Proposal for a Council Regulation in matters of parenthood*

In the draft regulation, the proposed system of rules for determining the applicable law is justified by the objective of achieving legal certainty and predictability. In view of the European Commission these common rules aim to avoid conflicting decisions on parenthood depending on which Member State's courts or other competent authorities establish parenthood. They also aim to facilitate, in particular, the acceptance of authentic instruments which do not establish parenthood with binding legal effect in the Member State of origin, but which have evidentiary effects in that Member State[43].

Legal certainty and predictability are achieved first of all through the establishment of the so-called universal character of the applicable law. This normative principle articulated in Article 16 of the Proposal states that any law designated as applicable by the Regulation shall be applied whether or not it is the law of a Member State. If the connecting factors are located in a third country and point to the law of a third country as the applicable law, the court seised in a Member State must apply that law. The connecting factors, in turn, relate to the respective natural persons, primarily to their habitual residence or nationality. Therefore, the Regulation may also apply to persons who are territorially or personally connected either to Member States or to third countries. This principle, together with the principle of the primacy of EU law, fully sets aside any conflicting domestic private international law rules. In this way, the authorities in the Member State apply solely and exclusively the Regulation on determining the applicable law, and are not required to take into account different sources (national and EU) depending on the parties to the parent-child relationship. This facilitates their work and enhances the predictability and legal certainty of their final act. This provision of the Regulation, which has been known since the time of the Convention on

[43] COM(2022) 695 final.

the law applicable to contractual obligations (Rome Convention)[44] and carried over into all other regulations determining the applicable law, is appropriate and effectively achieves the objectives set.

With the aim of ensuring predictability and legal certainty, the law applicable to the establishment of parenthood pursuant to the Proposal is determined by a cascade system of connecting factors (Article 17). As a main rule, the law applicable to the establishment of parenthood in cross-border situations should be the law of the State of the habitual residence of the person giving birth at the time of birth. This rule is followed by a fall-back rule: if habitual residence cannot be determined (e.g., refugee or displaced mother), the law of the place of birth of the child applies. By way of exception, where the law applicable as a rule results in the establishment of parenthood as regards only one parent (e.g., only the genetic parent in a same-sex couple), either of two subsidiary laws may be applied (i) the law of the nationality of either parent, or (ii) the law of the child's place of birth, to establish parenthood for the second parent. This can be done whether or not another Member State has already established parenthood for the first parent. This system is based on the practically justified approach of first providing rules for the most common situations encountered in practice and subsequently regulating the rarer and more complex cases.

Article 17 determines the law applicable to the establishment of parenthood. This does not mean that other matters relating to parenthood are not covered by the Proposal. Article 4(3) defines the establishment of parenthood as *"the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously"*. The contesting is also referred to in Article 18, letter „a". Recital 33 expressly states that where relevant, the Regulation should also apply to the extinction or termination of parenthood. All these confirm that the establishment of parenthood encompasses a broad range of matters beyond the initial connection between the child and his or her parent. For the sake of clarity and legal certainty, it is recommended that, when determining the applicable law, reference be made either exclusively to "parenthood" (as in Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a

[44] OJ L 266, 9.10.1980, pp. 1-19.

European Certificate of Succession[45] as regards the succession) or alternatively to "the establishment, contestation, extinction, or termination of parenthood" (as employed in Regulation (EU) 2019/1111 (Brussels II ter) on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)[46] in relation to the concept of parental responsibility).

In view of the Commission, the main connecting factor provided for in Article 17, para. 1 linked to the habitual residence of the person giving birth should ensure that the applicable law can be determined in the vast majority of cases, including as regards a new-born, whose habitual residence may be difficult to establish (recital 51). Indeed, the establishment of the habitual residence of a new-born child can create significant legal uncertainty, as highlighted by the case law of the Court of Justice of the European Union (CJEU) interpreting the Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000[47] (Brussels IIa Regulation) [48]. The choice of habitual residence over nationality as the connecting factor reflects the principle of free movement and corresponds to the main criteria applied in other EU instruments (e.g. Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[49] or Regulation (EU) No 650/2012). It prioritises the person's centre of family and social life over formal nationality, thereby ensuring coherence, predictability, and alignment with modern cross-border mobility realities. Referring to the person giving birth, rather than to the mother, is correct, since the mother is determined according to the applicable law. This may also lead to scenarios in which the person who gave birth to the child is not considered to be its legal

[45] OJ L 201, 27.7.2012, pp. 107–134.
[46] OJ L 178, 2.7.2019, pp. 1–115.
[47] OJ L 338, 23.12.2003, pp. 1–29.
[48] Judgment of Court of 22 December 2021, Mercredi, C-497/10 PPU and Judgment of Court of 28 June 2018, HR, C-512/17.
[49] OJ L 7, 10.1.2009 , pp. 1–79.

mother (for example, in cases of surrogacy[50]). The relevant moment for determining this person's habitual residence is the time of birth. According to the Commission the time of birth should be interpreted strictly, referring to the most common situation where parenthood is established upon birth by operation of law and registered in the relevant register within a few days thereafter (Recital 51). This ensures the closest possible connection and eliminates the risks of manipulating the connecting factor. Nevertheless, all potential complications inherent in the interpretation of the concept of habitual residence remain. As stressed explicitly in Recital 51, the law of the states of the habitual residence of the person giving birth should apply both to situations in which that habitual residence overlaps with the State of birth (as would be the typical situation) and also to situations in which the person giving birth has the habitual residence in a State other than the State of birth (for example, when birth occurs while travelling). This law, should apply, by analogy, also where the parenthood of the child needs to be established before the child is born.

The main connecting factor of the habitual residence of the person giving birth is criticized, on the one hand, for not being provided as a criterion for determining international jurisdiction and thus creating a lack of correspondence between applicable law and forum[51], and on the other hand, for being applicable primarily in relation to the parenthood bond to be established at the time of birth itself or within a short period of time thereafter[52]. The first criticism may be addressed by noting that, although not expressly provided, this factor would very often apply and there would be overlapping between law and forum (for example, in cases where the person giving birth is a respondent or has habitual residence in the state of his or her nationality). The difficulty of application in legal disputes that are not closely connected to the time of birth does not mean that this factor fails to encompass the main practical situations and maintains a very close connection to legal relationship. Indeed, if a matter of parenthood arises at a later stage after the birth and if in the meantime the mother and child have moved to another country or the

[50] MARBOURG GROUP, *Comments on the European Commission's Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*, 10 May 2023, available at https://www.marburg-group.de/, p. 338.

[51] PESCE F., *The Law Applicable to Parenthood in the European Commission's Regulation Proposal*, in *The European Legal Forum*, 2024, p. 7.

[52] MARBURG GROUP, op. cit., p. 338.

child has been separated from the birth mother (for example in cases of surrogacy) it would be not appropriate to further apply the law of the State of the habitual residence of the birth mother[53]. As suggested a dedicated conflict-of-laws rule based on the child's habitual residence should be introduced to resolve these specific situations[54].

The main rule is followed by a fall-back clause applicable in the very rare cases where the habitual residence of the person giving birth at the time of birth cannot be established (for example, in the case of a refugee or an internationally displaced mother). In such circumstances, the law of the State where the child was born is to be applied (Article 17, para.1). This rule is grounded in the concept of closeness to the birth and will in practice be applied only in exceptional circumstances.

The exception, introduced by Article 17, para. 2 aims to ensure legal recognition of both parents in same-sex relationships, avoiding scenarios where restrictive domestic legislation results in only single-parent legal status. The provision is applicable only where the applicable law pursuant to the main rule and fall-back cluse result in the establishment of parenthood as regards only one parent. Then the authorities may apply alternative rules to establish parenthood for the second parent: either the law of nationality of either parent or the law of the child's State of birth. Parenthood established under any designated applicable law must be recognized across all Member States (Recital 52). This provision is a consequence of the Court of Justice ruling in the Pancharevo case. It may also apply in cases of surrogacy, where parenthood is established with respect to only one parent[55]. It provides legal certainty and predictability for parents. To achieve this result, it is advisable that its application be *ex officio*, rather than at the discretion of the relevant authority or court[56].

In light with the Rome-Regulations the applicable law rules are supplemented by a provision defining their scope in a non-exhaustive way (Article 18). Rather than listing typical substantive parenthood matters (e.g. the presumption of paternity of a child born in marriage or persons

---

[53] BUDZIKIEWICZ C., DUDEN K., DUTTA A., HELMS T., MAYER C., *The European Commission's Parenthood Proposal,* in *IPRax*, 2023, p. 428.

[54] EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW, *Commission's Parenthood Proposal*, in *IPRax*, 2023, p. 429.

[55] PESCE F., op.cit., p. 7.

[56] EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW, *Commission's Parenthood Proposal*, in *IPRax*, 2023, p. 429.

with legal standing), it addresses aspects that might otherwise create uncertainty about their inclusion within the applicable law's scope (such as the evidentiary effects of authentic instruments). This approach clearly reinforces legal certainty and predictability. Naturally, these specified issues could be further clarified (such as by referring to conditions for establishing parenthood rather than procedure[57]) and expanded upon (for instance, concerning adoption matters)[58].

The subsequent provisions are equally typical of applicable law instruments. Both the rule on change of applicable law (Article 19) and that on formal validity of unilateral acts establishing parenthood (Article 20) share a distinctly *favor filiationis* approach to parenthood establishment providing legal certainty and the continuity of parenthood.

The Proposal contains an exclusion of *renvoi* characteristic of uniform regulation (Article 21), as well as a provision on public policy (Article 22). However, it lacks an explicit rule addressing overriding mandatory provisions[59] - rightly criticized by pointing to national rules combating abusive acknowledgements of paternity for establishing residence or nationality rights[60].

The public policy provision encompasses two distinct rules. The first, set out in Article 22(1), mirrors the concept employed across all other applicable law instruments. This rule applies solely when the application of foreign law would be manifestly incompatible with the public policy (*ordre public*) of the forum. The second rule in Article 22(2), is novel for applicable law instruments. It specifies that the public policy exception shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination. It is considered that this rule limits the application of public policy[61], with suggestions to expand its scope to encompass all

[57] MARBURG GROUP, op. cit., p. 339.

[58] EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW, *Commission's Parenthood Proposal*, in *IPRax*, 2023, p. 430.

[59] VÁLKOVÁ L., *The Commission Proposal for a Regulation on the Recognition of Parenthood and Other Legislative Trends Affecting Legal Parenthood*, in *Rivista di diritto internazionale private e processuale, 2022, p. 893*;

[60] EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW, *Commission's Parenthood Proposal*, in *IPRax*, 2023, p. 430.

[61] PESCE F., op.cit., p. 9.

fundamental rights under the Charter, particularly to accommodate Article 24 (Rights of the Child)[62]. The aim of the rule is clear: to restrict the possibility of invoking public policy against the application of foreign law that is discriminatory (for example, on grounds of sexual orientation, birth, etc.). This clarification should remain, but it would appear more appropriate to be included as a recital, as was done in Regulation (EU) No 650/2012 (Recital 58). In this way, the content of public policy would be determined without such limitation, but the recital would clearly emphasize the need to take into account the specific provisions of the Charter.

4. *Challenges*

The analysis of the national legal frameworks of the selected jurisdictions from the UNIPAR project and the Regulation on applicable law reveals substantial differences. The primary reason for their existence lies in divergent underlying value constructions - that of the individual state and that of the EU as an autonomous legal order, maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. The differences are not, in themselves, grounds to oppose the EU's efforts to adopt a regulation. Only through such an instrument, applicable by all Member States, can the desired legal certainty and predictability be achieved.

The research has identified several recommendations for consideration during the adoption process of the regulation, as highlighted in the preceding paragraph. In summary, these recommendations concern:

1. clarification regarding the subject matter of connecting factors for the applicable law - whether limited to "parenthood" or covering "the establishment, contestation, extinction, or termination of parenthood."
2. introduction of specific rules on the post-birth establishment or contestation of parenthood based on the child's current habitual residence;
3. *ex officio* application of the exception introduced by Article 17(2), ensuring legal recognition of both parents;
4. including, at the end of the sytem of connecting factors, a provision that allows application a different law if it is "more favorable

[62] MARBURG GROUP, op. cit., p. 339.

for the child", extending beyond cases that simply enable parenthood for both parents;
5. clarification and expansion of the scope of the applicable law, including reference to the conditions for establishing parenthood rather than procedural aspects, as well as covering substantive parenthood matters alongside adoption-related issues;
6. inclusion of overriding mandatory provisions;
7. addressing fundamental rights considerations under the Charter in a recital modelled by Regulation No 650/2012.

As visible from the national analyses in some EU Member States, the determination of the applicable law will not be achieved solely and exclusively through the Regulation on determining the applicable law in matters of parenthood. In this way, there will not be full unification and universal effect of this future instrument. Following the model of other instruments in the area of judicial cooperation in civil matters with cross-border implications, the Regulation explicitly states that it "shall not affect" the international conventions to which one or more Member States are party at the time when this Regulation is adopted and which lay down provisions on matters governed by this Regulation (Artcile 66, para.1). As previously mentioned, such instruments include mutual legal aid treaties with third countries. The rules of these treaties will continue to apply in parallel alongside the Regulation, and authorities in Member States are required to secure their application. A particular challenge arises from the fact that these legal aid treaties were conceived in a different era - before the establishment of the free movement of persons within the EU - and primarily envisioned scenarios where nationals of one state reside in another. Situations involving connections with multiple other states were not contemplated. Consequently, this leads to complex questions regarding the relationship between the Regulation and existing international legal aid treaties.

A pertinent example illustrating these complexities is found in the case law of the Court of Justice of the European Union (CJEU). In case C-21/22 concerning Regulation No 650/2012 on succession, the Court clarified relying on Article 351 TFEU that the application of an EU Regulation cannot affect the application of international conventions to which one or more Member States are parties, provided those States were parties at the time the Regulation was adopted, and the conventions con-

cern matters governed by the Regulation. This underscores the continuing coexistence of EU Regulations and international conventions in judicial cooperation.

In the more recent case C-395/23 (Anikovi) decided on 6 March 2025, the Court addressed the relationship between the Brussels IIb Regulation and a bilateral treaty on jurisdiction with a third country (Russia) concluded before Bulgaria's accession to the EU. The Court established under Article 351 TFEU, a sequential test for national courts confronting conflicts between pre-accession international treaties and EU law. The referring jurisdiction must first verify whether the treaty concluded before the EU accession contains rules that the third country can require the Member State to comply with. If such obligations exist, the court must then assess whether the bilateral treaty is incompatible with the EU-Regulation. Following this compatibility assessment, the court must examine whether the incompatibility can be avoided by interpreting the international agreement, insofar as possible and in compliance with international law, in accordance with the EU regulation. Only if this harmonizing interpretation proves impossible and the national court lacks powers to eliminate the incompatibility may it apply the treaty provisions while disapplying the EU regulation. This framework prioritizes attempts at harmonization through interpretation before permitting the disapplication of EU law in favor of pre-accession international commitments. This case highlights how EU law respects pre-existing international treaties while affirming the primacy of EU law within intra-EU matters and reflects the practical complexities for authorities managing overlaps between EU rules and international agreements in cross-border family law.

Therefore, while the Regulation aims to provide a uniform legal framework within the EU, authorities and practitioners must remain vigilant about the parallel operation of international conventions, especially those concluded with third countries. In this regard, it is advisable for the Regulation to include a list of international conventions which continue to apply notwithstanding the Regulation. This would provide clarity and legal certainty. It could also be recommended to include, as a recital, the guidance established in the Anikovi case for national jurisdictions when confronted with an international treaty that could conflict with the regulation (concerning the compatibility assessment and the interpretation of international agreements insofar as possible and in compliance with international law, in accordance with Union law).

5. *Conclusions*

The analysis of the national approaches and of the Commission Proposal confirms that the law applicable to parenthood remains one of the most fragmented areas of private international law in Europe. The comparative overview of Member States shows a deep-rooted reliance on nationality in some jurisdictions, while others increasingly favour habitual residence as a connecting factor. Corrective mechanisms - such as escape clauses, *favor filii* provisions, and limited acceptance of *renvoi* - demonstrate a shared concern to avoid rigid outcomes that might deprive the child of legally recognised parentage. At the same time, bilateral treaties on legal aid, many of them concluded decades ago, continue to shape the applicable law in parallel to national and EU rules, adding further layers of complexity.

Against this backdrop, the Proposal for a Regulation represents a significant step towards coherence and predictability. By introducing a universal rule of application, a cascade of connecting factors centred on the habitual residence of the person giving birth, and a non-discrimination clause limiting the public policy exception, the draft seeks to secure uniformity and to safeguard fundamental rights. Its *favor filiationis* orientation is evident,but important issues remain among others: the relationship with pre-existing bilateral treaties, the absence of an explicit reference to overriding mandatory provisions, and the challenges of applying habitual residence as the decisive factor in fast-changing family situations.

Overall, the proposed Regulation has the potential to provide much-needed certainty for cross-border families and to ensure the effective recognition of children's parentage throughout the Union. Yet, its success will depend on careful coordination with national legal traditions and with international commitments of the Member States. Only if these interactions are clarified can the Regulation deliver on its promise to reconcile diversity with unity, and to guarantee that children's family ties are protected consistently across the European legal space

.

CRISTINA GONZÁLEZ BEILFUSS

THE RECOGNITION OF FOREIGN JUDGMENTS AND THE ACCEPTANCE OF AUTHENTIC INSTRUMENTS ON PARENTHOOD MATTERS

CONTENT: 1. Introduction – 2. The recognition of judgments – 2.1. The recognition of parenthood judgments under the current national rules – 2.2. The recognition of judgments under the Parenthood Proposal. – 3. 3.1. The recognition of birth certificates. – 3.1. The recognition of birth certificates under the current national rules. 3.2. The recognition of birth certificates 3. 2.. The "recognition "of birth certificates under the Parenthood Proposal. – 4. Concluding remarks.

1. *Introduction*

Since 1999, when the EU gained competence to legislate on cooperation in civil matters, several Regulations and Directives have been adopted. The area of family law has not been exempted, even though the requirement of unanimity in the Council established in art. 81. 2 of the TFEU already signals that Member States have their sensitivities in this field. This was confirmed by the adoption of instruments by means of an enhanced cooperation[1] as regards the law applicable to legal separation and divorce[2] and matrimonial property[3] and the property consequences of registered partnership[4] .

[1] Enhanced cooperation (Article 20 of the Treaty on European Union and Title III of the Treaty on the Functioning of the EU) is a mechanism permitting a minimum of nine EU Member States to pursue deeper integration or cooperation in specific areas when it becomes evident that the objectives cannot be achieved by the EU as a whole within a reasonable timeframe.

[2] 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

[3] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[4] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

The Proposal on parenthood (hereinafter PP)[5] that is under negotiation at present is proving to be even more controversial than the abovementioned instruments. In the absence of a European consensus in connection with new family forms and assisted reproduction, political difficulties were programmed to arise. From a technical perspective it is undoubtedly challenging to draft legal provisions without prior comparative studies both as regards substantive law and PIL.

The UNIPAR project's main goal is to investigate how Member States are presently dealing with parenthood in the absence of uniform rules. The purpose of this research is to uncover the technical and political challenges and to further assess the rules that have been proposed by the EU Commission.

The starting point of this paper is therefore the UNIPAR national reports in connection with the recognition of decisions and the acceptance of authentic instruments. These reports will form the basis for a comparative analysis and evaluation of the *status quo*. The rules proposed by the Comission will then be scrutinized. The major goal is to assess whether the proposed rules have the potential to improve the lives of European citizens as is undoubtedly their purpose.

2. *The recognition of judgments*

Parenthood is usually established by operation of the law. Judgments arise mainly when there is a dispute as to who is the legal parent, most often the legal father of a child, or when parenthood is constituted by a judicial authority. The most obvious example of the latter would be adoption, which will be left out of this paper since it is being dealt with by Thalia Kruger and Leontine Bruijnen[6]. Recognition of foreign adoption decisions most often occurs in intercountry adoption, where specific measures exist to prevent abuse.

The focus of our analysis will thus be on the recognition of classical judgments establishing or terminating paternity or pre-birth judgments that are sometimes issued in connection with the use of assisted reproduction.

---

[5] Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM/2022/695 final).

[6] See KRUGER T., BRUIJNEN L., *How to avoid the mistakes of intercountry adoption in surrogacy and ART*, in this Volume.

The recognition of judgments is a very classical field of Private international law with well-established rules and principles. Recognition entails that the procedural effects of the foreign judgment, such as enforceability and *res judicata* which in principle only apply in the State of origin are accepted in the receiving State. In some systems the effects of the judgment in the State of origin are extended to the receiving State, in others the foreign judgment is equated to a domestic judgment of the receiving State[7].

Enforceability is not an issue in parenthood matters since parenthood is a civil status, a position in a social group, the family, from which many rights originate e.g. in the areas of parental responsibility, maintenance, succession or nationality. These rights and their corresponding obligations might imply an obligation to do or to abstain from doing which might require enforcement when they are not voluntarily performed, which is not the case with parenthood.

The need for recognition of a foreign decision on parenthood mainly arises in connection with an entry or the update of an entry in the Civil Registry or when there are court proceedings on one of the rights that are derived from parenthood, and parenthood is dealt with as a preliminary question. In ordinary dealings with public authorities, i.e. when parents claim social security benefits, they rely on the birth certificates that are issued following the judgment or its recognition.

2.1. *The recognition of parenthood judgments under the current national rules*

The national reports show that there are no special rules as regards the recognition of judgments on filiation except as regards adoption which is not covered by this paper. The analysed Member States apply the general rules for the recognition and enforcement of judgments available in their system which differ substantially. International Conventions do not seem to play a major role in this area of the law, except in some bilateral relations (for example, 1961 Poland-Bulgaria bilateral agreement).

---

[7] See DOMEJ T., *Recognition and enforcement of judgments (civil law)* in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL P., *Encyclopedia of Private international law*, Cheltenham, 2017, p. 1472.

In some systems the recognition of foreign judgements is automatic meaning that no special *exequatur* procedure must be followed. Requirements for recognition are formulated in the negative as grounds of refusal and even though the jurisdiction of the court of origin (indirect jurisdiction) is controlled, there is flexibility in this regard.

Under the general rule articulated in Article 22 of the Belgian PIL Statute[8], foreign filiation judgments are, in principle, recognised in Belgium. The grounds for refusal of recognition or enforcement are enumerated in Article 25, §1 of the Belgian Code of PIL, which includes the conventional public policy exception; however, this exception is narrowly construed. Public policy considerations arise only if recognition or enforcement would be manifestly incompatible with Belgian public policy. When assessing such incompatibility, particular attention must be paid to the degree of connection with the Belgian legal order and the seriousness of the consequences arising from recognition or enforcement. In accordance with Article 25 §2, review of the merits of a foreign filiation judgment is precluded.

Recognition may also be withheld if, in cases where parties are unable to freely exercise their rights or where the judgment was rendered solely to circumvent the application of law designated by the Belgian PIL Statute (Article 25 §1.3). This ground for refusal is uncommon in other PIL systems and appears infrequently invoked, likely due to the inherent difficulty in establishing fraudulent intent.

The jurisdiction of the court of origin is only minimally controlled. Recognition is refused if the matter falls under the exclusive jurisdiction of Belgian courts (Article 25 § 1. 7) or if the jurisdiction of the foreign court was based exclusively on the presence of the defendant or the location of assets in the forum (Article 25 § 1. 8). These requirements do not seem to play any role as regards filiation.

Italian PIL[9] also foresees modern rules as regards the recognition of foreign judgments. Art.64 of the Law 218/ 1995 provides that foreign judgments are recognized automatically without the need for resort to any proceedings if the foreign judge rendering the judgment had jurisdiction according to Italian jurisdictional principles and if the effects of the judgment are not contrary to Italian public policy.

Other PIL systems have more stringent rules on the recognition of foreign judgments. Recognizing in Spain a foreign judgment in matters

[8] The information is taken from the Belgian National Report, in this Volume.
[9] The information is taken from the Italian national report.

of parenthood, requires an *exequatur* procedure[10]. The *exequatur* procedure is a contradictory proceeding, with the intervention of the Public Prosecutor's Office in all cases. The recognition may be refused for the reasons set forth in Art. 46(1) LICCMA[11], among them, if the act was adopted by a foreign authority which manifestly lacks jurisdiction. Under Spanish law the foreign authority shall be deemed to have jurisdiction if the case has a well-founded connection with the foreign State whose authorities have granted the act. Recognition can also be refused if the recognition of the foreign decision would produce effects manifestly contrary to Spanish public policy. Art. 48 LICCMA explicitly prohibits the review of the merits of the foreign decision and establishes that the fact that the court of origin has applied a different law to that "which would have been applicable according to the rules of Spanish private international law" is not a cause for refusal of recognition.

Incidental recognition with effects only for the main proceedings is generally available in judicial proceedings dealing with related mattes such as for example maintenance It is also possible to request an incidental recognition by the Civil Registrar which would not have the effect of *res judicata* and would not prevent the parties from requesting an *exequatur* at a later date or from filing an appeal before the Directorate General of Registries and Notaries. The Registrar must verify: "(i) the regularity and formal authenticity of the documents presented; (ii) that the Court of origin had based its international jurisdiction on criteria equivalent to those contemplated in Spanish law; (iii) that all parties were duly notified and had sufficient time to prepare the proceedings; (iv) that the registration of the decision is not manifestly incompatible with Spanish public policy." (Art. 96(2) 2° CRA). There is no control of the applicable law or the merits of the case.

Under Bulgarian law[12] the foreign judgment shall be recognized by the authority whereto the said judgment is presented (Article 118, para.1 Code on Private international Law-CPIL). Should, however, the conditions of recognition of the foreign judgment be raised as an issue in a dispute, an action for recognition may be brought before the Sofia City Court (Article 118, para.2 CPIL). The interested party must present a true copy of the judgment, authenticated by the rendering court, and a certificate issued by the same court, to the effect that the said judgment

[10] The information is taken from the Spanish national report.
[11] Law 29/2015, of 30 July, on international legal cooperation in civil matters.
[12] The information is taken from the Bulgarian national report.

has taken effect. These documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria (Article 119, para.2 CPIL). If the recognition of the foreign judgment comes up incidentally during proceedings that are being heard in Bulgaria, recognition can take place incidentally (as developed by the case law of the Supreme Court of Cassation considering Article 118, para.1 CPIL). According to the case law of the Supreme Court of Cassation, recognition carried out by the authority before which the foreign judgment is presented concerns only the jurisdiction and sphere of action of the relevant authority. In view of the Supreme Court of Cassation it does not have constitutive effect and does not bind the Bulgarian court.

Article 117 CPIL lays down conditions for the recognition of foreign judgments. The foreign court must have had jurisdiction according to the provisions of Bulgarian law and the recognition must not be contrary to Bulgarian public policy.

Croatian PIL[13] requires the intervention of a court in Croatia for the recognition of a foreign judgment (Article 66(1) of the PIL Act). Recognition of a foreign court decision shall be refused if the court based its jurisdiction contrary to the provisions of Sections 3, 4, and 5 of Chapter II of the Brussels Ibis Regulation. (Article 69) and if such recognition would clearly be contrary to the public policy of the Republic of Croatia. (Article 71).

In Poland [14] foreign judgments are recognized by operation of the law unless one of the grounds of refusal is raised. In such a case (e.g. if the exclusive jurisdiction of the Polish courts or the fundamental principles of Polish law have not been respected) the district court will issue a judgment as to whether recognition is granted.

[13] The information is taken from the Croatian national report.
[14] The information is taken from the Polish national report.

2. 2 *The recognition of judgments under the Parenthood Proposal*

The rules proposed by the Commission as regards the recognition of judgments on parenthood are closely inspired by the rules that are already in force as regards civil and commercial matters[15] and parental responsibility and matrimonial matters[16].

Art. 24(1) PP provides that a court decision on parenthood given in another Member State shall be recognised in all other Member States without the need for a special procedure (principle of automatic recognition). Art. 24(2) PP deals with the updating of civil status records requested in a Member State based on a foreign parenthood decision which can take place without any special proceeding being required, provided that the decision is final. Art. 24(3) PP governs the recognition of a court decision on parenthood given in another Member State when it arises as an incidental question. Art. 25 PP opens the possibility for parties to apply for a court decision in a special (optional) procedure, which determines whether there are any grounds for refusing the recognition of a decision.

In line with the European acquis the review of jurisdiction is prohibited. The grounds for refusal admitted correspond to those available under the Brussels II ter Regulation and include, among others, the public policy exception

In general, no fundamental objections against the proposed rules have been raised, except as regards certain provisions that blindly copy from Regulation 2019/1111 and fail to consider the specificities of parenthood, a concept distinct from parental responsibility. As regards the ground of refusal based on the irreconcilability with a court decision from a Member State or third State, Art. 31(1)(e) PP has taken over art. 39 of the Parental Responsibility Regulation without realizing that it is exceptional to give priority to the later decision. This is only justified by the special nature of parental responsibility decisions which are never truly final and need to be adjustable to changing circumstances. Parenthood, however, is about status, about the position of a child in a family and in society. There is no reason to depart from the *res iudicata* rule that gives priority

[15] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[16] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

to the earlier decision. As noted by the Marburg group court decisions on parenthood are primarily based on unchangeable circumstances at the time of birth[17]. If parenthood is successfully contested at a later stage in one Member State and recognition of this decision is sought, there would be no irreconcilability with a prior decision since different people would be regarded as parents.

Another contentious matter is the role that must be given to the hearing of the child. If parenthood decisions deal with the biological descent of the child, the hearing of the child is most often not required and should therefore not justify the refusal of recognition[18].

As already anticipated the purpose of this paper is not to propose amendments to the proposed rules but rather to evaluate their impact. Since parenthood decisions are either declaratory or constitutive they do not require enforcement. This entails that in this area the advantages of the Brussels system are quite limited, especially in those Member States that do not require a special exequatur procedure or where the exequatur procedure does not need to be pursued for the update of a Civil Register or when the recognition of a foreign court decision is raised as an incidental question in judicial proceedings.

It would thus seem that the simplification of the recognition regime will have a more significant impact on Croatia, Bulgaria and Poland than on Italy or Belgium. Spain would as well benefit from the abolition of exequatur but since this is not required for incidental recognition in court proceedings or for the updating of entries in the Civil Registry the practical impact also appears to be rather reduced.

The main factor of simplification as regards the recognition of foreign decision is that the jurisdiction of the court of origin of the foreign decision is no longer reviewed under the proposed rules. As is the case with other EU Regulations this is brought about because of the unification of the jurisdiction rules.

Whether the public policy exception will be curtailed as suggested by several Recitals in the Proposal is in my view questionable, but I will not delve into this matter that will be developed in another paper. In general,

---

[17] European Group for Private International Law (GEDIP), *Observations on the Proposal for a Council Regulation in matters of Parenthood* Meeting of September 2023 (text adopted on 6.12. 2023); BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER, C. *The Marburg Group's Comments on the European Commission's Parenthood Proposal,* 2024, p. 68.

[18] GONZALEZ BEILFUSS C., *La proposition de Règlement européen en matière de filiation : analyse liminaire* in *RTD Eur. 2023,* p.217.

public policy does not seem to play a major role in traditional paternity judgments[19]. Leaving aside adoption which is outside the scope of this paper it might arise particularly in connection with pre-birth judgments connected to ART and surrogacy.

3. *The recognition of birth certificates*

As already mentioned judicial decisions on filiation are rather exceptional, if adoption is left aside. Most often filiation results from the operation of the law with birth certificate being issued. Even where filiation results from a legal act, for example of acknowledgment, or a judgment States are under the obligation of providing for updated birth certificates. Birth certificates do not disclose how filiation was established. In Spain it is even possible to request a modification of the entry about the place of birth in order not to reveal that filiation results from adoption or surrogacy[20].

A birth certificate is a vital record that documents a person's birth, including their name, date and place of birth. It also records the identity of the woman who gave birth to the child. That this woman is the legal mother of the child does however not result from the birth certificate but from the law applicable to filiation which may or may not be the law of the State issuing the certificate. It is also this law that establishes the status *vis-a-vis* the spouse of the woman giving birth.

---

[19] HEPTING, R., DUTTA, A., *Familie und Personenstand*, 2022, p.535.

[20] In 2005 on occasion of the enactment of a statute on International Adoption a new provision in the Civil Registry Regulation entered into force providing that in cases of international adoption, the adopter or adoptive parents may, by mutual agreement, apply directly to the Civil Registry of their domicile for the principal birth registration and the marginal adoption registration to be made, as well as for a new birth registration to be made on the corresponding page, which shall contain, in addition to the birth and birth details, only the personal circumstances of the adoptive parents, the appropriate reference to their marriage and a record of their domicile as the place of birth of the adoptee (art. 16,3 Ley de 8 de junio de 1957 sobre el Registro Civil. By virtue of a decision of the Supreme Court the possibility was extended to children born out of a surrogacy arrangement- See STS 4370/2024 - ECLI:ES:TS: 2024:4370.

Birth certificates produce evidentiary effects. In line with the ELI-Enhancing Child Protection project[21] it is useful to distinguish between formal evidentiary effects and substantial evidentiary effects.

In Romano-Germanic legal systems, authentic acts issued by notaries or civil status registrars have general or formal evidentiary effects. This means that the elements directly ascertained by the issuing authority are presumed to be correct and accurate. For birth certificates, these effects pertain to the date the birth was declared, the identity of the declarant, and the fact that a declaration was made. In certain systems, these evidentiary effects have been extended by law to include the birth itself, even if the Registrar did not witness it personally. However, filiation is not covered by these general or formal evidentiary effects, which primarily address factual matters.

In addition to general or formal evidentiary effects, authentic acts can also have more substantial evidentiary effects concerning the legal content of the act. For instance, with filiation, which results from legal reasoning rather than being purely factual, the individual named as mother or father on the birth certificate may assert that status. This presumption serves as an evidentiary mechanism: it does not establish filiation but facilitates the assertion of this status, which may only be contested through judicial proceedings. In cross-border cases, parents and children may seek to rely on a foreign birth certificate as evidence of the existence of filiation.

Birth certificates qualify as public documents inasmuch as they are issued by a public authority. As is the case with public documents generally two issues are at stake. First, the authenticity and the evidential value of the document itself (*instrumentum*) and second the authority of the legal situation evidenced in the document, i.e. its content (*negotium*).

Recognition of the document as such usually requires providing for a translation into the official language of the requested State and the legalisation or obtention of an apostille in order to prove its authenticity. These matters will not be the focus of the current paper. In the EU they are covered by *Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of*

[21] See ELI Project: *Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695* https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-enhancing-child-protection-private-international-law-on-filiation-and-the-european-commissions-proposal-com2022695/ (accessed 1.10. 2025).

citizens by simplifying the requirements for presenting certain public documents in the European Union. This Regulation provides, in relation to certain public documents which are issued by the authorities of a Member State and which have to be presented to the authorities of another Member State, for a system of exemption from legalisation or similar formality. A translation is generally not required if the document is accompanied, by a multilingual standard form.

The focus of our investigation is the recognition of the content of birth certificates. We will begin by examining the current situation in the Member States participating in the UNIPAR project, followed by an analysis of the Parenthood Proposal.

3.1. *The recognition of birth certificates under the current national rules*

Article 27, §1 of the Belgian Code of Private International Law (PIL)[22] stipulates that a foreign authentic instrument pertaining to filiation may be recognised in Belgium without the need for formal proceedings, subject to certain conditions. Firstly, the validity of parenthood must be established in accordance with the applicable law as designated by the Code of PIL. Additionally, the law prohibits any evasion; Article 18 specifies that facts or actions undertaken solely to circumvent the application of the prescribed law are not acknowledged -a scenario most notably encountered in cases of surrogacy. Furthermore, recognition is contingent upon compliance with the public policy exception outlined in Article 21. Article 27, §1 also requires that a foreign authentic instrument meet the legal criteria for authenticity under the jurisdiction in which it was issued.

In practice, a foreign birth certificate may only be transcribed into the Belgian civil register after thorough assessment of the prerequisites listed in Article 27, §1 (referenced in Article 31). This evaluation is conducted by the Civil Registry upon submission of the foreign birth certificate. If the examination yields a favourable outcome, the Civil Registry will issue a Belgian birth certificate based on the documentation provided.

When a child is born abroad and possesses a foreign birth certificate, Bulgarian legislation [23]mandates transcription into the Bulgarian Civil

[22] The information is taken from the Belgian National Report.
[23] The information is taken from the Bulgarian National Report.

Registry. The individual's name, date and place of birth, gender, and established origin are recorded based on the submitted transcript or the Bulgarian translation of the foreign document. Should the transcript or extract lack complete parental information, relevant data shall be obtained from their identity documents or the population register. If any essential details—such as the child's name, date of birth, place of birth, or gender—are missing, transcription of the foreign birth certificate cannot proceed. In such cases, interested parties are required to establish their rights through judicial proceedings.

Under Croatian law[24] the registration of facts of birth, of Croatian citizens occurring abroad is carried out based on an extract from the civil register issued by the foreign authority. A choice of law test is not conducted even though all authorities should be bound by PIL rules.

If the birth of a child occurs abroad and there is a foreign birth certificate, parenthood is assessed based on choice-of-law rules as provided in the PolishPrivate International Law Act (PILA)[25]. Articles 52–54 govern the determination of parenthood.However, Civil Registry authorities (USC) do not themselves actively determine parenthood; they rely on: foreign birth certificates or foreign judicial decisions (e.g., establishing or denying paternity) and they will only verify whether the foreign document can be recognized under Polish law (i.e., whether parentage can be put into Polish civil records).

Transcribing a foreign birth certificate in the Spanish Civil Registry[26] involves several conditions that must be verified by the Registrar: (i) the certificate must be issued by a competent foreign authority according to its own national legislation; (ii) the foreign Registry of origin should provide guarantees similar to those required by Spanish law for registration; (iii) the validity of the fact or act stated in the foreign certificate must be determined under the law specified by Spanish private international law rules; (iv) the registration of the foreign document must not clearly conflict with Spanish public policy. The third condition requires that parenthood indicated in the foreign birth certificate be valid according to the law identified by Spanish conflict of law provisions.

If a child is born abroad and a birth certificate concerning an Italian citizen is issued outside of Italy[27], the foreign birth certificate—properly

[24] The information is taken from the Croatian National Report.
[25] The information is taken from the Polish National Report.
[26] The information is taken from the Spanish National Report.
[27] The information is taken from the Italian National Report.

legalized and translated—should be submitted to the territorially competent Civil Registrar. Submission may be carried out by: (i) the Italian diplomatic or consular authorities of the country where the birth occurred; (ii) the individuals named in the foreign birth certificate; or (iii) any party with an interest in the registration.

Civil Registrars are not required to apply foreign law according to Italian private international law. Under Italian private international law, filiation is governed by Italian law whenever the parents are Italian citizens. Their responsibilities include verifying that the submitted documents comply with Italian formal requirements, assessing whether the child was born within or outside of marriage, and determining if the child has been acknowledged by one or both parents. Although this role is limited, Italian law obliges Civil Registrars to refuse registration of any act that conflicts with Italian public policy.

The national systems analysed all seem to provide rather straightforward systems for the recognition of foreign birth certificates. Leaving aside formalities such as translation and legalization which have been considerably simplifed when birth certificates originate from another Member State by virtue of Regulation 2016/1191, the jurisdictions reviewed are mostly ready to accept the general or formal evidentiary effect that was alluded to in the Introduction i.e. that the fact of the birth occurred and the place and date of birth as recorded in the birth certificate.

When it comes to recognizing the extended evidentiary effects, the situation differs between Member States that subject the recognition of the bond of filiation to a choice-of-law test and those that do not. In the latter case the national report of Croatia mentions that this practice is not in accordance with the rule establishing that choice- of-law rules bind all authorities in Croatia[28]. The Italian report also suggests some inconsistencies as regards the limited role of civil registrars [29].

This is an area of the law, where the law in the books and the law in action seem likely to differ quite significantly. In the absence of empirical evidence, one cannot know with certainty whether choice-of-law tests are undertaken or not, but it is suggested that there are deficiencies. Authorities in civil registries are probably not well equipped to deal with foreign law in many countries and content themselves to transcribing the foreign birth certificate as it is presented unless essential information is missing or the content is manifestly contrary to public policy.

[28] See Croatian National Report.
[29] See Italian National Report.

3.2. *The recognition of birth certificates under the Parenthood Proposal*

The rules as regards authentic instruments are among the most controversial of the proposed Regulation.The Proposal distinguishes between birth certificates with binding legal effect and birth certificates with non binding legal effect[30]. The categorization is unclear. If what the Commission means are birth certificates that establish parenthood with constitutive effect the category might be unnecessary since in accordance with the CJEU finding in the *Senatsverwaltung* case[31] such authentic instruments might qualify as court decisions and thus be subjected to the legal rules on the recognition of decisions. The Marbourg Group suggests that such authentic instruments with constitutive effect do not exist[32], the ELI Project considers that they are in any case a very limited number,[33] which adds a further argument for not creating a new special regime about these documents[34].

The most compelling reason for dispensing with the rules proposed for authentic instruments with binding legal effect is however brought forward by the ELI project. In a cross-border scenario what parents and children need is the acceptance of what we have called the extended evidentiary effects of the birth certificate, namely that the persons named in the certificate are presumed to be the legal parents of the child. In the case of a child that is a national of the requested State this suffices to ensure that parenthood is recorded in the Civil Status registry and to obtain documents such as a birth certificate, an identity card or a passport. In cases in which the child is not a national of the requested State the foreign birth certificate may need to be provided as

---

[30] See Chapter IV Section 3 and Chapter V of the Proposal.

[31] Judgment of the Court of 15 November 2022, *Senatsverwaltung fur Inneres und Sport, Standesamtsaufsicht v. TB,* Case C-646/20, para. 58 et seq.

[32] BUDZIKIEWICZ CH., DUDEN K., DUTTA A., HELMS T., MAYER M. *The Marburg Group's Comments on the European Commission's Parenthood Proposal, cit.* , p. 77.

[33] See ELI Project: *Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695* https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-enhancing-child-protection-private-international-law-on-filiation-and-the-european-commissions-proposal-com2022695/ (accessed 1.10. 2025).

[34] DOMINELLI however rightly points out that authentic instruments wth binding legal effect might in the future become more prevalent should the movement towards the contractualization of parenthood continue to advance. See DOMINELLI S., *Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood under the Commission's 2022 Proposal* in *The European Legal Forum*, Issue 1-2024 p. 13.

evidence on parenthood in order to claim Social security benefits or for health insurance purposes, for example. It thus appears to be unnecessary to rely on the constitutive effect of the birth certificate. This would only be an issue if the extended evidentiary effect of the birth certificate were challenged in court.

In connection with authentic instruments the Commission proposes that, in line with Art. 59 Succession Regulation[35], Art. 58 of the Matrimonial Property Regulation and Art. 58 of the Partnership Regulation, an authentic instrument which has evidentiary effects in the Member State of origin should have the same evidentiary effects in another Member State as it has in the Member State of origin. To ensure that the extended evidentiary effects – namely the presumption that the persons named in the certificate are the legal parents of the child- are also accepted Member states should as well be required to accept the evidentiary effects provided by the law governing filiation. In this respect it is of course beneficial to have uniform applicable law provisions, which is where the real value of the proposed Regulation lies.

4. *Concluding remarks*

An examination of the national UNIPAR reports indicates that the proposed Regulation has significant potential to facilitate processes for European citizens. Regarding the recognition of judgments, the elimination of *exequatur* is particularly noteworthy; however, its practical effects will vary based on each Member State's existing recognition framework. In jurisdictions where automatic recognition already exists and civil registrars can directly update entries, assessing compliance with recognition requirements or grounds for refusal, the effect of the new rules will be less pronounced compared to Member States requiring court decisions for foreign judgment recognition.

The provisions concerning judgment recognition are especially advantageous as they remove the necessity to verify the jurisdiction of the originating court. This outcome arises from the adoption of uniform jurisdiction rules, mirroring the approach taken with the 1968 Brussels Convention and later followed in other EU Regulations on the recognition of

[35] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

judgments. The resultant streamlined recognition procedure represents a clear simplification, which is also anticipated to positively impact parenthood-related matters.

In connection with foreign birth certificates the analysis of the current situation suggests that the focus of EU intervention should be on the acceptance of the evidentiary effects of such documents. The EU has already successfully simplified the recognition of the document by dispensing with legalization and apostille and creating a multilingual form that reduces the need for costly translations. Whether the content of the foreign document is accepted i.e. whether the presumption that the persons named in the certificate are the legal parents of the child will uphold, continues to be governed at present by national PIL rules.

The national reports show that there is a lot of confusion as regards the handling of foreign birth certificates by Registrars who do not seem well equipped to deal with choice-of-law rules and foreign law. In some Member States Registrars limit themselves to the transcription of the foreign birth certificate unless essential data are missing or the content of the foreign birth certificate infringes public policy. In connection with surrogacy and ART this may result in inconsistent practice depending on whether the Registrar only investigates the operative part of the certificate or chooses to look behind the scenes into how the child was conceived. In such a scenario rainbow families are likely to be disadvantaged. In other Member States the recognition of the content of the birth certificate is subject to a choice-of -law test and will only be recognized if the law designated by the national choice of law provisions was applied.

The added value of EU intervention lies mainly in the fact that the enactment of uniform choice-of-law provisions creates the conditions for eliminating the need for a choice-of-law test. This would be more workable if the uniform choice-of-law rules were straightforward, which is currently not the case. The EU should further reconsider whether a special regime for authentic instruments with binding legal effect is necessary. Following ECJ case law such public documents could be equated to decisions and subject to the regime on the recognition of foreign judgments.

MIRELA ŽUPAN AND MARTINA DRVENTIĆ BARIŠIN

THE ROLE OF PUBLIC POLICY IN THE PRIVATE INTERNATIONAL LAW RULES ON PARENTHOOD

CONTENT: 1. Introduction. – 2. Public Policy and Parenthood – a Multifaced Dragon?. – 3. Public Policy Positioned within Parenthood Unification (Attempts). – 3.1. The Hague Surrogacy Project. – 3.2. EU Parenthood Proposal. – 4. Public Policy Position in Courts Jurisprudence. – 4.1. Public Policy in Jurisprudence on Parenthood. – 4.2. Public Policy as an Exception to Recognise the Effect of a Foreign Surrogacy Agreement. – 4.3. Public Policy versus Freedom of Movement in the EU. – 5. Reflections on Content of Public Policy in Parenthood Matters. – 6. Conclusion.

1. *Introduction*

To date, there is no international convention or European legislation in force governing the establishment/contestation of parenthood, neither there are relevant private international law rules. Consequently, the legal effects of this core civil status remain largely a matter of domestic regulation. From a comparative perspective parenthood inherent legislation knows of wide range of approaches on: recognition of parent–child relationships in particular in traditional vs. non-traditional families, with specific rules on conditions, active legitimation and time limits to establish/contest parentage are given. Rules divers in relation to maternal and paternal recognition, rights and obligations under co-parenthood, single or multiple parenthood; the legal position of the biological but not legal parent; situation of the legal but not biological parent, surrogacy and other. However, in increasingly mobile societies, it is scarcely feasible for the legal effects of parenthood to remain confined to a single jurisdiction. The portability of parental rights acquired in one legal system to others, as well as the limitations on their recognition outside the primary jurisdiction, constitute the cornerstone of this paper. Any discussion on the matter inevitably entails a consideration of how fundamental national policy interests and core international and domestic legal standards are safeguarded through public policy exceptions.

Using the shield of public policy, this paper focuses on defining the scope of public policy rules in parenthood matters, and in particular in its most sensitive aspect of surrogacy. It situates the discussion within the

broader framework of international and European standards, as proposed by the Hague Conference on Private International Law (hereinafter: HCCH) and the European Union's legislative initiatives, while taking guidance from the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU). Guided by major rulings of European courts, Member States have, to date, developed certain pathways to address public policy considerations in cross-border parenthood as well as surrogacy matters, which this paper seeks to categorize and analyse more closely.

2. *Public Policy and Parenthood – a Multifaced Dragon?*

The main features of the public policy exception are reflected in the legislation of UNIPAR Member States. Public policy operates both as a control mechanism over substantive law in cases involving the application of foreign law and as a ground for refusing recognition of foreign decisions, encompassing both substantive and procedural dimensions[1]. The exception is to be invoked with restraint, taking into account the specific circumstances of the case, particularly the degree of connection with the domestic legal order and the seriousness of the consequences that would result from applying the foreign law[2]. Where the application of foreign law is precluded due to manifest incompatibility with public policy, another relevant provision of that legal system is to be applied instead.

The object of public policy is not an abstract foreign rule of law that may conflict with the fundaments of domestic public order; rather, it pertains solely to the effect of its application in a specific case[3]. Within the context of parenthood matters, public policy control encompasses both

---

[1] See: GÖSSL S., MELCHER M., *Recognition of a Status Acquired Abroad in ihe EU. – A Challenge for National Laws from Evolving Traditional Methods to New Forms of Acceptance and Bypassing Alternatives,* in *Cuadernos de Derecho Transnacional*, 2022, p. 1012.

[2] THOMA I., *Public Policy (ordre public)*, in BASEDOW J, RÜHL G, FERRARI F, DE MIGUEL ASENSIO P (eds.), *Encyclopedia of Private International Law*, Cheltenham, p. 1453; LAGARDE P., *Public Policy, Chapter 11,* in LIPSTEIN K. (ed), *International Encyclopedia of Comparative Law*, Vol III: Private International Law, 1994.

[3] See: HARTLEY T, *Public Policy and Mandatory Provisions*, in BEAUMONT P., HOLLIDAY J. (eds.), *A Guide to Global Private International Law, Hart Publishing*, Oxford, 2022, p. 75-77; GIULIANO M., LAGARDE P., *Report on the Convention on the law applicable to contractual obligations*, Official Journal C 282, 1980.

the fundamental domestic values articulated in a State's constitutional framework and the core international standards derived from human rights treaties. Among EU Member States its also the shared values of the European legal order, as exemplified in the Treaty on the Functioning of the European Union (hereinafter: TFEU) and the Charter of Fundamental Rights of the European Union[4] (hereinafter: Charter).

Its relative nature is manifest precisely in this interplay, as the content and application of public policy evolve over time in response to societal and legal developments. The relativity of public policy is particularly evident today, especially within the context of parenthood. The emergence of alternative family structures and the diversification of medically assisted reproduction methods have significantly impacted the legal understanding of parenthood[5]. Consequently, both international and European institutions have been prompted to reassess the boundaries of public policy and to reconsider the interpretation of fundamental rights pertaining to children and the individuals involved in these complex relationships[6].

Accordingly, the principal issue surrounding the public policy exception in matters of filiation now revolves around the recognition and continuity of a filiation status established abroad, particularly in circumstances involving children born through surrogacy arrangements or within same-sex or multi-parent family structures. Nonetheless, even within more conventional contexts, there persist situations in which considerations of public policy may warrant the refusal to recognise or give

---

[4] GEBAUER M., BERNER F., *Ordre public (Public Policy)*, in *Max Planck Encyclopedias of International Law*, 2019., URL: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1448?d=%2F10.1093%2Flaw%3Aepil%2F9780199231690%2Flaw- 9780199231690-e1448&p=emailA%2FwIUNHk1I6uQ&print#; MILLS A., *The Dimensions of Public Policy in Private International Law*, in *Journal of Private International Law*, 2008, p. 201; GÖSSL S. L., *The public policy exception in the European civil justice system*, in *The European Legal Forum*, 2016, p. 85.

[5] See: CARPANETO L., *Legal parentage and private international law: the establishment, contestation and recognition of children's legal parentage,* in CARRUTHERS J.M., LINDSAY B.W.M. (eds.), *Research Handbook on International Family Law*, Cheltenham-Northampton, 2024, p. 12-13.

[6] See *inter alia*: EUROPEAN COMMISSION, *Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States. Final report*, 2022.; TRYFONIDOU A., *Cross-Border Legal Recognition of Parenthood in the EU*, Study Requested by the PETI committee, 2023.

effect to certain foreign legal standards, insofar as they are deemed incompatible with the fundamental tenets of the forum's legal order. These would be disused in the last chapter.

Public policy can play different roles in connection with parenthood. First, public policy may be understood as a limitation on fundamental freedoms and human rights, a concern that the ECtHR has addressed for over a decade. Public policy may also operate in the EU context, where the non-recognition of filiation established through surrogacy abroad can constitute an obstacle to the freedom of movement of EU citizens. Finally, public policy can serve as a basis for the non-recognition of surrogacy agreements, thereby representing a restriction on the freedom of contract[7]. Aspects of public policy reflection in filiation cases of Belgium, Bulgaria, Croatia, Italy, Poland and Spain are thoroughly elaborated by UNIPAR teams' national reports[8].

3. *Public Policy Positioned within Parenthood Unification (Attempts)*

The unification of rules on cross-border parenthood has been addressed by various international organizations, albeit in differing contexts.

The growing number of cross-border parenthood cases, with many arising from surrogacy agreements, has prompted both international and European Union legislators to consider the adoption of unified rules. Efforts to establish minimum international standards on cross-border parenthood legal settlement can be traced back to the work of the HCCH[9]. At the EU level, the institutions have likewise been given a mandate to legislate on the matter, though such attempts are, to date, still tracked in a pending in legislative procedure. The ambit of the proposed supranational rules is far-reaching; accordingly, provisions delineating boundaries to safeguard domestic legal orders are invariably included among them.

---

[7] ALLEN A.A., *Surrogacy and Limitations to Freedom of Contract: Toward Being more Fully Human*, in *Harvard Journal of Law & Public Policy*, 2018, p. 754

[8] See: the National Reports developed within the UniPAR project, in this Volume.

[9] HCCH, About the Parentage / Surrogacy Project, URL: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

3.1. *The Hague Parentage / Surrogacy Project*[10]

The Hague Project underscores the central role of public policy in drafting a global convention on ethically sensitive matters such as filiation, in particular one involving a surrogacy. Within the negotiations, public policy has been widely discussed both as a safeguard within substantive law and as a procedural law safeguard.

Interim negotiation results – i.e. *Expert group Final report*, set out a list of grounds for the refusal of recognition, placing the general public policy exception at the forefront. In addition, three further grounds are articulated, which in essence operate as expressions of procedural public policy[11].

The Final Report makes clear, however, that reliance on the public policy exception is to remain exceptional, functioning as a "safety valve" to be invoked only in individual cases and on a narrowly tailored basis. This approach is to be read in conjunction with possible refusals grounded in breaches of fundamental procedural guarantees, such as the child's right to be heard[12]. The potentially expansive application of the public policy exception due to the failure to ensure the child's right to be heard, could jeopardize the well-established narrow approach to public policy traditionally adopted by the HCCH, an approach that the drafters appear to adhere to. A central tension highlighted in the Final Report concerns the balance between establishing a clear and comprehensive catalogue of grounds for refusal, on the one hand, and maintaining the flexibility to assess cases individually, on the other.

---

[10] Parentage / Surrogacy Experts' Group: *Final Report, The feasibility of one or more private international law instruments on legal parentage*, Prel. Doc. No 1 of November 2022, p. 17.

[11] These are: where a party did not have proper notice of the proceedings and an opportunity to be heard; fraud, in connection with a matter of procedure; and where there are inconsistent judicial decisions or parallel proceedings. Parentage / Surrogacy Experts' Group: *Final Report, The feasibility of one or more private international law instruments on legal parentage,* cit., Note 43.

[12] Parentage / Surrogacy Experts' Group: *Final Report, The feasibility of one or more private international law instruments on legal parentage,* cit., Note 43., p. 17, 27.

There are at the moment several possible pathways at the table[13]. Options are either to go with a detailed conditions for recognition or a safeguards / standards which have to be respected. The later would enable introduction of a Protocol as a quicker avenue ("safe track") for the recognition of legal parentage. This would also provide certainty and predictability as people would know from the beginning of the international surrogacy agreement process that, in principle, the intended legal parentage would be recognised if the safeguards / standards are met. It would also reduce the need for recourse to the public policy exception because there would be more detailed rules for determining when recognition has to be granted or refused, taking into account the human rights of the child and the persons concerned.

3.2. *EU Parenthood Proposal*

With the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (hereinafter: Parenthood Proposal)[14] the discourse on public policy has been reframed in light of EU constitutional principles. The Parenthood Proposal uses public policy in all available forms, for different purposes.

Parenthood Proposal targets the positive effect of public policy. Under Article 21 TFEU and the relevant secondary legislation, as interpreted by the CJEU, neither the respect for a Member State's national identity under Article 4(2) TEU nor a Member State's public policy may justify the refusal to recognize a parent–child relationship between children and their same-sex parents for the purpose of exercising the rights that a child derives from Union law. Moreover, for the exercise of such

[13] Model 1 on uniform safeguards / standards some of which feature as conditions for recognition and Model 2 on state-specific safeguards / standards with some grounds for refusal only. Parentage / Surrogacy Experts' Group: *Final Report, The feasibility of one or more private international law instruments on legal parentage,* cit., pp. 40. – 44.

[14] Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM/2022/695 final., See: GONZÁLEZ BEILFUSS C., PRETELLI I., *The Proposal for a European Regulation on Filiation Matters – Overview and Analysis*, in *Yearbook of Private International Law*, 2022/2023, 2023, p. 275.

rights, proof of parenthood may be provided by any means. Consequently, a Member State may not require that a person present either the attestations provided under the Regulation accompanying a court decision or an authentic instrument of parenthood, nor the European Certificate of Parenthood established by the Regulation, when invoking, in the context of the exercise of free movement, rights derived by the child from Union law[15]. Here the Proposal seeks to heavily restrict the possibility of invoking public policy, which is in line with the CJEU case-law in *Coman* and *Pancharevo*[16] (see*: infra* chapter 4.2).

The Parenthood Proposal further addresses public policy in the context of conflict-of-laws control. It provides that considerations of public interest may, in exceptional circumstances, permit courts and other competent authorities establishing parenthood in a Member State to disregard certain provisions of a foreign law when their application would be manifestly incompatible with the public policy of that Member State. However, the courts or competent authorities may not invoke the public policy exception to override the law of another State in a manner that would contravene the Charter, and in particular Article 21, which prohibits discrimination.[17] Here the Proposal narrows down the control, disregarding that „fundamental rights must be considered as a whole and the various rights guaranteed in the Charter must be balanced", in particular Rights of the Child under Art 24 of the Charter[18].

The Proposal further addresses negative function of the public policy in the context of grounds for refusal of a recognition. The ground for the refusal of recognition based on public policy is to be used exceptionally and in the light of the circumstances of each particular case. Considerations of public interest should allow Member State to refuse, in exceptional circumstances, to recognise or, as the case may be, accept

---

[15] Parenthood Proposal, Recital 14, Article 2.

[16] RAKIĆ R., CHOI J., *Parent in One Member State, Parent in All Member States: The Good, the Bad and the Ugly,* in *European Paper*, 2023, p. 1555, at p. 1560.; Judgment of the Court (Grand Chamber) of 5 June 2018, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, Case C-673/16; Judgment of the Court (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon „Pancharevo", Case C-490/20.

[17] Parenthood Proposal, Recital 56, Art. 22.

[18] EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW, *Observations on the Proposal for a Council Regulation in matters of Parenthood*, Meeting of September, 2023, Note 15.; BUDZIKIEWICZ C., DUDEN K, DUTTA A., HELMS T., MAYER C., *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, Intersentia, Cambridge - Antwerp - Chicago, 2024, p. 66.

a court decision or authentic instrument on the parenthood established in another Member State where, in a given case, such recognition or acceptance would be manifestly incompatible with the public policy of the Member State concerned. The courts or other competent authorities should not be able to refuse to recognise a court decision or an authentic instrument issued in another Member State[19] where doing so would be contrary to the Charter and, in particular, Article 21 thereof, which prohibits discrimination, including of children[20]. Member State authorities could not thus refuse on public policy grounds the recognition of a court decision or an authentic instrument establishing parenthood through adoption by a single man, or establishing parenthood as regards two parents in a same-sex couple merely on the ground that the parents are of the same sex[21].

The Proposal also contains a notably EU private international law-specific narrowing of the public policy exception. Namely, the jurisdiction of the court of the Member State of origin in establishing parenthood may not be subject to review. Moreover, the public policy test referred to in point (a) of Article 31(1) may not be applied to the rules on jurisdiction set out in Articles 6 to 9[22].

4. *Public Policy Position in Courts Jurisprudence*

The rules of private international law on parenthood are expected to align with the fundamental principles derived from substantive filiation law, which can be influenced by various factors. It is essential to balance the needs and expectations of individuals regarding the parent-child relationship with the wider interests of society. In recent decades, a notable shift in focus has occurred, with an increased emphasis on child rights protection, particularly in matters related to establishing parentage[23].

This has been achieved primarily through the interpretation of Article 8 by the ECtHR. The CJEU has also addressed the question of invoking

---

[19] Parenthood Proposal, Art. 45.

[20] TRYFONIDOU A., *Cross-border recognition of parenthood in the EU: comments on the Commission proposal of 7 December*, in *ERA Forum*, 2023, p. 158.

[21] Parenthood Proposal, Recital 75, Article 23.

[22] Parenthood Proposal, Art. 40

[23] See: BIAGIONI G., *International Surrogacy and International Parentage: Hopes for a Global Solution*, in BEAUMONT P., HOLLIDAY J. (eds.), *A Guide to Global Private International Law*, Hart Publishing, Oxford, 2022, p. 568-569.

public policy as a reason for refusing to recognise a foreign legal status, which may restrict an individual's right to free movement.

4.1. *Public Policy in Jurisprudence on Parenthood*

The ECtHR has, in several cases, identified elements arising from national filiation legal systems that may conflict with the right under Article 8. Certain aspects of foreign law may infringe fundamental rights to privacy, particularly in relation to the biological father's ability to contest the presumption of the husband's paternity and in connection with challenges to paternal filiation initiated by the putative father. In *Vagdalt v. Hungary* ECtHR clarified that rules governing the establishment or contestation of paternity where domestic time-limits for instituting paternity proceedings are overly rigid go against the right to privacy[24]. Case *Mikulić v. Croatia* contested that the DNA testing in paternity proceedings likewise engages fundamental right to privacy and family life, though it is not inherently a violation. Compulsory or court-ordered DNA testing constitutes an interference with private life, affecting both bodily integrity and personal identity. Such interference may, however, be justified under Article 8(2) if it pursues a legitimate aim, such as the protection of the rights of others, legal certainty, or the establishment of parentage, and is necessary and proportionate[25]. In light of competing rights and interests, a fair balance must be established[26]. The decision of the CJEU is expected on the matter of the taking of genetic samples from a dead body in order to prove paternity if the person concerned did not give his or her express consent while alive.[27] In the meantime, Advocate General Ćapeta, following the standards established by the ECtHR, has held that the right to know one's origins is protected under the right to private life[28]. She identifies the right to respect for the human body after death

[24] ECtHR, Vagdalt v. Hungary, Application no. 9525/19, 7 March 2024, Para 66.

[25] ECtHR, Mikulić v. Croatia, Application no. 53176/99, 4 September 2002, Para. 64.

[26] See also: ECtHR, Mifsud v. Malta, 2019, Application no. 62257/15, 29 January 2019, para. 77; I.L.V. v. Romania (dec.), Application no. 4901/04, 24.08.2010, Para. 37–47.

[27] Request for a preliminary ruling from the Tribunal judiciaire de Chambéry (France) lodged on 20 February 2024 - XX v WW YY, ZZ, VV, Case C-196/24, C/2024/3591, 17 June 2024.

[28] Opinion of Advocate General Ćapeta delivered on 11 September 2025 in Case C-196/24 XX v WW, YY, ZZ, VV, joined parties: Ministère Public, Para. 84-91.

as a general principle of EU law, reflecting the dual nature of human dignity. This right must be taken into account when assessing requests for exhumation for genetic sampling. Nonetheless, it is not absolute and must be balanced against other fundamental rights, including the right to know one's origins.

Finally, the ECtHR has consistently interpreted the concept of "private life" under Article 8 as encompassing not only physical and psychological integrity but also the right to personal identity. This includes the right to know one's origins and to have one's biological and legal parentage determined and recognised[29]. As the Court has emphasised: "*Respect for private life requires that everyone should be able to establish the details of their identity as individual human beings, which includes the legal parent–child relationship*[30]." Thus, individuals possess a vital interest protected under the Convention in obtaining the information necessary to understand such a critical dimension of their personal identity[31]. In relation to that, the Contracting States also need to comply with the positive obligations – with the regard to voluntary acknowledgment[32] or to proceedings for the establishment of maternity or paternity[33]. These obligations will be examined in greater detail in cases concerning surrogacy.

4.2. *Public Policy as an Exception to Recognise the Effect of a Foreign Surrogacy Agreement*

The lack of a clear legislative framework on surrogacy within domestic legal systems, which was often accompanied by mechanisms that indirectly discourage parents from seeking surrogacy abroad has fostered judicial activism in several countries. This activism was manifested, for example, through the adaptation of personal status to national legal regimes, and has increasingly necessitated the intervention of supranational courts[34]. In *Mennesson v. France*[35] and *Labassee v. France*[36], the French

[29] ECtHR, Ternovszky v. Hungary, Application no. 67545/09, 14 December 2010; Godelli v. Italy, Application no. 33783/09, 25 September 2012.

[30] ECtHR, Jäggi v. Switzerland, Aplication no. 58757/00, 13 July 2006, Para 37.

[31] ECtHR, Scalzo v. Italy, Application no. 8790/21, 6 December 2022, Para 64.

[32] ECtHR, Marckx v. Belgium, Application no. 6833/74, 13 June 1979, Para 36-37.

[33] ECtHR, Mikulić v. Croatia, Application no. 53176/99, 4 September 2002; ECtHR, Boljević v. Serbia, Application no. 47443/14, 16 June 2020.

[34] BIAGIONI G., cit., p. 575.-576.

[35] ECtHR, Mennesson v. France, Application no. 65192/11, 26 June 2014.

[36] ECtHR, Labassee v. France, Application no. 65941/11, 26 June 2014.

courts refused to recognise the effects of the surrogacy arrangement established in the USA on the grounds of public policy, as surrogacy agreements are not permitted under French law. In both cases, the intended father was the genetic father of a child. During the national proceedings in *Mannesson*, before the Court of Cassation, the Advocate General had recourse to the public policy matter. He stressed that a right lawfully acquired abroad or a foreign decision lawfully delivered by a foreign court could not be prevented from taking legal effect in France on grounds of international public policy where this would infringe a principle, a freedom or a right guaranteed by an international convention ratified by France[37]. He opted for the *Wagner* case[38] and ECtHR reasoning grounded on the concept of *de facto* family unit by saying: "*where it is merely a question of giving effect on the national territory to situations lawfully established abroad, be this at the cost of deliberately disregarding the strictures of a mandatory law, there is nothing to preclude international public policy, even based upon proximity, from being overridden in order to allow families to lead a life in conformity with the legal conditions in which they were created and the de facto conditions in which they now live.*" Despite the Advocate General proposing to overturn the decision on non-recognition, the Court of Cassation insisted that, under domestic law, it is contrary to the principle of inalienability of civil status, a fundamental principle of French law, to give effect to a surrogacy agreement[39]. The ECtHR emphasised that domestic courts, when using the public policy mechanism, must carefully balance the community's interest in supporting democratically made decisions with the interests of the applicants. In this context, the best interests of the children should be the primary consideration in upholding their rights to private and family life[40].

---

[37] Mennesson v. France, Para. 26.

[38] ECtHR, Wagner and J.M.W.L. v. Luxembourg, Application no. 76240/01, 28 June 2007.

[39] Mennesson v. France, Para. 27.

[40] Mennesson v. France, Para. 84.; Opposite to that, ECtHR found that the interference was justified in D. and Others v. Belgium, Application no. 29176/13, 8 July 2014, where the Belgian authorities had initially refused to issue a travel document to a child born trough surrogacy agreement in Ukraine, since the intended parents had not provided sufficient documentation regarding the surrogacy procedure and the husband's status as the biological father. The ECtHR held that the actions of the Belgian authorities were in accordance with the law and pursued several legitimate aims, notably the prevention of crime, in particular human trafficking, and the protection of the rights of others – namely, the surrogate mother and the child itself (Para. 16).

The ECtHR decisions in *Mannesson* and *Labassee* clearly assess the lack of conformity to the ECHR of a decision refusing, on public policy grounds, to recognise the filiation link between a couple and a child born from a surrogate[41]. In the subsequent Advisory Opinion of 10 April 2019, following the *Mannesson* case, the ECtHR emphasised the child's right to private life, with special regard to their identity. The ECtHR highlighted the significance of a potential genetic connection with one of the intended parents, typically the father, necessitating the clear establishment of parenthood in such cases. Concerning the intended mother, the law must provide a possibility to recognise the *de facto* established parent-child relationship. However, such recognition does not need to take the form of an automatic transcription in the civil status register, as it may also be effected through adoption.[42]

The Court confirmed this rule also in relation to the intended mother, who was at the same time the child's genetic mother. In the case of *D. v. France*, the ECtHR found no reason, to reach a different conclusion from the one in Advisory Opinion regarding the recognition of the legal relationship with the intended mother, who was the child's genetic mother[43]. This was also recently confirmed in relation to the genetic mother in the same-sex families in *RF and Others v. Germany*[44].

---

[41] See: COESTER-WALTHER D, *A case of harmonisation of private international law? Juggling between surrogacy, interest of a child and parenthood*, in MUIR WATT H, BÍZIKOVÁ L, BRANDÃO DE OLIVEIRA A, FERNÁNDEZ ARROYO D P (eds.), *Global Private International Law. Adjudication without Frontiers*, Cheltenham, 2019, p. 506; See: ECtHR, C and E v. France, Application no. 1462/18 and 17348/18, 19 November 2019.

[42] [42] ECtHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother Requested by the French Court of Cassation, Request no. P16-2018-001, 10 April 2019 and subsequent ECtHR decision: ECtHR, D v. France, Application, Application no. 11288/18, 16 July 2020; ECtHR, D. B. and others v. Switzerland, Application no. 58817/15 and 58252/15, 22 November 2022; ECtHR, C v. Italy, Application no. 47196/21, 31 August 2023; ECtHR, Valdís Fjölnisdóttir and Others v. Iceland, Application no. 71552/17, 18. August 2021; ECtHR, A.M. v. Norway, Application no. 30254/18, 24 March 2022; ECtHR, C.E. and Others v. France, Applications nos. 29775/18 and 29693/19, 24 March 2022; ECtHR, H. v The United Kingdom, Application no. 32185/20, 23 June 2022; K.K. and others v. Denmark, Application no. 25212/21, 6 December 2022; ECtHR, Bonzano and Others v. Italy, Application no. 59054/19, 30 May 2023; Modanese and Others v. Italy, Application n. 47196/21, 31 August 2023.; See: QUEIROLO I, MAOLI F, *Surrogacy and circulation of family relationships: which role for the best interests of the child?*, in *Papers di diritto europeo*, 2025, p. 10.

[43] ECtHR, D v. France, Application, Application no. 11288/18, 16 July 2020.

[44] ECtHR, RF and Others v. Germany, Application no. 46808/16, 12 November 2024.

Contrary to *Manesson* and *Labasse,* the *Paradiso and Campanelli v. Itally*[45] concerned the surrogacy case in which the child had no genetic link to the intended parents. The ECtHR firstly decided that there was *de facto* existence of family life between the couple and child[46]. The Grand Chamber overturned the decision, thus allowing a wide margin of appreciation to the national authorities on the issue.

In its first decision, ECtHR referred to the public policy. It stated that the reference to public order could not, however, be considered as giving *carte blanche* for any measure, since the State had an obligation to take the child's best interests into account, irrespective of the nature of the parental link, genetic or otherwise.[47] In contrast to that, the Grand Chamber elaborated that the public interests involved carry significant weight, while the applicants' interest in their personal development through continued contact with the child is comparatively limited. Allowing the applicants to retain the child, potentially as adoptive parents, would effectively legalise a situation created in violation of key provisions of Italian law[48].

Following the ECtHR ruling in *Paradiso and Campanelli* it can be concluded that the violation of Article 8 is limited to the lack of recognition of filiation links that reflect the genetic truth. Whilst in *Mennesson*, the links between the child and biological father are recognised, in *Paradisso and Camplanelli*, the absence of a genetic link prevented the recognition of any family ties between the intended parents and child. This decision had a major impact on defining family life in the sense of Article 8[49]. One of the key concerns is the interpretation of the child's best interests by the Grand Chamber, which considered that it is in the child's best interests to resolve the unlawful situation swiftly. However, the case reflected

---

[45] ECtHR, Grand Chamber, Paradiso and Campanelli v. Italy, Application no. 25358/12, 24 January 2017.

[46] ECtHR, Paradiso and Campanelli v. Italy, Application no. 25358/12, 27 January 2015.; See: BEAUMONT P., TRIMMINGS K., *Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?*, in: IPPOLITO F., BIAGIONI G. (eds.), *Migrant Children: Challenges for Public and Private International Law*, Editoriale Scientifica, Naples, 2016, p. 109.

[47] Paradiso and Campanelli v. Italy, 2015, para. 80.

[48] Paradiso and Campanelli v. Italy, 2017, para. 215.

[49] TRILHA K., *Surrogacy in the Context of Private International Law? Cross-border Effects of International Reproductive Agreements*, in p. in MUIR WATT H., BÍZIKOVÁ L., BRANDÃO DE OLIVEIRA A., FERNÁNDEZ ARROYO D. P. (eds.), *Global Private International Law. Adjudication without Frontiers*, Cheltenham, 2019, p. 501. See also: ECtHR, Valdís Fjölnisdóttir and Others v. Iceland, Application no. 71552/17, 18 May 2021.

a broader public interest that had to be balanced with the individual rights and interests of the child[50].

UNIPAR national reports illustrate a noteworthy evolution of domestic jurisprudence in the field of surrogacy, marked by considerable diversity across jurisdictions. In certain UNIPAR Member States, the case law of the ECtHR has been directly incorporated into the domestic legal order through the practice of registrars and courts.[51]

By contrast, Spain provides a striking example of legislative and judicial activism in this domain. In its decision of 4 December 2024[52], the Spanish Supreme Court held that the very conclusion of a surrogacy contract constitutes a violation of the dignity and the free development of the personality of both the surrogate mother and the children born as a result of such an agreement. The Court emphasised that both the woman and the child are reduced to the status of objects within the contractual arrangement, and rejected the proposition that a parent–child relationship may validly be created by virtue of a contract, even when "validated" by a foreign judgment. The Court categorised commercial surrogacy as falling within the scope of the prohibition on the "sale of children." This judicial stance is further reinforced by legislative developments. The 2023 Law on Sexual and Reproductive Health and Voluntary Termination of Pregnancy expressly classifies surrogacy as a form of violence against women and extends the prohibition by banning advertising by intermediary agencies. Against this backdrop, the central question confronting Spanish courts remains whether the recognition of parenthood validly established abroad can be reconciled with the domestic prohibition of surrogacy, particularly where the best interests of the child are invoked as a countervailing consideration to public policy. The Spanish Supreme Court has held that the best interests of the child cannot be grounded in the existence of a surrogacy contract or in foreign determinations of parenthood in favour of intended parents. Instead, protection must derive from severing legal ties with the gestational mother, recognising biological paternity, and situating the child within a stable family environment. The Court further clarified that the child's best interests

---

[50] VALC J., *Towards an international consensus on cross-border surrogacy: the role of the European Court of Human Rights?,* in *Medical Law Review*, 2025, p. 15.

[51] For example Croatia and Bulgaria, see the National Reports on Croatia and Bulgaria, in this Volume.

[52] Tribunal Supremo, Sala de lo Civil, STS 5879/2024, ECLI:ES:TS:2024:5879.

are not to be defined according to the intentions of commissioning parents, but in light of societal values reflected in domestic law and international conventions. Importantly, it emphasised that judges cannot create parenthood on the basis of a child's best interests; this is the prerogative of the legislator, who must balance competing considerations such as procreative freedom, the right to know one's origins, and legal certainty. Ultimately, the Court concluded that surrogacy contracts, even when validated abroad, constitute exploitation of women and harm to children, and that recognition of such foreign judgments is contrary to Spanish public policy.[53] In addition, the Instruction of 28 April 2025 expressly prohibits civil and consular registrars from accepting, for the purposes of birth and parenthood registration of children born through surrogacy, foreign registry certificates, declarations accompanied by medical attestations, or even final judgments issued by foreign courts. In the context of same-sex couples, the invocation of public policy typically arises where two men seek the registration of a birth certificate, whereas such objections are far less likely to be raised in cases concerning co-motherhood.[54]

4.3. *Public Policy versus Freedom of Movement in the EU*

The CJEU's case law over the past decade established a clear framework for recognising foreign personal statuses, emphasising that such recognition must respect public policy but cannot be arbitrarily denied by Member States.[55] In 2018, case law regarding personal status was further developed through the interpretation of the CJEU in the case of *Coman* concerning same-sex marriages validly concluded in one Member

[53] See the National Report on Spain.

[54] See: the National Reports on Spain, Bulgaria and Italy..

[55] Judgment of the Court of 2 October 2003, Carlos Garcia Avello v Belgian State, Case C-148/02; Judgment of the Court (Grand Chamber) of 14 October 2008, Stefan Grunkin and Dorothee Regina Paul, Case C-353/06; Judgment of the Court (Second Chamber) of 22 December 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Case C-208/09; Judgment of the Court (Second Chamber) of 12 May 2011, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, CaseC-391/09; Judgment of the Court (Second Chamber) of 2 June 2016, Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, Case C-438/14; Judgment of the Court (Second Chamber) of 8 June 2017, Proceedings brought by Mircea Florian Freitag, Case C- 541/15.

State.[56] Here, the CJEU repeats that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[57]

In *Pancharevo* and *Rzecznik*[58] cases, the CJEU was confronted with the matter of same-sex parenthood, again in the context of the mobility rights that Union citizens derive from Article 21(1) TFEU. In *Pancharevo* case, a same-sex couple legally married in Spain petitioned for the issuance of a Bulgarian birth certificate for their daughter, who was born in Spain in 2019. The Bulgarian authorities denied this request, referencing national legislation that recognizes only heterosexual marriages and associated parental rights. The applicant subsequently contested the decision, asserting that it contravened established EU principles concerning non discrimination, the right to family life, and the freedom of movement. The CJEU responded to the questions referred for a preliminary ruling in a relatively brief judgment which, consistent with its earlier decision in *Coman*, adopts a functional approach designed to ensure that the Union citizens concerned can exercise their rights of free movement without requiring Bulgaria to recognize same-sex parenthood in a broader context, let alone to incorporate it into its own legislation or to issue a birth certificate reflecting such parentage. The CJEU reiterated its position on public policy, as established in *Coman*, and called upon the opinion of the Advocate General.[59] Advocate General Kokott was more precise by noting that the obligation to enter on identity documents, for the sole purpose of ensuring the exercise of the child's freedom of movement

[56] See: NÍ SHÚILLEABHÁIN M, *Same-Sex Marriage and the Conflict of Laws: the Unresolved Cross-Border Dimension*, in *Law Quarterly Review*, 2019, p. 374.; NÍ SHÚILLEABHÁIN M, *Cross-Border (Non-) Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law*, in SCHERPE J, BARGELLI E, *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change*, Intersentia, 2021, p. 13.

[57] C-673/16, Para. 44.; C-438/14, Para. 67, C-193/16, Para. 18.

[58] Order of the Court (Tenth Chamber) of 24 June 2022, Rzecznik Praw Obywatelskich v K.S. and Others, Case C-2/21. The CJEU answered the preliminary question referred by Polish courts in the same way as in Pancharevo.

[59] C-490/20, Para. 55.

with each of her parents individually, the names of the two women designated as mothers on the Spanish birth certificate, does not adversely affect the national identity.[60]

Ground breaking decisions on *Coman* and *Pancharevo* demonstrate that the concept of public policy must be interpreted narrowly and cannot override fundamental freedoms guaranteed by EU law. This case law reaffirms that matters of status and family law within the Member States, particularly in relation to choice of law, can no longer be viewed as isolated from the influence of EU law.

5. *Reflections on Content of Public Policy in Parenthood Matters*

The principal issue surrounding the public policy exception in matters of filiation now revolves around the recognition and continuity of a filiation status established abroad, particularly in circumstances involving children born through surrogacy arrangements or within same-sex or multi-parent family structures. Nonetheless, even within more conventional contexts, there persist situations in which considerations of public policy may warrant the refusal to recognise or give effect to certain foreign legal standards, insofar as they are deemed incompatible with the fundamental tenets of the forum's legal order.

From a comparative perspective, legal presumptions remain central to the establishment of filiation. However, ECtHR warned that when such presumptions override biological or social reality, they may conflict with fundamental rights to privacy and family life. Foreign laws or court practices that disregard DNA evidence or impose overly rigid procedural limits on paternity actions can infringe upon an individual's right to identity and private life, thus justifying the application of the *ordre public* exception. While DNA testing interferes with personal integrity and privacy, it may be legitimate when necessary and proportionate to protect

[60] Opinion of Advocate General Kokott delivered on 15 April 2021 (1) Case C-490/20 V.M.A. v. Stolichna obshtina, rayon 'Pancharevo' (Sofia municipality, Pancharevo district, Bulgaria), Para. 150-151.; However, the Bulgarian court ultimately rejected the request for issuing the birth certificate; See more: LUKU H., *The Supreme Administrative Court of Bulgaria's final decision in the Pancharevo case: Bulgaria is not obliged to issue identity documents for baby S.D.K.A. as she is not Bulgarian (but presumably Spanish)*, Conflicts of Laws, https://conflictoflaws.net/2023/the-supreme-administrative-court-of-bulgarias-final-decision-in-the-pancharevo-case-bulgaria-is-not-obliged-to-issue-identity-documents-for-baby-s-d-k-a-as-she-is-not-bulgarian-but-presuma/.

the rights of others or ensure legal certainty. Ultimately, a fair balance must be struck between the competing interests of legal stability, truth, and individual rights.

Let us look more closely on content of public policy in relation to surrogacy. Filiation constitutes one of the fundamental elements of human existence and the foundation of humanity's continuity. Accordingly, the law must play a crucial role in guiding human behaviour so as to preserve the very essence of humankind. Although states adopt differing positions regarding the contractualisation of filiation, scholars have persuasively argued that the distinction between commercial and altruistic surrogacy is exceedingly thin, often invisible, and ultimately devoid of substantive meaning.[61]

Nearly a decade ago, the United Nations Special Rapporteur observed that *commercial surrogacy commonly commodifies children and exploits surrogate mothers*.[62] This position was reaffirmed by the Special Rapporteur report presented before the General Assembly in 2025 [63].

More than a decade ago, within the framework of the HCCH, a clear conclusion was drawn: a State seeking to discourage individuals within its jurisdiction from resorting to surrogacy must not only prohibit domestic surrogacy arrangements, but also take measures to deter participation in international surrogacy. Such measures, it was noted, would most fundamentally involve a refusal, on public policy grounds, to legally recognise the parent–child relationship between the child and the intended parent(s) [64].

The foregoing analysis aligns closely with restrictions grounded in bioethical considerations: surrogacy arrangements lie beyond the legitimate boundaries of contract law, constituting a sphere in which limitations on contractual freedom are fully justified. The process of dehumanisation inherent in such arrangements strips both the birth mother and the child of their dignity, rendering surrogacy practices "*antithetical to the good of*

---

[61] FENTON-GLYNN C., SCHERPE J., *Surrogacy: is the law governing surrogacy keeping pace with social change?*, in *Cambridge Family Law*, 2017, p. 4.

[62] Report of the UN Special Rapporteur on the sale and sexual exploitation of children, Thematic Report on Surrogacy, A/HRC/37/60, 15 January 2018, 5, 7.

[63] Report of the Special Rapporteur on violence against women and girls, its causes and consequences, A/80/158.

[64] Permanent Bureau of the Hague Conference on Private International Law, A Preliminary Report on the Issues from International Surrogacy Arrangements, Preliminary Document No 10 (March 2012), para 1.

birth mothers and children, and thus antithetical to the common good and human flourishing[65]."

International law unequivocally classifies "*contracts in which the live birth of a child constitutes consideration*," and, in particular, contracts that include the transfer of the child, whether physical or legal, as part of that consideration, as amounting to the sale of a child[66]. Consequently, contractually based filiation, when recognised as a legally sanctioned and systemic practice, constitutes a grave violation of the rights of the child[67].

Most recently, the European Union has also characterised certain forms of surrogacy as an international crime falling within the broader framework of human trafficking. [68]

Flowing from the foregoing, commercial surrogacy arrangements constitute a matter of serious concern—indeed, a red alert—and must be regarded as unacceptable and subject to appropriate sanction. But, given that in nearly all Member States commercial surrogacy remains prohibited, while some Member States may enact legislation permitting altruistic surrogacy, private international law legislator must bare in mind that the boundary between the two forms may be fluid, with the risk that commercial practices could be disguised under the guise of altruism.[69]

Sovereign states are empowered to render their legal responses, and private international law is here to coordinate and set limitations to safeguard internationally accepted fundament values. The ECtHR has consistently recognised that States retain a wide margin of appreciation in this domain. A State is not obliged to ensure the continuity of a filiation status established abroad when that status is founded upon manifestly flawed or unlawful foundations. In such circumstances, public policy provides a legitimate and sufficient ground for refusing to apply foreign law or to recognise a foreign judgment or public document that contravenes the fundamental principles of the forum's legal order. Following

---

[65] ALLEN A.A., *Surrogacy And Limitations To Freedom Of Contract: Toward Being More Fully Human*, in *Harvard Journal of Law & Public Policy*, p. 810.

[66] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC).

[67] Submission by Child Identity Protection (CHIP) to discussions on EC Proposal 2022 695, 24 June 2025.

[68] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ L, 2024/1712, 24.6.2024, ELI: http://data.europa.eu/eli/dir/2024/1712/oj.

[69] DE GROOT D., *Surrogacy: The legal situation in the EU.*, European Parliamentary Research Service PE 769.50, February 2025. p. 5-7.

the discussion on the possibility of refusing recognition of a filiation on public policy grounds, it remains clear that States must nonetheless establish mechanisms to protect the interests of the child. The best interests of the child must be the paramount consideration in any decision affecting parent–child relationships.[70] Where a balancing of interests is necessary, the interests of the child must prevail.[71]

The ECtHR has clarified, particularly in its jurisprudence on surrogacy, that a State's refusal to recognise a filiation relationship falls within its margin of appreciation. However, where such proceedings involve a refusal to acknowledge a genetic link between an adult and a child, the State nonetheless retains a positive obligation under Article 8 of the ECHR to safeguard the rights and interests of the child. The Court has emphasised that a child must not be made to bear the consequences of the actions, choices, or legal strategies of adults.[72]

The protection of personal identity under Article 8 extends to the legal recognition of parent–child relationships and may be fulfilled through various legal mechanisms, provided that they adequately safeguard the child's right to identity.

The CJEU's case-law demonstrates a growing capacity to shape cross-border family law within the EU. Owing to its institutional authority and the link between "*limping relationships*" and the free movement of persons, the CJEU can directly address conflicts arising from inconsistent recognition of family status across Member States[73]. Although the *Pancharevo* ruling marks a significant advancement in the cross-border recognition of parenthood within the EU, notable protection gaps remain, as also reflected in the *Rzecznik* case. The judgment obliges Member States to recognize parenthood established in another Member State only for the purposes of EU law, notably regarding the child's rights to free movement, residence, and equal treatment. However, it does not require recognition for national purposes unrelated to EU free movement,

---

[70] TRIMMINGS, K., *Surrogacy Arrangements and the Best Interests of the Child: The Case Law of the European Court of Human Rights*, in BERGAMINI E., RAGNI C. (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Intersentia, 2019, p. 207.

[71] ECtHR, Koychev v. Bulgaria, Application no. 32495/15, 13 October 2020; ECtHR, Yousef v. The Netherlands, Application no. 33711/96, 5 November 2002, para. 73.

[72] R.F. and Others v. Germany, 2024, para. 87–88.

[73] See: DUDEN K., WIEDEMANN D., *Concluding Remarks: Changing Families, Changing Family Law*, in DUDEN K., WIEDEMANN D., *Changing Families, Changing Family Law in Europe*, Cambridge – Antwerp – Chicago, 2024, p. 339.

such as inheritance, taxation, custody, or social benefits outside EU competence, nor does it extend to birth certificates issued by third countries[74].

6. *Conclusion*

Regulation of parenthood matters should place primary emphasis on the rights of the child and ensure their thorough protection. Drafters of private international law instruments must remain vigilant against potential *forum shopping*, as long as substantive family law continues to be a prerogative of the Member States. The potential limits of child protection should be defined through clearly established minimal standards of control under the public policy exception. In the context of parenthood, public policy safeguards should explicitly prohibit the sale of children and human trafficking, including practices that are commercial in nature even if nominally described as altruistic surrogacy. They should also address potential violations of women's rights where surrogate mothers are involved in such arrangements, and ensure protection against infringements of fundamental rights, including the child's right to identity, non-discrimination, and best interests. If in a case at hand the violation of fundaments pertaining to public policy is detected, such parenthood status established abroad should be set aside. However, the fundamental rights of the child under international and European human rights impose the child's best interest is at the forefront while parenthood is (re)established.

[74] See: TRYFONIDOU A., cit., p. 39-40.

LEONTINE BRUIJNEN AND THALIA KRUGER

HOW TO AVOID THE MISTAKES OF INTERCOUNTRY ADOPTION IN SURROGACY AND ART

CONTENT: 1. Introduction – 2. Brief context of intercountry adoption. – 3. The demand-driven establishment of filiation. – 4. Not taking children's rights seriously. – 4.1. The right to registration and to know and be cared for by parents. – 4.2. The right to identity. – 5. Inadequate collection and preservation of information. – 6. Inadequate access to information. – 7. Conclusion.

1. *Introduction*

Over the past decades, there has been a drastic drop in intercountry adoptions[1], at the same time as the use of (medically) assisted reproduction (AR) has been increasing[2]. If the emergence of AR (including surrogacy) responded to a desire for families to have children[3], it seems that fewer adoptions do not reflect a decline in this desire for children. AR includes high-tech and low-tech fertilisations, and can involve surrogate mothers to bring children into the world. AR often contains a cross-border element, for instance when people travel to cheaper or otherwise more accessible clinics in other countries or make use of surrogates.

Both adoption and parenthood through AR offer alternatives to the model of a family composed of a biological mother, a biological father

[1] For statistics on intercountry adoptions worldwide, see SELMAN S., *The rise and fall of intercountry adoption 1995-2019*, in LOWE N., FENTON-GLYNN C., *Research Handbook on Adoption Law,* Cheltenham 2023, p. 321-345. In Flanders, the numbers have for instance consistently declined; see Vlaams Centrum voor Adoptie, *Activiteitenverslag Adoptie 2023*, available at https://publicaties.vlaanderen.be/view-file/67658.

[2] See European Society of Human Reproduction and Embryology, "IVF and IUI treatment cycles increase across Europe, along with stable pregnancy rates", Press release of 8 July 2024, available at https://www.eurekalert.org/news-releases/1050302; American Society for Reproductive Medicine, "US IVF usage increases in 2023, leads to over 95,000 babies born", 25 April 2025, available at https://www.asrm.org/news-and-events/asrm-news/press-releasesbulletins/us-ivf-usage-increases-in-2023-leads-to-over-95000-babies-born/.

[3] SELMAN P., *The rise and fall of intercountry adoption 1995-2019*, cit., p. 343; and SCHERMAN S., MISCA G., ROTABI K., SELMAN P., *Global commercial surrogacy and international adoption: parallels and differences*, in *Adoption & Fostering,* 2016, p. 21-23. This point was also raised by the Flemish Filiation Centre at the Belgian national seminar organised at the University of Antwerp team on 26 May 2025 within the UniPAR project.

and their common children. Both systems raise questions about the legal, ethical, and practical consequences for the persons involved[4]. While intercountry adoption is a process of placing a live child into a family in another country, AR is used to create children. These different starting points mean that the processes and legal contexts of intercountry adoption largely differ from those of AR. Yet, there is a commonality in the quest for children for families who might not otherwise have children for various reasons (such as infertility, age, or composition of the family). This commonality between intercountry adoption and alternative means of reproduction makes it useful to pause and consider what the latter can learn from the years of practice of the other. Intercountry adoptions indeed encompass a decades-old practice where many scandals and malpractices have emerged[5].

This paper examines the mistakes in intercountry adoption, in order to draw lessons from those mistakes. The paper starts with a brief context of intercountry adoption and then turns to specific mistakes, including the demand-driven nature of the process, not taking the children's rights seriously, inadequate collection and preservation of information, and inadequate access to information. The focus throughout the paper is on intercountry adoption, where the issues of preserving of and access to information have been particularly stark. The paper does not systematically analyse the decisions of the European Court of Human Rights (ECtHR), but includes references to a few key decisions[6].

---

[4] CAHN N., *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, in *Journal of the American Academy of Matrimonial Lawyers,* 2011, p. 1.

[5] See for instance SMITH ROTABI K., *Fraud in Intercountry Adoption: Child Shales and Abduction in Vietnam, Cambodia, and Guatemala*, in GIBBONS J.L. AND SMITH Rotabi K., *Intercountry Adoption*, Ashgate 2012, 67-76; ATTAR M., *Enfants volés au Congo et adoptés en Belgique : l'initiatrice des adoptions est condamnée à 10 ans de prison ferme*, RTBF, 11 October 2024, available at https://www.rtbf.be/article/enfants-voles-au-congo-et-adoptes-en-belgique-l-initiatrice-des-adoptions-est-condamnee-a-10-ans-de-prison-ferme-11447336; MOUHAMOU I., *Niet alle adoptiekinderen uit Ethiopië vrijwillig afgestaan: "Impact op het leven van betrokkenen is enorm*, Belga, 23 November 2023, available at https://www.vrt.be/vrtnws/nl/2023/11/23/adoptiekinderen-uit-ethiopie/.

[6] For a more comprehensive treatment of the ECtHR case law, see the Chapter by L. CARPANETO, F. MAOLI AND I QUEIROLO in this volume.

2. *Brief context of intercountry adoption*

In recent years, the existence of intercountry adoption as a child protection measure is being questioned in several European countries,[7] Malpractices in intercountry adoption cases came to light, including lack of (genuine) consent by parents, the adoption of children who were not orphans, and incomplete or incorrect adoption files[8]. This led to a halt in intercountry adoptions in Sweden, Flanders and the Netherlands, for example, and a planned halt in Switzerland[9].

But where did it start and what changed? By the 1980s there were large numbers of intercountry adoptions, in a context of complex human problems and insufficient legal frameworks[10]. Many of these adoptions were seen as an act of philanthropy, i.e. providing a house and family to children that were living in poverty in countries perceived to have fewer resources[11]. However, it was not only philanthropy: the adopting parents also wanted to have a child, and these were often people who could not

---

[7] For example, see the report on intercountry adoption practices in Flanders (Belgium): Expertenpanel inzake interlandelijke adoptie, *Eindrapport*, 2021. In the Netherlands: Commissie onderzoek interlandelijke adoptie, *Rapport Commissie onderzoek interlandelijke adoptie*, 2021. In Sweden (preliminary report): Adoptionskommissionen, *Sveriges internationella adoptionsverksamhet – lärdomar och vägen framåt. Volym 1*, 2025. In Switzerland: Groupe d'experts Adoption internationale, *Rapport final*, 2024. See also SERVATTAZ E., *Why countries are banning international adoptions*, at Swissinfo.ch, 14 February 2025, https://www.swissinfo.ch/eng/international-cooperation/why-countries-are-banning-international-adoptions/88858045

[8] VILLANUEVA O'DRISCOLL J., JASPERS Y., VANSPAUWEN N., *Transnational Adoption: A Curse or a Blessing? The Psychosocial Impact of Malpractices in Transnational Adoption on Adoptees*, in *Adoption Quarterly,* 2022, p. 105; LOIBL E., *The aftermath of transnational illegal adoptions: Redressing human rights violations in the intercountry adoption system with instruments of transitional justice*, in *Childhood*, 2021 p. 477-491; MOMOH O., *Intercountry adoption: preventing and addressing illicit practices*, in CARRUTHERS J., LINDSAY B., *Research Handbook on International Family Law* , Cheltenham, 2024, p. 32.

[9] n 7 *supra*; news item of 29 January 2025 on the website of the Swiss Federal Authorities: https://www.news.admin.ch/en/nsb?id=103957. This announcement was made after the publication of a report by experts: Expertengruppe «Internationale Adoption» & Monika Pfaffinger (chair), "Schlussbericht Zu Handen des Bundesamtes für Justiz" (Zürich, 27 June 2024), available at the same page.

[10] See PARRA-ARANGUREN G., *Explanatory Report on the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (adopted by the Seventeenth Session, 2022), p. 38 to 39.

[11] See MATHER M., "Intercountry Adoption", *Archives of Disease in Childhood* 2007 (vol 9), issue 6: "Few would wish to insult the good intentions of adoptive parents. However, it would be naive to deny that corruption and criminality can exploit the desperation of parents caring for children they can ill afford and the yearnings of those with none."

have their own biological children for one reason or another. There was a demand for children by these families. In seeking to provide safeguards for these children the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption came into being in 1993. The purpose of the Convention was not to promote or to facilitate intercountry adoptions, but to provide safeguard for the children involved and to ensure that their best interests are guaranteed and their fundamental rights respected[12].

For this protection, the Convention set up a system of authorities cooperating for the transfer of a child from one State to another (in Articles 6 to 13). Each of these authorities has a number of duties to protect the child. The authorities in the State of origin should check the consent of the birth parents (Article 16(1)c) and Article 17), while the authorities in the State of destination should vet and prepare the intending parents (Article 15(1)). The authorities of both States have to take the necessary steps to allow the child to leave the country of origin and enter the State of destination with the purpose of residing there permanently (Article 18). The use of this cooperation system between authorities is mandatory as between Contracting States: parents cannot arrange adoptions themselves (Articles 4 and 5).

3. *The demand-driven establishment of filiation*

Thus, the Hague Adoption Convention came into existence to create a legal framework which would safeguard the best interests of children. The protection was needed against philanthropy, which was sometimes misplaced, for instance at times or a war or natural disaster, when there is chaos and the rights of children can often not be sufficiently guaranteed[13]. But the protection was also needed against a demand for children,

[12] See the Preamble and Article 1 of the 1993 Hague Adoption Convention.

[13] See for instance the information notes and press releases by the Hague Conference on Private International Law on the armed conflict in Ukraine (2022), the Haiti Earthquake (2010), and the Asian-African Tsunami Disaster (2005), available at https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption.

which created a market[14]. In countries where many children were in orphanages or where poverty was prevalent, institutions, agencies, human traffickers, and sometimes even birth parents saw a way to make money by selling children to intending parents elsewhere in the world[15]. Sometimes these intending parents were desperate, and paid exorbitant amounts of money, or did not see the plain truth that documents were falsified.

The cooperating authorities in the two States (of origin and of destination) are responsible for matching the child with the family. This system was indeed intended to prevent intending parents from going to fetch children of their own accord. It to a large extent reached that goal. Yet, the system places much pressure on the authorities, especially in the State of origin[16]. The authorities in States of origin are responsible for checking adoptability, i.e. whether the child is an orphan or abandoned by their parents. This turned out to be a sticky point: many children in orphanages are not orphans, but stay there because their parents cannot take care of them, sometimes only temporarily. Intending parents are sometimes not aware of this reality. They, and their surroundings might think that it could not be difficult to adopt a child, because there are so many children in a particular country in orphanages.

As the lack of understanding on the demand side grew, institutions and authorities in countries of origin sometimes gave in to pressure[17]. They get files from countries where people want to adopt children, and they are assumed to have these children available. This is the problem of demand-driven intercountry adoptions. It is exacerbated by the mismatch between the demand and the children that are truly in need of someone to care for them. The demand is for young, healthy babies, while the children needing care are often older, ill or handicapped, have behavioural traumas, or are part of a group of three or more siblings who

---

[14] See GRAFF E.J., *They steal babies, don't they? Pacific Standard*, 24 November 2014: "Demand would begin to outstrip supply, leading to that obvious two-part capitalist solution: increased prices and increased production."

[15] On the structural problem, see BUNN J., *Regulating Corruption in Intercountry Adoption*, in *Vanderbilt Journal of Transnational Law*, 2019 (vol 52), 685- 726 at 697-699.

[16] *Ibid.* at 696.

[17] See GRAFF (n 14 *supra*).

should stay together[18]. The mismatch led to the creation of a separate category for "special needs" children, who could be adopted more quickly. Even this solution shows how demand-driven adoption became. This lies at the basis of many of the mistakes that came out in the scandals over the past years, such as parents being told that their children were merely going on holidays and then never returning, birth certificates being mixed up, children being registered as orphans while their parents were alive.

Creating children through AR (including surrogacy) is also demand-driven. Intending parents want to have children. The difference is that the children are not yet born, but still have to be conceived. Therefore the demand-driven approach is less of an immediate infringement of an existing child's rights. The United Nationals Convention on the Rights of the Child (CRC) does not state explicitly whether it applies to unborn children. As this is left to the national laws of the Contracting States, they often apply it from birth until 18 years. The discussion about the rights of the embryo is however not relevant for our purposes. The point is that the purpose of AR is to create a child and once that child is born, they have rights. So at the moment of AR, all those involved must consider the rights that will accrue at birth. From that moment the child will have the right to registration and to identity (as discussed below). It is thus important that legislators and authorities alike learn from the experiences of adoption in this regard. If not, more and more scandals will erupt regarding children who seek answers about who they are and where they came from.

The only way to avoid the mistakes of the past, is to be very wary of the demands by intending parents, and to shift the focus to the rights of children[19]. The view that the best interests of the child should be the primary consideration in intercountry adoption is now more widely practised than might have been the case at some points of time in the past.[20] Unfortunately the child's best interests is currently not yet the starting

---

[18] See Hague Conference on Private International Law, T*he Implementation and Operation of the 1993 Hague Intercountry Adoption Convention. Guide to Good Practice (Guide No. 1)*, 2008, para 386 to 390. Special needs children could sometimes be placed more quickly, if countries operate a separate list for them.

[19] This would be similar to the solution proposed for intercountry adoption in the Flemish Report that for these adoptions the initiative should lie be in the hands of the States of origin (n 7 *supra*): p. 17.

[20] TOBIN J., *Understanding adoption: the rights approach*, cit., p. 37-57; CAHN N., *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, cit., p. 3.

point in surrogacy or AR cases[21]. This is reflected, for example, in the way in which States and authorities weigh the child's rights to know their origins and a biological parent's wish to remain anonymous. Many States allow anonymous gamete donation because they are concerned that there would otherwise be a shortage of donors. These countries seem to give preference to the donor's right to privacy over the child's right to know their identity and their origins[22]. The widespread demand of intending parents or donated gametes and surrogate mothers is again what drives the practice as well as the approach to regulation today.

4. *Not taking children's rights seriously*

Almost all States in the world have ratified the United Nationals Convention on the Rights of the Child[23]. An almost universally accepted Convention should mean universal protection of the rights that it enshrines. The content of the Convention itself does not lead to much controversy, but rather there is much lip service paid to this content. There are many ways in which rights are recognised without truly being guaranteed. This section's focus is on Articles 7 (the right to birth registration, to a name and nationality and to be cared for by their parents) and 8 (the right to preserve their identity). Other rights of the child could also be relevant in this discussion, but in light of the ambit of the paper, we have chosen to limit the discussion to two rights that are being insufficiently respected. Other instruments also guarantee these same rights, and we will refer to them where appropriate, but keep the main focus on the provisions of the CRC.

---

[21] SABATELLO M., *Are the kids all right? A child-centred approach to assisted reproductive technologies*, in *Netherlands Quarterly of Human Rights,* 2013, p. 74-98; CAHN N., *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, cit., p. 1-32.

[22] BESSON S., *Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights*, cit., p. 147; TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents*, cit., p. 266-267.

[23] According to the UN Treaty Office, the Convention has 196 Contracting States: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en/.

4.1. *The right to registration and to know and be cared for by parents*

Article 7(1) of the CRC stipulates that "*the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents*"[24]. Neither the CRC, its preparatory works, nor the Committee on the Rights of the Child clarified which information should be registered. According to scholars, this should include at least the child's name at birth, their date and place of birth, and the names and addresses of their parents, as well as the parents' nationalities[25]. Neither the CRC nor the Committee on the Rights of the Child defined 'parents'[26]. This raises the question whether Article 7 envisages legal, social, gestational, genetic parents, and/or biological parents[27]. Some authors argue that the term should encompass all these types of

[24] The right to birth registration is also enshrined in Article 24 of the International Covenant on Civil and Political Rights. Furthermore, Sustainable Development Goal Target 16.9 aims to guarantee everyone's legal identity, including birth registration. The ECtHR also confirmed the right to birth registration: ECtHR 16 November 2023, *G.B.T. v. Spain*, App. no. 3041/19, para 118.

[25] TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents* in TOBIN J., *The UN Convention on the Rights of the Child: A Commentary,* Oxford, 2019, p. 247; HODGKIN R., NEWELL P., *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, 2007, p. 101.

[26] TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents*, cit., p. 258. TOBIN and SEOW mention that, for the purposes of other articles such as Article 3 of the CRC, the term 'parents' has been clarified. UN Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* states "*[t]he term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom*" *(art. 3, para. 1)*, para 59.

[27] SALLES VIEIRA PINTO J., *Adoptees' Right to Know. A Right We Do Not Fully 'Know'? Steps Towards Conceptualization via a Textualist Analysis of Legal Sources*, cit., p. 8.

parents[28]. This is also in line with Principles 11.1 and 12.3 of the Principles for the Protection of the Rights of the Child Born through Surrogacy (the Verona Principles)[29].

The malpractices in the context of intercountry adoption included inadequate registration. This caused great difficulties for adoptees to find their birth parents and to develop their identity[30]. In trying to avoid the mistakes of the past, 'parents' should be interpreted in an elaborate way, so that it includes all biological and genetic parents where AR was used. One argument raised against registering the gestational and biological parents on the birth certificate is that it could have (unintended) legal consequences for them. This is one of the examples of not taking the rights of children seriously. Yes, being registered might have legal consequences. But it is only right that putting a child in the world should bring legal consequences: from the moment that child is born, they have rights. The persons that surround them, surrounded them at the time of birth, or contributed to their birth incur legal responsibilities. Concerning 'unintended' legal consequences, legislators should draft carefully so as to ensure the correct registration of parents or persons with different roles, and to delimit the legal responsibilities accordingly[31]. Not registering cannot be the preferred solution, but simply amounts to fear or legal laziness.

---

[28] See for example TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents*, cit., p. 241; BESSON S., *Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights*, cit., p. 143.

[29] Principles concluded by the International Social Service in 2021, available at https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February 2021.pdf.

[30] VILLANUEVA O'DRISCOLL J., JASPERS Y., VANSPAUWEN N., *Transnational Adoption: A Curse or a Blessing? The Psychosocial Impact of Malpractices in Transnational Adoption on Adoptees*, cit., p. 103-133; BESSON S., *Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights*, cit.,p. 141; SCHERMAN R., MISCA G., ROTABI K., SELMAN P., *Global commercial surrogacy and international adoption: parallels and differences*, cit., p. 20-35; DAMBACH M., CANTWELL N., *Child's right to identity in surrogacy*, in TRIMMINGS K., SHAKARGY S., ACHMAD C., *Research Handbook on Surrogacy and the Law,* Cheltenham, 2024, p. 108-129; Expertenpanel inzake interlandelijke adoptie (Flanders), *Eindrapport*, 2021; Commissie onderzoek interlandelijke adoptie, *Rapport Commissie onderzoek interlandelijke adoptie*, 2021. This point was also raised by the Flemish Filiation Centre at the Belgian national seminar organised at the University of Antwerp on 26 May 2025 within the UniPAR project.

[31] TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents*, cit., p. 259-260.

The phrase 'as far as possible' in Article 7(1) was added as a compromise for States that allow anonymous birth and/or secret adoption[32]. This exception covers situations in which it is practically impossible to determine the identity of the parents. It could be for example that the child was abandoned at birth, and despite all efforts by the authorities, they could not find the parents. Since it is known that secret births and adoptions can lead to or exacerbate difficulties for adoptees to construct their identity[33], societies should make an effort to avoid similar problems for children born from AR. 'As far as possible' should therefore no longer be construed as a justification for social or cultural reasons not to register parents. According to Tobin and Seow, this phrase can cover situations in which the identities of the social, gestational and/or genetic parents are known, but are not disclosed for social or cultural reasons[34]. This interpretation, however, would amount to a repetition of the mistakes of the past: more and more children growing up with fundamental questions about themselves that society prevents itself from answering. In adoption law, legal amendments have restricted the possibility to invoke impossibility. For instance, the European Convention on Adoption (revised version of 2008)[35] provides that the child shall have access to information on their origins held by the competent authorities (Article 22(3)). This right is robust: even where the birth parents have a right to keep

[32] The Czech Republic, Luxembourg and Poland have made a reservation to Article 7 of the CRC, stating that the practice of anonymous birth in their countries does not contradict this Article. United Nations, *United Nations Treaty Collection. 11. Convention on the Rights of the Child*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en; BROWER BLAIR M., *The Impact of Family Paradigms, Domestic Constitutions, and The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination Identities and Heritage: A Comparative Examination*, in *Michigan Journal of International Law*, 2001, p. 646-647; TOBIN J., *Understanding adoption: the rights approach*, in LOWE N., FENTON-GLYNN C., *Research Handbook on Adoption Law,* Cheltenham, 2023, p. 52.

[33] See TROTTER S., *Thinking about Secret Birth* in LOWE N., FENTON-GLYNN C., *Research Handbook on Adoption Law*, 2023, Cheltenham, p. 116-134 at p 127; GROTEVANT H.D., *Coming to Terms with Adoption*, in *Adoption Quarterly*, 1997, 1, 3-27, at 9-11.

[34] TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents*, cit., p. 262.

[35] Council of Europe Convention no. 202 of 27 November 2008.

their identities secret, the authorities may override that right; the birth parents thus do not have a veto[36].

However, Article 7(2) of the CRC also seems to be conditional: "*States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field […]*". It thus seems again that a child's right to be registered at birth and to know their parents may be restricted by national or international law. For example, the right of the biological mother to remain anonymous, as guaranteed by her right to privacy under Article 17(2) of the International Covenant on Civil and Political Rights (ICCPR) and under Article 8 of the European Convention on Human Rights (ECHR), may conflict with the child's right to know their biological mother[37]. Article 7 of the CRC does not clarify whether the child's right takes precedence over the right of the biological parent(s) to remain anonymous.

The Committee on the Rights of the Child acknowledged the tension between a child's right to know their origins and a biological parent's right to privacy. Nevertheless, the Committee appears to prioritise the child's right to know their identity, having requested certain States to facilitate disclosure[38]. Such prioritisation seems the only way in which to truly avoid the mistakes that were previously made in adoptions. A mother's privacy can be guaranteed but restricted to the extent that a child must be able to know their origins. However, granting full anonymity to the mother negates the child's right to know their origins. In the balancing exercise, it is therefore better to limit the mother's right but guarantee privacy beyond what is strictly necessary, rather than to absolutely recognise the mother's right and absolutely dene the child's.

---

[36] See also VANDENHOLE W., ERDEM TÜRKELLI G., LEMBRECHT S., *Children's Rights. A Commentary on the Convention on the Rights of the Child and its Protocols*, Cheltenham, 2024, p. 119-120.

[37] TOBIN J., *Understanding adoption: the rights approach,* cit., p. 53-54.

[38] TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents*, cit., p. 263-264; UN Committee on the Rights of the Children, *Concluding observations Norway*, CRC/C/15/Add.23, para 10; UN Committee on the Rights of the Children, *Concluding observations Denmark*, CRC/C/15/Add.33, para 11; and UN Committee on the Rights of the Children, *Concluding observations Seychelles*, CRC/C/SYC/CO/2- 4, paras 40– 41.

4.2. *The right to identity*

Article 8(1) of the CRC provides: "*States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference*". The right to identity can also be inferred from the right to private and family life (Art. 8 of the ECHR). Article 8(1) of the CRC entails on the one hand the obligation for States to protect children from unreasonable interference with their right to preserve their identity by (non-)State actors. On the other hand, the provision obliges States to take all reasonable measures to ensure that children can effectively enjoy this right[39].

The exact scope of 'identity' is not settled under the CRC or under the ECHR[40]. According to the International Social Service (ISS), identity refers to "the comprehension of the 'I', the idea one has of oneself"[41]. Based on the formulation of Article 8(1) of the CRC, it clearly encompasses nationality, name and family relations at the very least. However, the word 'including' indicates that other aspects that form a child's identity could be covered. This could encompass "*biological/ genetic origins, cultural, ethnic or racial heritage, gender identity, sexual orientation, physical appearance and capabilities, social and family history, and religious and political identity*"[42]. The European Court of Human Rights (ECtHR) recognised that knowing the identity of one's parents is an important aspect of personal identity and thus of the right protected under Article 8 of the ECHR. Furthermore, birth and the circumstances in which a child is

[39] TOBIN J, TODRES J., *The Right to Preservation of a Child's Identity*, in TOBIN J., *The UN Convention on the Rights of the Child: A Commentary*, Oxford, 2019, p. 287-291.

[40] BESSON S., *Enforcing the child's right to know her origins: contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights*, in *International Journal of Law, Policy and the Family,* 2007, p. 141. For a detailed analysis of how the right to know is defined in various international instruments, and how the ambiguous scope can lead to legal uncertainty for children wishing to invoke it, see SALLES VIEIRA PINTO V., *Adoptees' Right to Know. A Right We Do Not Fully 'Know'? Steps Towards Conceptualization via a Textualist Analysis of Legal Sources*, in *Family & Law,* 2025, p. 1-24.

[41] JEANNIN C. AND POULEZ J., *Access to Origins: Panorama on Legal and Practical Considerations. ISS/IRC comparative working paper 2: Spotlight on solutions*, 2019, available at https://iss-ssi.org/storage/2023/04/ACCESS_ORIGINS_AN.pdf, p. 12.

[42] TOBIN J., TODRES J., *The Right to Preservation of a Child's Identity',* cit., p. 292.

born are considered part of a person's private life[43], as can personal identification and linking to a family[44], as well as a right to self-development and the right to establish and develop relationships with other human beings[45]. As has emerged from adoption files, these elements can be essential for a person to construct their identity.

Article 8(1) of the CRC also contains nuances: 'as recognised by law' and 'without unlawful interference'. The right may thus be restricted in a manner that is consistent with domestic and international law. Nevertheless, Article 8 of the CRC requires that, in cases of (intercountry) adoption, States should, in principle, take all reasonable measures to preserve the child's pre-adoptive identity. This includes the parents' nationality, the child's name, and family relations as recognised by law. The term 'family relations as recognised by law' is broader than 'parents' in Article 7 of the CRC and encompasses also siblings, grandparents and other relatives.

Intercountry adoptions have demonstrated the importance of preserving not only this information, but also other information, such as the circumstances of the adoption[46]. Not having such information can have an impact on the child's identity. A broad concept of identity should be upheld not only in cases of intercountry adoption, but also in cases of AR. As with intercountry adoption, anonymity in AR cases is often driven from social and/or cultural stigma. Nevertheless, as with intercountry adoption, the focus should be on the child rather than on the biological or genetic parents' wish to remain anonymous, or the intending parents'

---

[43] ECtHR, Odièvre v. France, Application no. 42326/98, 13 February 2003, para 29; ECtHR, Cherrier v. France, Application no. 18843/20, 30 January 2024, para 50; and The Registry of the Council of Europe, *Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence*, 2025, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng.

[44] ECtHR (Grand Chamber), S and Marper v. United Kingdom, Applications no. 30562/04 and 30566/04, 4 december 2008, para 66.

[45] *Ibid*; ECtHR (Grand Chamber), Gilbert v. Sweden, Application no. 41723/06, 3 April 2012, para 66.

[46] TOBIN J., *Understanding adoption: the rights approach*, cit., p. 56; TOBIN J., TODRES J., *The Right to Preservation of a Child's Identity',* cit., p. 297-298; VILLANUEVA O'DRISCOLL J., JASPERS Y., VANSPAUWEN N., *Transnational Adoption: A Curse or a Blessing? The Psychosocial Impact of Malpractices in Transnational Adoption on Adoptees*, cit., p. 103-133; DAMBACH M., CANTWELL N., *Child's right to identity in surrogacy*, cit., p. 108-129; Expertenpanel inzake interlandelijke adoptie, *Eindrapport*, 2021; and Commissie onderzoek interlandelijke adoptie, *Rapport Commissie onderzoek interlandelijke adoptie,* 2021.

wish to have a child whose biological or genetic parents remain unknown to the child. This is the only way in which to avoid the mistake of not taking children's rights seriously.

5. *Inadequate collection and preservation of information*

In order to enable children to exercise their right to birth registration and to know their parents, Article 7 of the CRC requires States to establish a system for collecting and preserving the information[47]. Article 30(1) of the Hague Adoption Convention also provides that competent authorities in Contracting States must ensure that information about the child's origins, including the identity of the parents, and medical history, is preserved. The importance of collecting and preserving identifying and non-identifying information was highlighted in cases of intercountry adoption. These cases demonstrated that adequate birth registration is crucial if a child later wishes to discover their origins[48]. The mistakes in this context include wrong or incomplete registration of parents, children being swapped, records being destroyed or not kept up to date, records not transferred if institutions close.

The ISS provides various practices to reach the goal of information collection, such as integrated birth certificates (containing full names of birth parents, guardians and adoptive parents), Later Life Letters (letters written by social workers for later in life), and Lifebooks (in which care givers document the child's life)[49]. While these practices are not directly transposable to the AR context, they provide valuable ideas for ways to assemble information for the child to access later.

The establishment of registers that contain at minimum the following information is essential: date and place of birth, full names and dates of birth parents, of persons of whom donor material was used, and if relevant of surrogate mother that gave birth. The Verona Principles state that surrogate agreements should only involve surrogate mothers and gamete donors who provide accurate identifying information[50]. Anonymous

---

[47] TOBIN J., SEOW F., *The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents*, cit., p. 262.

[48] See n 22 (*supra*).

[49] See n 41 (*supra*), p. 23-24.

[50] Verona Principles 11.3 and 11.4.

gamete donation can simply no longer be an option[51] unless society wants to repeat the mistakes of intercountry adoption.

States should have a system for storing information, and authorities have to be transparent about how the system functions. For example, States should indicate which information is collected and whether their system is kept up to date[52]. Moreover, when intermediaries cease their operations or are taken over by others, States should ensure a system by which information is not lost but transferred. Accurate registers would enable children at a later stage in life to obtain this information when they need it for the building of their identities.

Data should be stored for a sufficiently long period of time. The Special Commission of the Hague Conference on Private International Law recommends keeping information in perpetuity[53]. A later Special Commission recalled the importance of keeping information, and encouraged the use of technology for the collection, centralising, and preservation of information[54]. The ISS confirms that this is the ideal, and that information should be kept for at least 100 years[55].

From an international perspective, States should only agree to cooperate with other States on the condition that they keep registers with this minimum of information.

It is important to note that registration does not mean that the information has to be publicly accessible. The European Union, and many countries, have strict data protection legislation[56]. Registers can clearly indicate which information may be shared and with whom. This can also be agreed upon internationally (for instance in conventions or soft law).

---

[51] The Belgian Constitutional Court, in its judgment of 26 September 2024, found that anonymous donations are unconstitutional

[52] This is also supported by Principle 11.6 of the Verona Principles.

[53] Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention (17-25 June 2010), available at https://assets.hcch.net/upload/wop/adop2010concl_e.pdf, § 28.

[54] Conclusions and Recommendations Adopted by the by the Fifth Meeting of the Special Commission on the Practical Operation of the 1993 Adoption Convention (July 2022), available at https://assets.hcch.net/docs/d56b7ba3-6695-4862-b49c-75c730e9d599.pdf, § 27 and 28.

[55] See n 41 (*supra*), p. 25.

[56] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Generally speaking, under private international law, the law of the place of the register will determine accessibility to the register.

6. *Inadequate access to information*

Intercountry adoption can also provide valuable insights into how access to information should be handled in cases of AR. Access to information can be considered as part of the aftercare process. The duty to provide access is the next step in the duty to collect and preserve information. However, the legal framework might be slightly different. For instance, the Hague Adoption Convention, creates an obligation to preserve information (Article 30(1)), but refers to the domestic law of the States involved on the question of access to the information (Article 30(2)). It is thus important that aftercare is regulated by national legislation. Mistakes in intercountry adoption highlight the importance of such legal framework, which should address questions such as: at what age can the information be given to the child? Who decides whether the child has access to the information? Is a confidential intermediary involved? And how are the interests of the child and the other persons involved balanced?

Providing access to information requires financial resources. For instance, the Hague Adoption Convention provides that the child should receive 'appropriate guidance' (Article 30(2)). The domestic laws of some countries also provide for such guidance, and sometimes even make it compulsory[57]. The years of experience which led to this legislation is relevant for AR. Some institution or authority must be available for children who have questions. Moreover, intercountry adoption has demonstrated the need for resources to enable children to travel to their country of birth and access information about their origins[58]. Such resources might also be necessary in the case of AR, if the some of the persons who contributed to the child's birth are located in other countries (as is often the case).

---

[57] ISS Report (n 41 *supra*), p. 35.

[58] Expertenpanel inzake interlandelijke adoptie, *Eindrapport*, 2021; Commissie onderzoek interlandelijke adoptie, *Rapport Commissie onderzoek interlandelijke adoptie*, 2021; Groupe d'experts Adoption internationale, *Rapport final*, 2024; and Villanueva O'Driscoll J., Jaspers Y., Vanspauwen N., *Transnational Adoption: A Curse or a Blessing? The Psychosocial Impact of Malpractices in Transnational Adoption on Adoptees*, cit., p. 103-133.

The question of 'who' has access to information might raise the issue of consent. According to the Verona Principles, only surrogate mothers and gamete donors who agree to grant access to their identities should be involved in arrangements[59]. In the light of experiences with intercountry adoption, requiring such consent at the start of the process is essential[60].

The ECtHR has dealt with issues of access to information that the authorities had stored somewhere. The Court found that although the right to know one's origins is an important aspect of the right to private life under Article 8 of the ECHR, this does not automatically entitle persons to access the information. In the *Odièvre v. France* judgment, the ECtHR addressed the fact that a person's interest in knowing their origins can conflict with a mother's interest in giving birth anonymously and remaining anonymous. The French legislature permitted anonymous birth in order to safeguard the health of both the mother and the child during pregnancy and birth, and to prevent illegal abortions and the abandonment of children. This legislation aims to protect the right to respect for life, which is considered high-ranking under the ECHR. In the *Odièvre v. France* case, the applicant had access to non-identifying information about her mother and her biological family, which enabled her to trace some of her roots. The ECtHR found that the French legislature had struck a fair balance between the competing interests, which fell within the State's margin of appreciation under Article 8 of the ECHR[61]. However, the applicants in *Godelli v. Italy* and *Mitrevska v. North Macedonia*, did not have access to non-identifying information. The ECtHR ruled that Italian and North Macedonian law had failed to strike a balance between the competing interests in this case, and thereby violated Article 8 of the ECHR[62].

These cases thus do not recognise an automatic overriding of the right to privacy by the right to know one's origins. In these cases, the child was an adult at the time of seeking the information. Thus, at that moment the

---

[59] Verona Principles 11.3 and 11.4.

[60] Another issue is the consent of persons other than those who chose for AR and whom the child would like to contact, such as siblings. This entails a more difficult balancing of rights. Due to its limited scope, this chapter will not discuss this matter.

[61] ECtHR, Odièvre v. France, Application no. 42326/98, 13 February 2003, para 44-49.

[62] ECtHR, Godelli v. Italy, Application no. 33783/09, 25 September 2012, para 54-59; ECtHR, Mitreska v. North Macedonia, Application no. 20949/21, 14 May 2024, para 55-58.

interests of two adults were in conflict, rather than those of an adult and a minor. However, the searching and questioning often starts before the age of majority and, as explained in the *Godelli* case, this can cause suffering during childhood[63]. It thus remains, to our minds, a right of the child, even though infringements are sometimes addressed only later. Moreover, these cases date from more than ten years ago. In light of the many scandals and questions that have arisen, possibly the Court might in the future balance the opposing rights to private life differently. In order to learn from the scandals in intercountry adoption, any rebalancing of the rights should include not only adopted children but also children conceived with donor material or born to surrogate mothers.

The ECtHR also found that a person has a right to receive information necessary to understand their childhood and early development[64]. The Court however acknowledged that it is sometimes necessary for public records to be kept confidential in order to protect the rights of other persons. Requesting the consent of the contributor to the records can be justified, but does not always provide a sufficient guarantee for the rights of the person seeking access. Therefore, when the contributor cannot give consent or improperly refuses consent, an independent authority must ultimately decide on access.

In any event, it is clear that the child's right to information about their origins has to be respected and it can only be in very rare cases that the balance tips towards the privacy of the parents or gamete donors.

7. *Conclusion*

It is no secret that intercountry adoption has followed a rough road. While some intentions were good, there were also abuses. Very often scandals have arisen on information either not adequately collected, preserved or made available. Such practices are in conflict with a robust reading of Articles 7 and 8 of the CRC. These provisions, as well as the ECtHR's interpretations of Article 8 of the ECHR, indicate that the child's right to birth registration and identity include information about birth parents and conditions of birth. The ECtHR indicated that in the balancing between this right and the parent's or donor's right to privacy,

[63] Godelli (n 39 *supra*) para 9.

[64] ECtHR, Gaskin v. The United Kingdom, Application no. 10454/83, 7 July 1989, para 49.

the child's right to know weighs heavily. The need to know is part of the forming of identity and thus has to be protected. Experiences on intercountry adoption have shown how important this need can be. After more than 40 years of intercountry adoptions, legislators and courts should have seen this by now. It would be a shame to let yet another generation of children suffer from the same mistakes.

IMPACT NATIONAL REPORTS

Introduction

The present Impact National Reports are part of the research undertaken under the EU co-funded project UniPAR – Towards Universal Parenthood in Europe[1], which addresses the legal issues stemming from the circulation of family status – in particular, parent-child relationships – across borders, also in light of the current evolutions in the field of Assisted Reproductive Technologies (hereinafter ARTs).

The Impact National Reports represent the results of an analytical research conducted by the UniPAR consortium on Belgium, Italy, Spain, Croatia, Poland and Bulgaria, concerning domestic law - including private international law rules, case law and current practices on parenthood.

Each Impact National Report finds its basis in the European Impact Report developed by the Consortium and aimed at identifying parenthood issues arising in connection to existing EU secondary law, also analysing the possible impact of the Parenthood Regulation at the EU level[2]. In order to obtain this result, the consortium has conducted an analytical research of the EU acquis, accompanied by an impact research in the light of the possible introduction of a Parenthood Regulation. At the same time, the research will be supported by consultations with professionals and stakeholders, in the form of six national seminars and a European stakeholder meeting in Brussels. At the end of the project, the Consortium will formulate Conclusions and Recommendations, which will be the natural development of the research outputs incorporating the inputs from the Stakeholder's meeting and national seminars.

In this context, the present Impact National Reports analyses how parenthood issues are dealt with in each of the six jurisdictions covered. Such information will be of value in order to deal with the increasingly frequent (cross-border) cases in which parenthood is an issue. A compar-

[1] JUST-JCOO-AG-2023-101137859. More information about the project, its activities and resources are available on the official website: https://www.pravos.unios.hr/unipar/.

[2] The European Impact Report is accessible on the UniPAR website at https://www.pravos.unios.hr/unipar/resources-305/.

ison between domestic legal systems will reveal convergences and divergences in the respective approaches. In addition, the research is supported by the analysis of a series of case-studies, identified by means of a preliminary analysis of case law and concerning specific disharmonies created by recent developments in ARTs as well as in the society and in the legal systems.

This factual approach is focused on results that would be reached in the specific situations at stake.

The Impact National Reports also deal with the possible introduction of an EU Parenthood Regulation, in the light of the fact that the introduction of the new PIL rules will determine substantial changes in the application of the already existing EU PIL instruments in family matters. The auspice is that the Impact National Reports would help stakeholders and professionals to be aware of problems and possible future developments, in order to accompany them through the transition.

Please note that in all the documents/deliverables of the UniPAR project, the term "parenthood" is used in order to make reference to the (legal) parent-child relationship, coherently with the title of the project itself (*i.e.* UniPAR – Towards Universal Parenthood in Europe).

However, the UniPAR consortium is aware of the fact that also "filiation" and (biological and legal) "parentage" are terms frequently use to make reference to relation existing between a child and his/her parent(s)[3].

The Impact National Reports have been drafted on the basis of a common questionnaire and the analysis of case studies, used as a guideline for the development of the research. The questionnaire and case studies are available hereby.

[3] It appears that (i) the term "parenthood" refers to an ongoing status of the mother or father of a child, associated with the responsibility of raising a child, (ii) "parentage" traditionally refers to the genetic link between a child and another person (even if the expression "legal parentage" as opposed to "biological parentage" is frequently used as well and (iii) "filiation" focuses on the child's perspective of the parent-child relation. On this topic, see BAINHAM A., *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions*, in GILMORE S. (ed), *Parental Rights and Responsibilities*, London-NewYork, 2017, p. 159; LECKEY R., *Filiation*, in *McGill Law Journal*, 2020, p. 73.

Questionnaire

A) Parenthood

1) Relevant private international law rules on parenthood

Please provide an English translation of the relevant private international law rules on parenthood (jurisdiction, applicable law and recognition and enforcement)
Please provide a brief explanation of their functioning.

As far as jurisdiction is concerned, please clarify whether a competent authority hearing a case on another matter:

- is able to determine parenthood or not;
- may recognise a judgment on parenthood for the purpose of taking its decision on the other matter.

Please clarify which is the law applicable to limitations; legal standing, and evidence (including presumptions).
Please explain briefly how a foreign judgment on parenthood is recognised in your State.

2) Foreign birth certificates and their registration in national registries

Please explain how the authorities of the Civil or Population Registry of your country proceed if the birth of a child occurred abroad and there is a foreign birth certificate.

Please clarify:

- whether they determine parenthood on the basis of choice-of-law rules;
- Whether they transcribe the foreign birth certificate in the Civil or Population Registry or whether transcription is required only in some circumstances;
- Whether the authorities in charge of the Civil or Population Registry are allowed to modify their records on the basis of a foreign judgment and, in the affirmative, whether a special procedure is required.

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law).
Leo's birth is registered in your State.

Please clarify:

- Whether the father, Jürgen, will be registered as the child's father (despite the divorce);
- Whether it is possible under your legal system for Maria to appear at the birth registry with the man she says is the father (Jan) and register him as Leo's legal father and, in the negative, whether there is a way in your legal system to establish parenthood between Jan and Leo.

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

Please clarify:

- Whether Leo's birth may be registered in your State;
- The value (if any) of the German birth certificate in your State;
- Whether Jürgen may be registered as the child's father in your State,
- Whether it is possible in your legal system for Maria to appear at the birth registry with the man she says is the father (Jan) and register him as Leo's legal father and, in the negative, whether there is a way in your legal system to establish parenthood between Jan and Leo.

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

Please clarify:

- Whether Tom's birth can be registered in your State;
- The value of the Dutch birth certificate be in your State;
- Whether the two women (Valentina and Jette) may be considered to be the legal mothers of the child in your State and, in the affirmative, whether this happens to all effects.

B) Parenthood following an International surrogacy agreement (hereinafter ISA)

1) Attitude *vis-à-vis* surrogacy and relevant rules on (international) surrogacy in the national legal order

Please provide a brief description of the attitude of your legal order vis-à-vis surrogacy.

In case your legal order regulates surrogacy, please provide an English translation of the relevant national rules on surrogacy and a brief description of their functioning.

In case your legal order does not expressly regulate surrogacy, please explain which rules may apply to children born abroad following a surrogacy agreement.

In case your legal order does expressly prohibit surrogacy, please provide a brief explanation in English of the legislation, the functioning thereof and a reference to the original text of the legislation.

2) Relevant problems considered by the case-law in your legal order

Please enlist and explain briefly the relevant problems considered by the case-law in your country concerning recognition of parenthood of children born following a surrogacy agreement.

Please explain briefly:

- the solutions adopted in your legal order with regard to the implementation of the indications provided by the ECtHR in its first Opinion rendered on Request No. P16-2018-001;
- how (foreign) birth certificates of children born following a surrogacy agreements are considered by the Civil Registrars in your legal,

- how foreign adoption decisions (concerning adoption by the intentional parent) are considered by the Civil Registrars in your legal order.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.
Agnese gave birth to Maria and the foreign birth certificate from the third State recognizes Marco and Michela's legal parenthood of Maria.
Whilst Marco has a genetic link with Maria, Michela has not.

Please explain the effects (if any) your legal system would give to this foreign birth certificate and, in particular, please

- Whether Marco's parenthood can be recognised;
- whether Michela's parenthood can be recognised;

What procedure shall be followed (if any);

- whether grounds for refusal exist and, in the affirmative, which;
- Whether differences would exist if two men were indicated as parents in the foreign birth certificate;
- Whether difference would exist if only a father is indicated in the foreign birth certificate, while the mother is not.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.
Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.
Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

Please clarify whether, in your legal order, Michele has a right to be recognise as a parent and, in the affirmative, what procedure can be followed in order to enforce that right (for example, establishment of parenthood, adoption).

Please clarify whether in your legal order differences may exist in the situation where the intentional parent asking for the recognition of parenthood is a man (as in the example) or is a woman
Please describe the requirements for the establishment of parenthood in favour of the non-biological (intentional) parent of a surrogacy agreement.
Please clarify whether the biological parent's consent and/or the surrogate mother's one are a necessary element for the establishment of parenthood with regard to the intentional (non-biological) parent.

Recognition of a foreign decision establishing parenthood.

Clara (intending mother) and Peter (intending father), resident in - your country - entered into a commercial gestational surrogacy agreement (i.e. the intentional parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not a EU country), allowing such agreements.
Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.
Clara and Peter come back to your country and require the recognition of the foreign judgment.

Please clarify the procedure to be followed for the (judicial) recognition of the foreign judgment of the State X.
Please clarify also whether a different procedure is envisaged in your legal order in case of recognition of a (foreign) adoption decision.

BELGIUM*

A) *Parenthood*

1) *Relevant private international law rules on parenthood*

The private international law rules on parenthood are laid down in the Belgian Code of Private International Law (*Wetboek van Internationaal Privaatrecht* or *Code de droit international privé*). For some instances below the Civil Code is also relevant. Belgium is in the process of renewing the Civil Code. However, the matters discussed below are still comprised in the Old Civil Code. This Code is still in force for the parts that have not been replaced. Therefore, the references below to "Old Civil Code" should not be understood as old law, but as the law currently in force. The current government has agreed that it will revise Belgian law on filiation[1], so that the current law, including the private international law, might change in the course of the next four years.

International Jurisdiction

Article 61 of the Belgian Code of Private International Law (hereafter referred to as Code of PIL) determines the conditions under which Belgian judges have jurisdiction to hear claims relating to the establishment or contestation of filiation. This article states that:
"*In addition to the cases provided for in the general provisions of the present statute, the Belgian courts have jurisdiction to hear any action regarding the establishment or contestation of a link of lineage, if:*

1° the child has his habitual residence in Belgium when the action is introduced;

2° the person whose link of lineage is invoked or contested has his habitual residence in Belgium when the action is introduced; or

---

* By Leontine Bruijnen, Thalia Kruger, Tine Van Hof.

[1] See the Government Agreement of 2025, https://www.belgium.be/sites/default/files/resources/publication/files/Accord_gouvernemental-Bart_De_Wever_fr.pdf, p. 130 and 166-167.

3° the child and the person whose link of lineage is invoked or contested have the Belgian nationality when the action is introduced"[2].

In addition to the specific provision of Article 61 of the Code PIL, Belgian judges can also base their jurisdiction on the general rules of jurisdiction in the Belgian Code of PIL. These are set out in Articles 5-14. One possible relevant ground of jurisdiction is Article 11, which contains the *forum necessitatis*. According to Article 11, Belgian courts will exceptionally have jurisdiction when the matter presents close connections with Belgium and proceedings abroad seem impossible or when it would be unreasonable to demand that the action be brought abroad.

Article 65 of the Belgian Code of PIL determines when the Belgian civil status officers can have jurisdiction to draw up the attestation of acknowledgement of filiation. This article provides that:
"*Declarations acknowledging natural children can be drawn up in Belgium, if:*

1° the person who recognizes has the Belgian nationality or has its domicile or habitual residence in Belgium at the time the declaration is drawn up;

2° the child is born in Belgium; or

3° the child has its habitual residence in Belgium at the time the declaration is drawn up"[3].

On the basis of Article 7, 2 of the Belgian Consular Code, Belgian consular officials may draw up an attestation of acknowledgement if the recognising parent has Belgian nationality and is domiciled in the consular jurisdiction[4].

If a question of filiation arises as an incidental question in another case, for example in the settlement of an inheritance, jurisdiction over the question of filiation should be determined on the basis of the jurisdiction rules on filiation. Furthermore, if the recognition of a foreign judgment on filiation is relevant for the determination of jurisdiction in a matter other than filiation, the Belgian authority will examine the recognition of

---

[2] This English translation of the Code of PIL is made by Caroline Clijmans and Paul Torremans. The translation is based on the version of the Code of PIL on 1 August 2018 and can be accessed on the website: https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.

[3] This English translation of the Code of PIL by Caroline Clijmans and Paul Torremans can be accessed on the website https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.

[4] Kruger T., Verhellen J., *Internationaal privaatrecht. De essentie* (3rd edition), Brugge, 2023, p. 285.

the foreign filiation judgment on the basis of Belgian private international law as a separate matter.

Applicable Law

The applicable law to filiation is determined by Article 62 of the Belgian Code of PIL. This article states:
"*§1. The establishment or the contestation of the link of lineage with a person is governed by the law of the State of the person's nationality upon the birth of the child or, if the establishment results from a voluntary act, at the time such act is carried out. If the law applicable by virtue of this article does not require such consent, the requirements and conditions for the consent of the child as well as the manner in which such consent is expressed are governed by the law of the State on the territory of which the child has his habitual residence at the time of the consent.*
§2. If the link of lineage is validly established according to the law applicable by virtue of the present statute vis-à-vis various persons, the law applicable to the filiation that results from the operation of the law on its own, will determine the consequence of a voluntary act of recognition. In case of a conflict between various filiations that result by operation of law from the law or that results from multiple acts of recognition, the law of the State with which the case has the closest connections amongst all designated legal regimes will apply"[5].

It is possible that, on the basis of the applicable law under Article 62, filiation is validly established in respect of several persons. In particular, it may be the case that filiation exists with respect to more than one person of the same sex because the different national legal systems are not aligned. Article 62, §2 offers a solution to these conflicts. Initially the wording of this provision specifically referred to filiation of more than one person of the same sex. When Belgium allowed co-motherhood, the legislator changed the wording to allow for this scenario. The current wording is however confusing, since, taken literally, it would apply to all children with more than one parent, while that is of course not the legislator's intention. It is supposed to refer to more than one person besides the mother who gave birth to the child.

[5] This English translation of the Code of PIL by Caroline Clijmans and Paul Torremans can be accessed on the website https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20 WIPR_augustus%202018.pdf.

Article 63 of the Belgian Code of PIL clarifies which aspects of filiation are determined by the applicable law pursuant to Article 62. Article 63 provides that:
"*The law applicable by virtue of article 62 determines notably:*
1° who is authorized to establish or contest the filiation;
2° the burden of proof and the elements to be proven regarding the filiation, as well as the evaluation of the evidence;
3° the conditions and consequences of the possession of status;
4° the term for introducing the action"[6].

Article 64 relates to the formal validity of the attestation of acknowledgement and provides that "*[t]he declaration of acknowledgment is drawn up in accordance with the formal requirements prescribed by the law that by virtue of article 62, §1, part 1 is applicable to the filiation or by the law of the State on the territory of which the deed is drawn up*"[7].

The Belgian Code of PIL also contains a so-called "escape clause" (Article 19). This provision allows for the application of another law that is closely related to the case if the appointed law has only a tenuous link with the case. This provision has been used in filiation cases where the mother and the child have Belgian nationality, and all of the involved people live in Belgium, while the father's foreign nationality is the only foreign element[8].

The Code of Private International Law further contains a public policy exception, for if the result of the application of foreign law would be manifestly contrary to public policy. The application of (a provision of) foreign law is to be refused if it would lead to a result which is manifestly incompatible with public policy. The public policy exception in Article

[6] This English translation of the Code of PIL by Caroline Clijmans and Paul Torremans can be accessed on the website https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.

[7] This English translation of the Code of PIL by Caroline Clijmans and Paul Torremans can be accessed on the website https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.

[8] Court of First Instance of Nivelles, 25 October 2005, *Revue trimestrielle de droit familiale* 2006, p. 875, with case note by M. Fallon; Court of First Instance of Liège, 5 May 2006, *Revue du droit des étrangers* 2006, p. 237; Court of First Instance of Leuven, 27 October 2008, *AR: Actuele Jurisprudentie* 08/1637/A; Family Tribunal of Namur, 4 december 2019, *Revue trimestrielle de droit familiale* 2020, p. 192; Court of Appeal of Ghent, 25 November 2021, *Tijdschrift@ipr.be* 2022/1, p. 45.

21 should be used with restraint. Moreover, it requires an assessment of the specific circumstances of the case. In this context, two factors should be taken into account. Firstly, the degree to which the situation is connected with the Belgian legal order, and secondly, the significance of the consequences produced by the application of the foreign law. Article 21 also stipulates that if a provision of the foreign law is not applied because of its incompatibility with public policy, another relevant provision of that law or, if required, of Belgian law applies.

Several filiation cases use Article 21, for instance when the foreign law makes it impossible to establish the legal filiation link between an unmarried father and the child[9]. The same applies if foreign law does not allow the establishment of co-motherhood if the child was born in the framework of a common family project of the mothers[10]. Case law also shows that the fact that the mother does not have to consent to the establishment of fatherhood is not inconsistent with public policy if the mother has the possibility to afterwards contest the fatherhood[11]. A foreign law that does not allow the child to contest fatherhood[12], or that makes the time limit for such contestation too short[13], is contrary to public policy. A court found that giving birth anonymously (in France) is not against public policy[14], but this case law is probably no longer good law in light of the judgment of the Belgian Constitutional Court on anonymous gamete donation[15].

Sometimes Articles 19 and 21 are used in combination to avert the application of foreign law and to apply Belgian law instead[16].

Belgian law also contains a rule on so-called sham acknowledgment of children. This rule, in Articles 330/1, 330/2 and 330/3 of the Old Civil

---

[9] Court of First Instance of Brussels, 12 January 2005, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 2008, p. 834; Court of Appeal of Ghent, 25 January 2018, *Tijdschrift voor notarissen* 2018, p. 503.

[10] Family Tribunal of Namur, 19 February 2020, *Actualités de droit familiale* 2020, p. 237; Family Tribunal of Brussels, 9 July 2021, *Actualités de droit familiale* 2022, p. 21.

[11] Family Tribunal of Brussels, 20 July 2021, *Revue du droit des étrangers* 2021, p. 158.

[12] Family Tribunal of East-Flanders (Ghent), 28 June 2018, *Tijdschrift@ipr.be* 2019/3, p. 185.

[13] Family Tribunal of Namur, 3 April 2019, *Actualités de droit familiale* 2022, p. 3.

[14] Court of Appeal of Brussels, 5 December 2019, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 2021, p. 1394.

[15] Constitutional Court, 26 September 2024, Nr. 102/2024, https://www.const-court.be/public/n/2024/2024-102n.pdf.

[16] E.g. Court of Appeal of Ghent, 11 February 2021, *Rechtskundig Weekblad* 2021-2022, p. 554.

Code, applies if a person seeks to acknowledge fatherhood of a child with the sole purpose of gaining a right of residence for himself, for the child or for the mother of the child. The courts accept that a person has the sole purpose of gaining a right of residence if they have no intention to create a family bond with the child or to assume parental responsibilities; in other words, if the acknowledgement does not correspond to the socio-affective reality[17]. Several factors are identified in the case law of which a combination may constitute a serious indication that the recognition concerns a sham recognition (e.g., the person and the mother have never met, they do not know each other's name or nationality or where they work, they did not have an affective relationship, one of the parties is in a weak social position)[18]. If the acknowledgment is found to be a sham, the filiation bond is not accepted under Belgian law. This means that no family tie will be created between the person involved and the child, irrespective of the biological reality. The preparatory documents explain that this provision is of an overriding mandatory nature. It thus applies even if foreign law would have been applicable to the establishment of the filiation.

Recognition and enforcement of judgments

The Belgian Code of PIL does not contain any specific provisions on the recognition and enforcement of foreign judgments or authentic instruments concerning filiation (such as birth certificates and certificates of recognition). As a result, the general rules on recognition and enforcement apply.

[17] Court of Appeal Liège (10th chamber), 20 December 2022, *Revue trimestrielle de droit familial* 2023/3-4, p. 834; Court of First Instance of Antwerp 18 februari 2021, *Rechtskundig Weekblad* 2022-23/10, p. 397.

[18] Court of First Instance Namur (2nd chamber), 19 October 2022, *Revue trimestrielle de droit familial* 2023/2, p. 404-405; Court of First Instance of Antwerp 18 februari 2021, *Rechtskundig Weekblad* 2022-23/10, p. 397.

The general rule on the recognition and enforcement of foreign judgments is laid down in Article 22 of the Belgian Code of PIL[19]. It provides for the automatic recognition of a foreign judgment in Belgium, wholly or partially. If the recognition issue is brought incidentally before a Belgian court, the latter has jurisdiction to hear it.

A foreign judgment, which is enforceable in the State in which it was rendered, will be declared enforceable in whole or in part in Belgium, in accordance with the procedure set out in Article 23 of the Belgian Code of PIL. This is a unilateral procedure, i.e. it is not required to involve the defendant in any way.

According to Article 22, §1, any interested party may apply to the court of first instance for the foreign judgment to be recognised or declared enforceable, in whole or in part, or for it not to be recognised or declared enforceable, in whole or in part, in Belgium. As a foreign filiation judgment concerns the status of a person, the Public Prosecutor can also request a declaratory recognition or enforcement judgment.

Based on the general recognition rule of Article 22, a foreign filiation judgment is in principle recognised and enforced in Belgium. The grounds for refusal of recognition or enforcement are listed in Article 25, §1 of the Belgian Code of PIL, which includes the refusal ground that the consequence of recognition or enforcement is manifestly incompatible with public policy. When determining incompatibility with public policy, particular consideration should be given to the extent to which the situation is connected to the Belgian legal order and the seriousness

[19] In English, Article 22 reads as follows: "*§1. A foreign judgment, which is enforceable in the State in which it was rendered, will be declared enforceable in whole or in part in Belgium, in accordance with the procedure set out in article 23. A foreign judgment will be recognized in Belgium, in whole or in part, without there being a need for the application of the procedure set out in article 23.If the recognition issue is brought incidentally before a Belgian court, the latter has jurisdiction to hear it. The judgment may only be recognized or declared enforceable if it does not violate the conditions of article 25. §2. Any interested party, and in matters regarding the status of natural persons also the advocate-general, can in accordance with the procedure set out in article 23 request that the judgment be recognized or declared enforceable, in whole or in part, or that it be declared not recognizable or not enforceable, in whole or in part. §3. For the purpose of the present statute: 1° the term judgment means any decision rendered by an authority exercising judicial power; 2° the recognition gives legal power to the foreign judgment*". This English translation of the Code of PIL by Caroline Clijmans and Paul Torremans can be accessed on the website https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.

of the consequences that recognition or enforcement might have. Pursuant to Article 25 §2 of the Belgian Code of PIL, the foreign filiation judgment cannot be reviewed on its merits.

The general rule on the recognition and enforcement of foreign authentic instruments is laid down in Article 27 of the Belgian Code of PIL[20]. On the basis of Article 27, §1, a foreign authentic instrument on filiation is recognised in Belgium by all authorities without any procedure. However, a number of conditions apply.

Firstly, the validity of the filiation should be established in accordance with the law applicable by virtue of the Code of PIL. For this purpose, the rules on the applicable law in the case of filiation set out in the Section of Applicable law are relevant.

Secondly, there should be no evasion of the law. According to Article 18 of the Belgian Code of PIL, facts and acts committed with the sole purpose of evading the application of the law designated by the Code of PIL are not taken into account. This rarely comes up, except in the situation of surrogacy (see below).

The third condition concerns the public policy exception of Article 21 of the Belgian Code of PIL (see under the Section of Applicable law above).

---

[20] In English, Article 27 reads as follows: "*§1. A foreign authentic instrument is recognized by any authority in Belgium without the need for any procedure if the validity is established in accordance with the law applicable by virtue of the present statute and more specifically with due regard of articles 18 and 21. The instrument must satisfy the conditions necessary to establish authenticity under the law of the State where it was drawn up. To the extent that is required, article 24 is applicable. In the event that the authority refuses to recognize the validity of the instrument, an appeal may be lodged before the court of first instance without prejudice to article 121, in accordance with the procedure set out in article 23. The appeal is lodged with the family court if the foreign authentic instrument is concerned with a matter referred to in article 572bis of the Code of Civil Procedure. §2. A foreign authentic instrument which has executory force in the State where the instrument was drawn up, will be declared enforceable in Belgium by the court of first instance, without prejudice to article 121 in accordance with the procedure set out in article 23 and after verification of the conditions provided for in §1. The request for a declaration of enforceability of a foreign authentic instrument is lodged with the family court if the instrument is concerned with a matter referred to in article 572bis of the Code of Civil Procedure. §3. A judicial settlement, which has been approved by a foreign judge and is enforceable in the State where the settlement was approved, can be declared enforceable under the same conditions as authentic instruments*". This English translation of the Code of PIL by Caroline Clijmans and Paul Torremans can be accessed on the website https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.

Article 27, §1 also determines that a foreign authentic instrument must satisfy the conditions necessary to establish authenticity under the law of the State where it was drawn up.

If a Belgian authority refuses to recognise the foreign filiation instrument, the interested person may lodge an appeal before the family court. This procedure is the same as described above for court judgments, i.e. it is a unilateral procedure, and the civil servant is not sued. The court's decision on the (non-)recognition of the filiation is decisive and must be respected by all Belgian authorities.

2) *Foreign birth certificates and their registration in national registries*

For the recognition of a foreign authentic act, such as a birth certificate, the Belgian Code of PIL requires an examination of the applicable law under the conflict-of-law rule (Article 27, §1 of the Belgian Code of PIL). For a discussion what this conflict-of-law rule entails, see Section A.1 above.

According to Article 68, §1 of the Old Civil Code, every Belgian citizen shall submit any foreign authentic act concerning him to the Civil Registry if it results in a change in the status of the person. This thus includes foreign birth certificates of a child born to a Belgian citizen. A foreign birth certificate can only be transcribed in the Civil Registry, serve as a basis for the modification of a civil status record, or serve as a basis for the inscription in the population, foreigners or waiting registers after examination of the conditions referred to in Article 27, §1 of the Code of PIL (Article 31 of the Code of PIL)[21]. This examination is carried out by the Civil Registry[22] to whom the foreign birth certificate is submitted. The Civil Registry shall immediately register the foreign birth certificate in the Database for Civil Status Records and shall indicate the status of the examination. If the examination has a positive result, the Civil Registry shall prepare a Belgian birth certificate based on the foreign birth certificate (Articles 68, §1 and 69, §1 *juncto* Article 44 of the Old Civil Code). A copy or extract of the foreign birth certificate and, where appropriate, its certified translation shall be included as an annex in the Database for Civil Status Records (Article 69, §2 of the Old Civil Code).

[21] For a discussion of Article 27 of the Code of PIL, see question A.1.

[22] The law also refers to the holder of the population, foreigner or waiting register but, in practice, the Civil Registry is also in charge of these registers so that these functions coincide.

For foreign citizens, the obligation arising from Article 68, §1 of the Old Civil Code does not apply. However, the Civil Registry is also obliged to prepare a Belgian civil status record if a foreign birth certificate is submitted for the preparation of another civil status record; e.g. for the preparation of nationality, recognition records or at the time of the declaration of birth (Article 68, §2 of the Old Civil Code)[23]. This obligation applies only if the requirements of Article 31 *juncto* Article 27, §1 of the Code of PIL are fulfilled. The rest of the procedure is also the same: if the examination has a positive result, the Civil Registry shall prepare a Belgian birth certificate based on the foreign birth certificate (Article 68, §2 of the Old Civil Code). A copy or extract of the foreign birth certificate and, where appropriate, its certified translation shall be included as an annex in the Database for Civil Status Records (Article 69, §2 of the Old Civil Code).

If the examination does not have a positive result and the Civil Registry refuses to prepare or modify a Belgian birth certificate based on the foreign birth certificate or refuses to register the birth certificate in the population, foreigners or waiting registers, this will also be mentioned in the Database for Civil Status Records. This the Database is a depositary or collection of foreign acts and decisions whose recognition in Belgium is under investigation or has been investigated and recognised or refused. Shopping at different municipalities is prevented, because they can consult the Database for Civil Status Records to check whether the act or decision has already been submitted in another municipality[24]. The Database however contains many difficulties for the registration of foreign documents[25].

The relevant articles on registration (most notably Article 68 of the Old Civil Code and Article 31 of the Code of PIL) do not distinguish between the transcription of the foreign act and the modification of the civil status records based on the foreign act. Authorities are thus allowed to modify their records on the basis of a foreign judgment following the same procedure as for preparing a new record.

---

[23] On how foreign acts and decisions are processed by the Civil Registry, see HEYLEN S., *De modernisering en informatisering van de burgerlijke stand*, in *Rechtskundig Weekblad*, 2018, p. 1452-1453.

[24] See in this regard: HEYLEN S., *De modernisering en informatisering van de burgerlijke stand*, cit., p. 1453.

[25] EVRARD T., WAUTELET P., *La réforme de la gestion des actes de l'état civil dans le contexte internationale : le droit subordonné à la technique*, in WAUTELET P., PFEIFF S. (eds), *Droit familiale international*, Liège, 2022, p. 149-206.

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law).

Leo's birth is registered in your State.

On the basis of Article 62 of the Belgian Code of PIL, the law of the State of which Jürgen is a national will determine whether Jürgen is considered to be Leo's legal father in Belgium. This means that German law will determine whether Jürgen is the legal father of Leo. As a result, German law will determine whether the divorce affects the establishment of Jürgen's fatherhood. The application of German law can only be refused if the result is contrary to the public policy pursuant to Article 21 of the Code of PIL. However, this exception should be applied with restraint. This means that if Jürgen is the father of Leo according to German law, he will in principle be registered as such in Belgium.

If Maria claims that Jan, rather than Jürgen, is the father of Leo, she may request the Belgian Civil Registry to register Jan as Leo's legal father. According to Article 62 of the Belgian Code of PIL, the civil registrar will determine Jan's legal fatherhood according to the law of the State of his nationality. The law of the State of which Jan is a national will therefore, in principle, determine whether he can be recognised as Leo's legal father. If there is also a legal presumption of fatherhood for Jürgen under German Law (which applies to him as explained in the previous paragraph), there is a conflict. Article 62, §2 of the Belgian Code of PIL offers a solution when there is conflict between a legal presumption of fatherhood and a voluntary act of acknowledgement. In this case, the law applicable to the legal presumption, i.e. German law, will determine the effect of Jan's acknowledgement.

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

** For this question, it is assumed that Maria is not married to anyone else at the moment of registration of Leo's birth and at the moment of acknowledgement by Jan.*

If Maria wants to register the birth of Leo in Belgium, the civil registrar will examine whether she is the legal mother under the Belgian Code of PIL. On the basis of Article 62 of the Belgian Code of PIL, the law of the State of which Maria is a national, i.e. Belgian law, will determine whether Maria is to be regarded as Leo's legal mother. Under Belgian law, the principle of *mater semper certa est* applies and Maria is therefore considered to be Leo's legal mother[26].

If Maria has already registered the birth of Leo in Germany, the recognition of the German birth certificate in Belgium is determined by Article 27 of the Belgian Code of PIL. On the basis of Article 27, §1, the German birth certificate is recognised in Belgium by all authorities without any procedure. However, a number of conditions apply. Firstly, there is a conflict-of-laws test. This means that it has to be examined whether Maria is the legal mother on the basis of the applicable law according to Article 62 of the Belgian Code of PIL. As indicated in the previous paragraph, this leads to the application of Belgian law, according to which Maria is considered to be the legal mother.

In addition to the conflict-of-law test, there should be no evasion of the law as described in Article 18 of the Belgian Code of PIL. The third condition under Article 27 of the Belgian Code of PIL concerns the public policy exception set out in Article 21. The application of (a provision of) foreign law should be refused if it would lead to a result which is manifestly incompatible with public policy. The application of Article 27

[26] Article 312, §1 juncto Article 44 of the Old Civil Code. See also VERSCHELDEN G., *Handboek Belgisch Personen-, familie- en relatievermogensrecht. Volume I. Verticale familiale relaties* (2nd edition), Brugge, 2023, p. 44-45.

of the Belgian Code of PIL in this case will most likely lead to the recognition of the German birth certificate in Belgium.

Whether Jürgen can be registered as Leo's father in Belgium will depend on Article 65 of the Belgian Code of PIL, which determines when the Belgian civil registrar has jurisdiction to issue an attestation of acknowledgement. If Leo is habitually resident in Belgium at the time the attestation is drawn up, the Belgian civil registrar will have jurisdiction. The registrar will use Article 62 to determine which law determines whether Jürgen can be the legal father. As explained in the context of the previous case on *Establishment of parenthood of a child born in the forum*, the application of Article 62 in Jürgen's case results in the application of German law. Thus, German law will determine whether Jürgen is Leo's legal father.

If Maria claims that Jan, rather than Jürgen, is the father of Leo, she may request the Belgian Civil Registry to register Jan as Leo's legal father. According to Article 62 of the Belgian Code of PIL, the civil registrar will determine Jan's legal fatherhood according to the law of the State of his nationality. The law of the State of which Jan is a national will therefore, in principle, determine whether he can be recognised as Leo's legal father. If there is also a legal presumption of fatherhood for Jürgen under German Law that applies to him based on his nationality, there is a conflict. Article 62, §2 of the Belgian Code of PIL offers a solution when there is conflict between a legal presumption of fatherhood and a voluntary act of recognition. In this case, the law applicable to the legal presumption, i.e. German law, will determine the effect of Jan's acknowledgement.

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

If Valentina and Jette want to register the birth of Tom in Belgium, the civil registrar will examine whether they are the legal mothers on the basis of the Belgian Code of PIL. In accordance with Article 62 of the Belgian Code of PIL, the law of the State of which Valentina and Jette are a national, i.e. Belgium law for Valentina and Dutch law for Jette, will determine whether they are to be regarded as Tom's legal mothers. Un-

der Belgian law, the principle of *mater semper certa est* applies to establishing legal motherhood. If Valentina gave birth to Tom, she will be considered his legal mother[27]. If Jette gave birth to Tom, Valentina can be considered the legal co-mother under Belgian law. Co-motherhood in law can be based on a legal presumption if the couple is married (Article 325/2 of the Old Civil Code), on recognition (Article 325/4 of the Old Civil Code) or on a court decision (Article 325/8 of the Old Civil Code).

If Valentina and Jette want to have a birth certificate that was issued in the Netherlands recognised in Belgium, Article 27 of the Belgian Code of PIL will apply. On the basis of Article 27, §1, the Dutch birth certificate is recognised in Belgium by all authorities without any procedure. However, a number of conditions apply. Firstly, there is a conflict-of-laws test. According to Article 62, the establishment or the contestation of filiation in respect to a person is determined by the law of the State of the person's nationality upon the birth of the child or, if the establishment results from a voluntary act, at the time such act is carried out. As a result, Belgian law will apply to determine whether Valentina can be regarded as the legal mother and Dutch law will apply to determine whether Jette can be regarded as the legal mother. As explained in the previous paragraph, Valentina can be considered the legal (co-)mother under Belgian law.

In addition to the conflict-of-law test, there should be no evasion of the law as described in Article 18 of the Code of PIL. The third condition under Article 27 of the Code of PIL concerns the public policy exception set out in Article 21. The application of (a provision of) foreign law should be refused if it would lead to a result which is manifestly incompatible with public policy. The fact that the applicable law allows the existence of two legal mothers does not automatically lead to a violation of public policy in Belgium. The application of Article 27 of the Code of PIL in this case will most likely lead to the recognition of the Dutch birth certificate in Belgium.

[27] Article 312, §1 juncto Article 44 of the Old Civil Code.

B) *Parenthood following an International surrogacy agreement (hereinafter ISA)*

1) *Attitude vis-à-vis surrogacy and relevant rules on (international) surrogacy in the national legal order*

Belgian legislation neither prohibits nor regulates surrogacy. There is no legal framework for the surrogate mother, the intended parent(s) and the child. As a result, intended parent(s) often go abroad to have a child through surrogacy[28]. The current government has taken up in the government agreement the intention to regulate surrogacy[29]. However, it is not clear whether this attempt will succeed.

If a child is born abroad as a result of a surrogacy agreement, it is important to check whether parenthood has been established in the country of birth by means of a birth certificate, an acknowledgment or a judgment. If there is a judgment, recognition is determined by the general rule in Article 22 of the Code of PIL. Based on Article 22, a foreign filiation judgment is in principle recognised in Belgium. The grounds for refusal of recognition are listed in Article 25, §1 of the Belgian Code of PIL, which includes the refusal ground that the consequence of recognition is manifestly incompatible with public policy.

If there is an authentic instrument, recognition is determined by the general rule in Article 27 of the Code of PIL. This leads to a conflict-of-laws test and the application of Article 62 of the Belgian Code PIL, which determines the applicable law to filiation. In addition, it should be examined whether there is no evasion of the law as described in Article 18 of the Code of PIL and whether there is no violation of public policy as provided in Article 21 of the Code of PIL. Belgian case law shows that the application of Article 27 of the Belgian Code of PIL leads to different results[30].

Various courts have found that establishing filiation through surrogacy does not amount to evasion of the law under Article 18 of the Code

[28] DEN HAESE S., *Crossing Borders: Proving Your Personal Status. Interactions Between Private International Law and Human Rights Law*, the Hague, 2023, p. 336.

[29] Government Agreement of 2025, https://www.belgium.be/sites/default/files/resources/publication/files/Accord_gouvernemental-Bart_De_Wever_fr.pdf, p. 130.

[30] TRAEST M., *Overzicht van rechtspraak (2010-2021) - Internationaal privaatrecht inzake personen-, familie- en familiaal vermogensrecht. Afstamming*, in *Tijdschrift voor Notarissen*, 2022, p. 1127-1140.

of PIL: even though parties reach a result that they could not have attained under Belgian law, this was not their sole purpose, but their purpose was to give effect to their wish to have a child[31]. Some courts have stated that surrogacy does amount to evasion of the law, but that the best interests of the child should prevail and therefore recognised the birth certificate nonetheless[32]. The correct analysis under private international law is that the applicable law should first be tested: if the intending parents have Belgian nationality, Belgian law applies. Then surrogacy is not possible under the applicable law and it is not necessary to consider whether there was evasion of the law[33].

2) *Relevant problems considered by the case-law in your legal order*

The first Opinion rendered by the ECtHR on Request No. P16-2018-001 did not lead to changes in the Belgian legislation, since adoption by the second parent was already possible under Belgian law at the time.

In the absence of a specific legal framework in Belgium, civil registrars recognise foreign birth certificates resulting from surrogacy agreements differently. This leads to different outcomes and judicial proceedings. Civil registrars also often believe that legal certainty is best served by a court decision on the recognition. It seems that the courts have more flexibility when it comes to finding solutions[34]. Due to the lack of a legal framework regarding surrogacy, courts also recognise foreign birth certificates following surrogacy agreements differently, or not at all. There is no uniform approach[35].

There is no uniform approach in the case law as to whether surrogacy is contrary to public policy under Article 21 of the Code of PIL. Some

[31] Such as Court of Appeal of Mons, 2 November 2020, *Revue trimestrielle de droit familial* 2021, p. 153; Court of Appeal of Ghent, 4 February 2021, *Tijdschrift@ipr.be* 2021/1, p. 40; Family Tribunal of Liège, 20 November 2020, *Revue trimestrielle de droit familial* 2021, p. 185.

[32] E.g. Court of Appeal of Brussels, 10 August 2018, *Actualités du droit de la famille* 2019, p. 159.

[33] Family Tribunal of Namur, 28 February 2018, *Journal des Tribunaux* 2018, p. 731.

[34] HEYLEN S., *Wetgeving draagmoederschap dringend nodig*, in *Tijdschrift voor Familierecht*, 2021, p. 170-172.

[35] DEN HAESE S., *Crossing Borders: Proving Your Personal Status. Interactions Between Private International Law and Human Rights Law*, cit., p. 347.

courts have stated that the absence of a legal framework on surrogacy in Belgium should not be grounds for refusing to recognise parenthood[36].

[36] E.g. Court of First Instance of Brussels, 15 February 2011, *Tijdschrift@ipr.be* 2011/1, p. 129; Court of First Instance of Brussels, 15 February 2016, *Tijdschrift@ipr.be* 2016/2, p. 65; Court of Appeal of Ghent 20 April 2017, *Tijdschrift@ipr.be* 2017/3, p. 82.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.

Agnese gave birth to Maria and the foreign birth certificate from the third State recognizes Marco and Michela's legal parenthood of Maria.

Whilst Marco has a genetic link with Maria, Michela has not.

The procedure for transcribing a foreign birth certificate in the Belgian Database for Civil Status Records was explained in Section A.2.

The recognition of Maria's birth certificate in Belgium is determined by the general rule in Article 27 of the Belgian Code of PIL. This leads to a conflict-of-laws test and the application of Article 62 of the Belgian Code PIL. According to Article 62, the establishment of filiation in respect to a person is determined by the law of the State of the person's nationality upon the birth of the child or, if the establishment results from a voluntary act, at the time such act is carried out. As a result, the law of the State of Marco's nationality will determine whether he can be Maria's legal father. In addition to the conflict-of-laws test, it is necessary to examine whether there is no evasion of the law as described in Article 18 of the Code of PIL, and whether there is no violation of public policy, as described in Article 21 of the Code of PIL.

Belgian case law does not take an unequivocal position on how public policy applies in the case of surrogacy[37]. One reason that could be used to argue that there is no violation of public policy is that Marco is the biological father.

The recognition regime explained above also applies to Michela. Whether she is Maria's legal mother depends in principle on the law of her nationality. A relevant aspect in Belgian case law seems to be whether

[37] TRAEST M., *Overzicht van rechtspraak (2010-2021) - Internationaal privaatrecht inzake personen-, familie- en familiaal vermogensrecht. Afstamming*, cit., p. 1127-1140.

this law allows the surrogate mother to be omitted from the birth certificate. If the applicable law allows it, there is not necessarily a conflict with public policy under Article 21 of the Belgian Code of PIL[38].

If Maria's birth certificate had mentioned two men as the legal parents, recognition in Belgium would have been more difficult. The general recognition regime under Article 27 of the Belgian Code PIL would still apply to the recognition of the foreign birth certificate. In this situation, however, it would be more likely that a violation of public policy would be found, since it is not possible under Belgian substantive law to have two legal fathers[39].

As this section has shown, the recognition of filiation between a child and their father or mother is determined separately for the (intended) father and mother. The effect of the fact that only the father is mentioned on the foreign birth certificate and not the (intended) mother is determined by the law applicable to the establishment of filiation respectively for the (intended) father and for the mother.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.

Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.

Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

As explained in Section B.1, Belgian legislation does not regulate surrogacy. There is no legal framework for enforcing a surrogacy agreement. Consequently, Michele cannot invoke a specific procedure to establish his parental rights based on the surrogacy agreement. In theory, however, legal fatherhood could be established through domestic adoption. The

[38] Family Tribunal of Namur, 28 February 2018, *Journal des Tribunaux* 2018, p. 731; Court of Appeal of Liège, 30 July 2020, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 2021, p. 437; and Traest M., *Overzicht van rechtspraak (2010-2021) - Internationaal privaatrecht inzake personen-, familie- en familiaal vermogensrecht. Afstamming*, cit., p. 1127-1140.

[39] Traest M., *Overzicht van rechtspraak (2010-2021) - Internationaal privaatrecht inzake personen-, familie- en familiaal vermogensrecht. Afstamming*, cit., p. 1127-1140.

rules for domestic adoption are set out in the Old Civil Code (Belgian law is applicable in the hypothesis that Michele is a Belgian citizen and Maria did not have her habitual residence in Canada: Articles 67-68 of the Belgian Code of PIL). According to Article 348-3 of the Old Civil Code, both parents must consent to the adoption of a child if their parentage has been established. As Giovanni refuses to consent to the adoption, Michele will not be able to adopt Maria under Belgian law.

There are no specific legal requirements for establishing parenthood in favour of the non-biological (intentional) parent in a surrogacy agreement. As mentioned in the previous paragraph, it is possible to follow the adoption legal framework. In the Belgian legal system, there is no difference between the situation where an intending parent asks for the recognition of parenthood based on adoption and that intending parent is a man or a woman. In case parenthood is based on acknowledgment, there is a difference. A man cannot establish legal fatherhood through acknowledgement if the child already has a legal father. According to Article 319 of the Old Civil Code, legal fatherhood cannot be established through an act of acknowledgement by a second man if legal fatherhood already exists. However, if the non-biological intentional parent is female and legal fatherhood has not been established, acknowledgement may be possible under Article 325/1 of the Old Civil Code.

If adoption or acknowledgement is possible, the consent of the legal parents will be required. As previously mentioned, Article 348-3 of the Old Civil Code stipulates that, when the parentage of a child has been established with regard to both parents, they must both consent to the adoption. If the parentage of a child has been established with regard to only one parent, only that parent should consent to the adoption.

Recognition of a foreign decision establishing parenthood

Clara (intending mother) and Peter (intending father), resident in Belgium, entered into a commercial gestational surrogacy agreement (i.e. the intentional parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not a EU country), allowing such agreements.

Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.

Clara and Peter come back to Belgium and require the recognition of the foreign judgment.

The recognition of the foreign judgment of the State X will be governed by the general rule on the recognition and enforcement of foreign judgments of Article 22 of the Belgian Code of PIL. According to Article 22, §1, any interested party may apply to the court of first instance for the foreign judgment to be recognised in Belgium. As a foreign filiation judgment concerns the status of a person, the Public Prosecutor can also request a declaratory recognition judgment.

Based on the general recognition rule of Article 22, the judgment of State X is in principle recognised and enforced in Belgium. The grounds for refusal of recognition or enforcement are listed in Article 25, §1 of the Belgian Code of PIL, which includes the refusal ground that the consequence of recognition or enforcement is manifestly incompatible with public policy. When determining incompatibility with public policy, particular consideration should be given to the extent to which the situation is connected to the Belgian legal order and the seriousness of the consequences that recognition or enforcement might have. Pursuant to Article 25 §2 of the Belgian Code of PIL, the foreign filiation judgment cannot be reviewed on its merits.

The Belgian Federal Central Authority is competent to examine the recognition of a foreign adoption decision. If State X is a party to the 1993 Hague Adoption Convention, recognition of the adoption in Belgium will be governed by this Convention. Under Article 364-1 of the Old Civil Code, such an adoption is recognised in Belgium by operation of law if the adoption is established in conformity with the Convention. Recognition may be refused only if the adoption is manifestly contrary to public policy, taking into account the best interest of the child and their fundamental rights under international law.

If State X is not a party to the 1993 Hague Adoption Convention, the recognition of the adoption decision is governed by Article 365-1 to 365-6 of the Old Civil Code. Article 365-1 of the Old Civil Code sets out the conditions for recognition, which include:

1. The adoption has to be established by the authority deemed competent under the law of that State, in accordance with the formal requirements and procedures in force in that State;
2. The adoption judgment has *res judicata* effect in that State;
3. If the adopter(s) has (have) their habitual residence in Belgium, the Belgian adoption procedure should have been followed[40].

[40] KRUGER T., VERHELLEN J., *Internationaal privaatrecht. De essentie*, cit., p. 294-295.

The grounds for refusal of recognition are set out in Article 365-2 of the Old Civil Code. One ground for refusal is that the adoption is manifestly contrary to public policy, having regard to the best interests of the child and their fundamental rights under international law.

BULGARIA*

A) *Parenthood*

1) *Relevant private international law rules on parenthood*

International Jurisdiction

The jurisdiction in matters of parenthood is governed by the Bulgarian Code on Private International Law (hereinafter "CPIL")[1] and some of the legal aid treaties.

The parenthood is subject to the general as well as to the special rules of jurisdiction contained in the Bulgarian CPIL.

Pursuant to Article 4, para. 1 CPIL the Bulgarian courts and other authorities shall have international jurisdiction where:

1. the defendant has a habitual residence, statutory seat or principal place of business in the Republic of Bulgaria;
2. the claimant or applicant is a Bulgarian national or is a legal person registered in the Republic of Bulgaria.

This jurisdiction is the general one and is alternatively applicable to all other grounds of jurisdiction except the exclusive jurisdiction.

The special jurisdiction is established in Article 9 CPIL, titled "Jurisdiction in Matters Relating to Parenthood". Pursuant to Article 9, para. 1 CPIL the Bulgarian courts and other authorities shall have jurisdiction over proceedings for establishment and contesting of parenthood except pursuant to Article 4 herein and where the child or the parent, who is a party, is a Bulgarian national or is habitually resident in the Republic of Bulgaria. As per Article 9, para. 2 the same grounds of jurisdiction apply to matters relating to relationships in personam and in rem between parents and children. This second paragraph is derogated by the rules of

* By Boriana Musseva and Tsvetelina Dimitrova.

[1] Prom. In State Gazette No 42 from 17 May 2005, amend. SG. No 59 from 20 Jul 2007, amend. SG. No 47 from 23 Jun 2009, amend. SG. No 100 from 21 Dec 2010, amend. SG. No 106 from 22 Dec 2023, amended in State Gazette No39 from 1 May 2024.

Regulation (EC) No 2019/1111[2], by the 1996 Hague Convention[3] and by legal aid treaties with rules on jurisdiction in matters of parental responsibility[4].

The CPIL provides a legal definition on the term "habitual residence". Pursuant to Article 48, para. 7 CPIL "habitual residence of a natural person" shall denote the place where the said person has settled predominantly to live without this being related to a need of registration or permit to reside or settle. For determination of this place, special regard must be given to circumstances of personal or professional nature arising from sustained connections of the person with the said place or from the intention of the said person to establish such connections. This definition is inspired by the Belgium Code of Private International Law and the way it is applied by the Bulgarian courts is consistent with the autonomous notion of habitual residence under the EU PIL.

The acquisition of Bulgarian nationality is governed by the Constitution of the Republic of Bulgaria[5] and the Bulgarian Citizenship Act[6]. Pur-

[2] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)

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

[4] For example: Article 24 (2) of the Agreement on legal assistance in civil, family and criminal matters between the People's Republic of Bulgaria and the Socialist Republic of Vietnam, published in the State Gazette, No. 69, September 4, 1987; Article 26 (2) of Agreement between the People's Republic of Bulgaria and the Republic of Cuba on legal assistance in civil, family and criminal matters (ratified by decree no. 1959 of the state council of 2 November 1979 - sg, no. 90 of 1979 in force from 25 July 1980); Article 25 of Agreement between the People's Republic of Bulgaria and the Union of Soviet Socialist Republics on legal assistance in civil, family and criminal matters (ratified by Decree No. 784 of the State Council of April 15, 1975 - State Gazette, No. 33 of 1975. In force since January 18, 1976) etc.

[5] Promulgate in State Gazette No 56 fro,13 Jul 1991, amended by State Gazette No 85 from 26 Sep 2003, amended by State Gazette No 18 from 25 Feb 2005, amended by State Gazette No 27 from 31 Mar 2006, amended by State Gazette No 78 from 26 Sep 2006, amended by State Gazette No 12 from 6 Feb 2007, amended and supplemented by State Gazette No 100 from 18 Dec 2015, amended and supplemented by State Gazette No 106 from 22 Dec 2023, amended by State Gazette No 66 from 6 Aug 2024.

[6] Prom. SG. 136/18 Nov 1998, amend. SG. 41/24 Apr 2001, suppl. SG. 54/31 May 2002, amend. SG. 52/29 Jun 2007, amend. SG. 109/20 Dec 2007, amend. SG. 74/15 Sep 2009, amend. SG. 82/16 Oct 2009, amend. SG. 33/30 Apr 2010, amend. SG. 11/7 Feb 2012, amend. SG. 21/13 Mar 2012, amend. SG. 16/19 Feb 2013, amend. SG. 66/26 Jul

suant to Article 25, para.1 of the Bulgarian Constitution a Bulgarian citizen shall be anyone born of at least one parent holding a Bulgarian citizenship or born on the territory of the Republic of Bulgaria, should he not be entitled to any other citizenship by virtue of origin. Bulgarian citizenship shall further be acquirable through naturalization. The Citizenship Act provides further details for acquiring Bulgarian citizenship. It is important to highlight that the general principle – *jus sanguinis* – considers the parenthood between the child and his/her parents. Citizenship is acquired automatically, including when parenthood stems from recognition or is established in a court decision (Article 9 of the Citizenship Act). In practice, the citizenship stems from the nationality of one of the parents without applying the conflict of law rule as regards parenthood envisaged in Article 83 CPIL.

The general jurisdiction considers the procedural positions of the parties. Thus, all persons habitually resident in Bulgaria irrespectively of their nationality are subject to the jurisdiction of the Bulgarian court and other authorities as defendants. However, the access to the Bulgarian court and other authorities is open only for claimants who are Bulgarian nationals irrespectively of their place of living[7]. The special jurisdiction does not consider the procedural position of the parties. It allows access to the Bulgarian court and authorities always if the child or one of the parents is a Bulgarian national. They may be resident in Bulgaria or abroad. The case law refers to this provision also in situation of a person, claiming to be the biological father, who is a Bulgarian citizen[8]. A parent who is not a Bulgarian citizen can also benefit from this jurisdiction, again no matter where he or she is residing. Foreign nationals - a child and/or parents - have the right or may be summoned before a Bulgarian court or authorities on matters of parenthood if they have their habitual residence in Bulgaria. It is clear from the regulation that the Bulgarian court or other authorities do not have jurisdiction in cases where neither the child nor the parent has a personal (based on nationality) or territorial connection (based on habitual residence) with Bulgaria. The personal or

2013, amend. SG. 68/2 Aug 2013, amend. SG. 108/17 Dec 2013, amend. SG. 98/28 Nov 2014, amend. SG. 14/20 Feb 2015, amend. SG. 22/24 Mar 2015, amend. and suppl. SG. 103/27 Dec 2016, suppl. SG. 77/18 Sep 2018, amend. and suppl. SG. 21/12 Mar 2021, amend. SG. 22/18 Mar 2022, amended by State Gazette No 26 from 1 Apr 2022.

[7] Ruling No. 341 of 2 October 2017 in Private Civil Case No. 3310/2017, Civil Chamber, Third Division, Supreme Court of Cassation;

[8] Ruling No. 341 of 2 October 2017 in Private Civil Case No. 3310/2017, Civil Chamber, Third Division, Supreme Court of Cassation;

territorial link with Bulgaria shall exist at the time when the procedure is commenced[9].

The rules on jurisdiction described above apply to the court when parenthood is the subject matter of the claim. Parenthood may be raised as an independent claim, i.e. for establishing fatherhood. It can be joined with another claim - i.e. a claim for establishing fatherhood lodged with a claim for maintenance. In this case, international jurisdiction is determined independently for each claim. It is possible that the question of parenthood is a preliminary/incidental issue for a dispute with another subject matter - i.e. a claim for maintenance. In that case, the court that has jurisdiction over the main claim may also rule incidentally on the preliminary/incidental issue (Article 38, para. 1 of the CPIL). Alternatively, it can also recognise a judgment on parenthood for the purpose of taking its decision on another matter (Article 118, para. 1 CPIL).

The rules on jurisdiction of the CPIL are also relevant for the Bulgarian civil status officials[10]. As established in Article 4 CPIL the heads of jurisdiction bind not only courts bult also "other authorities" such as civil status officials.

However, there is a new case law of the Bulgarian Supreme Administrative Court[11], stating that the civil status official who draws up civil status acts is not an administrative authority and does not act as an authority with international jurisdiction in the meaning of Art. 1, para. 1, item 1 of the CPIL. It does not apply the provisions of the CPIL, in particular, those of Art. 45 of the Code of Private International Law (on public order) and Art. 117 of CIPL (on recognition of foreign court decisions and acts). The civil status official in the view the Supreme Administrative Court does not establish but registers the parenthood of the child established under Bulgarian law. The proceedings are of a public law nature and do not apply conflict of laws rules of private international law, in view of which the application of foreign law could not be expected. This view is not in compliance with the PIL rules on both jurisdiction and applicable law.

International jurisdiction under treaties on legal assistance is not regulated uniformly. In some of these treaties, jurisdiction is determined solely with reference to the child. According to Article 25(6) of the Treaty

---

[9] NATOV N., *Commentary of the Code of Private International Law*, p. 165.

[10] Ibid.

[11] Decision No. 6044 of 16 May 2024 in Administrative Case No. 7594/2023, Third Division, Supreme Administrative Court.

on Legal Assistance with Russia[12] and Article 26(3) of the Treaty with Cuba[13], the competent court is that of the contracting state of which the child is a national, or where the child has domicile or habitual residence.

In others, jurisdiction is determined with reference to both the child and the parent. For instance, under Article 27 of the Treaty with Poland[14], the competent court is that of the contracting party whose nationality the child holds. However, if both parties to the proceedings are domiciled in the territory of one of the contracting states, the court of that state also has jurisdiction.

There were also treaties under which jurisdiction in matters relating to the establishment of parentage and legal relationships between parents and children lies either with the court of the state whose law is applicable to the matter, or with the court of the parties' common domicile - if both parties reside in the same country (as is the case in the treaty with Hungary[15]).

The rules on international jurisdiction under treaties on legal assistance take precedence over the provisions of Articles 4 and 9 of the Bulgarian Private International Law Code (PILC), pursuant to Article 5 (4) of the Constitution of the Republic of Bulgaria. These treaty provisions were the principal rules governing parentage matters prior to the adoption of the PILC in 2005.

---

[12] Agreement between the People's Republic of Bulgaria and the Union of Soviet Socialist Republics on legal assistance in civil, family and criminal matters (Ratified by Decree No. 784 of the State Council of April 15, 1975 - State Gazette, No. 33 of 1975. In force since January 18, 1976);

[13] Agreement between the People's Republic of Bulgaria and the Republic of Cuba on legal assistance in civil, family and criminal matters (ratified by decree no. 1959 of the state council of 2 November 1979 - sg, no. 90 of 1979 in force from 25 July 1980).

[14] Agreement between the People's Republic of Bulgaria and the Polish People's Republic on legal assistance and legal relations in civil, family and criminal matters (ratified by decree no. 172/7.IV.1962, published in the Gazette of notifications, no. 31/17.IV.1962, entered into force on 20 April 1963).

[15] Agreement between the People's Republic of Bulgaria and the Hungarian People's Republic on legal assistance in civil and criminal matters (ratified by the Presidential office of the National assembly by Decree no. 465 of 23 November 1953, published in "Notices of the presidential office of the national assembly", number 95 of 27 November 1953). This treaty was replaced in 1967, when a new agreement was concluded[15], which introduced in Article 22 (3) a different connecting factor – the habitual residence of the child.

Applicable Law

The applicable law in matters of parenthood is governed by the Bulgarian CPIL and some of the legal aid treaties.

Pursuant to Article 83, para. 1 CPIL parenthood shall be governed by the law of the State whose nationality the child acquired at the time of birth. According to para. 2 of Article 83 CPIL notwithstanding the application of para.1, the following law may be applied should this be more favourable to the child:

1. the law of the State of which the child is a national or in which the child is habitually resident at the time of establishment of parenthood, or
2. the law applicable to the relationships *in personam* between the parents at the time of birth.

Under para. 3 of Article 83 CPIL the renvoi to the law of a third State shall be admissible where the said law admits establishment of the parenthood of the child. Paragraph 4 of Article 83 CPIL envisages that acknowledgment shall be effective if it conforms to the national law of the affiliator or to the national law of the child at the time of acknowledgment, or by the law of the State in which the child has a habitual residence at the time of acknowledgment. Paragraph 5 further elaborates that the formal requirements for acknowledgment shall be governed by the law of the State where the acknowledgment has been effected, or by the law applicable according to para. 4 of Article 83 CPIL.

The concepts of Bulgarian "nationality" and "habitual residence" are described above. The foreign nationality is left to the foreign law as it stems from the international law providing for that each State is free to determine the acquisition and the loss of nationality[16]. The law applicable to the relationships *in personam* between the parents at the time of birth is governed by their common national law (Article 79, para.1 CPIL) or, if they hold different nationalities - by the law of the State in which they have a common habitual residence or, in the absence of such habitual residence, by the law of the State with which both spouses are most closely connected (Article 79, para.2 CPIL). According to the theory, the material criterion of "more favorable" law to the child is associated with the specific result, which will generally be present if, according to the relevant legal order, wider possibilities for establishing parenthood are allowed compared to those provided for in *lex patriae* of the child at the

[16] CJEU judgment of 7 July 1992 in Case C-369/90, *Micheletti and Others v Delegación del Gobierno en Cantabria* ECLI:EU:C:1992:295, para. 10.

time of his or her birth. The initiative for applying the more favorable law may lie with either party or the court may consider it *ex officio*[17]. The Supreme Court of Cassion applies this rule *ex officio* and considers that it is more favorable for establishing the parenthood of the child to apply foreign law to the form of acknowledgment, as it provides for a lighter form (in the case of acknowledgment of fatherhood with an oral statement before an official according to Portuguese law)[18].

The Bulgarian law permits *renvoi* as established in Article 40, para. 1 CPIL. Pursuant to it the notion "law of a State" shall denote the legal provisions of the said State, including the conflict of laws rules thereof, save as otherwise provided for in the CPIL or in another law. Parenthood is not among the matters excluded from *renvoi* as per Article 40, para. 2 CPIL. However, if the *renvoi* is admitted, Bulgarian substantive law or, respectively, the substantive law of the third State, shall apply as it stems from Article 40, para. 3 CPIL. Thus, the Bulgaria law allows in principle remission to the Bulgarian law and transmission to the substantive law of the third State. The solution is modified in matters of parenthood. Pursuant to Article 83, para. 3 CPIL the transmission to the law of the third State is possible only if it allows the establishment of parenthood. It is argued that this solution is an expression of the idea of implementing the law more favorable to the child[19]. The alternative system of rules for determining the law applicable to the acknowledgment of fatherhood, including its form, is an expression of the *favor validitatis* principle.

In determining the applicable law to matters of parentage, the public order (Article 45 of the Bulgarian Private International Law Code) and overriding mandatory provisions (Article 46 of the same Code) may come into effect.

The law applicable to parenthood does not depend on whether the child's parents are married or not.

Bulgarian law contains an independent system of rules regarding adoption (Article 84), which are special in relation to the conflict of law rules on parenthood.

The applicable law on parenthood governs all substantive law matters, including the time limits for bringing claims to establish or dispute

---

[17] STANCHEVA MINCHEVA V., *Commentary on the Code of Private international Law*, 2010, p. 249.

[18] Decision No. 271 of 10 January 2020 in Civil Case No. 913/2019, Civil Chamber, Fourth Division, Supreme Court of Cassation.

[19] STANCHEVA MINCHEVA V., *op.cit.*, p. 250.

parenthood. The distribution of the burden of proof, (including presumptions) is determined by the substantive law which governs the consequences of the fact requiring proof (Article 30, para.1 CPIL). The evidence is in principle a matter of lex fori but pursuant to Article 30, para.2 CPIL if the law applicable to the merits of the case admits testimony regarding the circumstances under Article 164 of the Code of Civil Procedure (for example for establishing legal act, which validity is subject to written act or contestation of the content of an official document), this type of evidence shall be admissible if the fact materialized within the territory of the State whereof the law is applicable.

For Applicable law under treaties on legal assistance is not regulated uniformly. In some of these treaties, the applicable law is determined with reference to the child. The simplest provision states that parentage is to be determined according to the child's nationality (for example - Article 20(1) of the Treaty with North Korea[20]) , Article 25 (2) of the Treaty on Legal aid with the Russia provides that cases concerning the contestation or establishment of paternity or maternity, as well as the establishment of the birth of a child within a marriage, shall be decided in accordance with the legislation of the contracting party of which the child was a citizen at the time of birth (including when the parents are not married (Article 25(4)). According to para. 5, if the child is a national of one of the contracting parties but resides in the territory of the other contracting party, and the legislation of the latter is more favorable to the child, then the legislation of that contracting party shall apply. In other treaties, the child's habitual residence is used as an alternative criterion to nationality for determining the applicable law (such as Article 25 (5) of the Treaty on Legal aid with Russia). The most notable provision is one in which the applicable law governing parentage is determined based on factors related to the father. For example, pursuant to Article 24 of the Treaty on Legal aid with Hungary signed in 1953[21], provided in Article 24 that, in the establishment of paternity, *"the law of the state of which the person alleged to be the father of the child was a national at the time of the child's birth shall apply. If the alleged father died before the birth of the*

[20] Agreement between the People's Republic of Bulgaria and the Democratic People's Republic of Korea, Published in the State Gazette, No. 15 of 20 February 1990.

[21] Agreement between the People's Republic of Bulgaria and the Hungarian People's Republic on legal assistance in civil and criminal matters (ratified by the Presidential Office of the National Assembly by Decree no. 465 of 23 November 1953, published in "Notices of the Presidential Office of the National Assembly", Number 95 of 27 November 1953), Published in the State Gazette No. 38 of 11 May 1954.

child, the law of the state of which he was a national at the time of his death shall apply. If the nationality of the alleged father at the time of his death or at the time of the child's birth cannot be established, the law of the state of his last known nationality shall apply." This treaty was replaced in 1967, when a new agreement was concluded[22], which introduced in Article 22 a different connecting factor – the nationality of the child: *"In cases concerning the establishment or contestation of paternity or maternity, the law of the Contracting Party of which the child was a national at the time of birth shall apply. In all other legal relations between parents and children, the law of the Contracting Party of which the child is a national shall apply."*. This framework demonstrates a dual approach, where the Bulgarian Private International Law emphasizes a child-friendly, flexible approach to parentage, prioritizing the most favorable legal regime, while the legal aid treaties primarily focus on the nationality of the child as the determining factor for establishing parentage.

Recognition and enforcement of judgments

Pursuant to Article 117 CPIL judgments and authentic acts of the foreign courts and other authorities shall be entitled to recognition and enforcement where:

1. the foreign court or authority had jurisdiction according to the provisions of Bulgarian law, but not if the nationality of the plaintiff or the registration thereof in the State of the court seized was the only ground for the foreign jurisdiction over disputes in rem;
2. the defendant was served a copy of the statement of action, the parties were duly summonsed, and fundamental principles of Bulgarian law, related to the defence of the said parties, have not been prejudiced;
3. if no effective judgment has been given by a Bulgarian court based on the same facts, involving the same cause of action and between the same parties;
4. if no proceedings based on the same facts, involving the same cause of action and between the same parties, are brought before a Bulgarian court earlier than a case instituted before the foreign court in the matter of which the judgment whereof the recognition is sought, and the enforcement is applied for has been rendered;

[22] Agreement between the People's Republic of Bulgaria and the Hungarian People's Republic, Published in the Official Gazette, No. 29, April 11, 1967.

5. the recognition or enforcement is not contrary to Bulgarian public policy.

The foreign judgment shall be recognized by the authority whereto the said judgment is presented (Article 118, para.1 CPIL). Should the conditions of recognition of the foreign judgment be raised as the issue in a dispute, an action for recognition may be brought before the Sofia City Court (Article 118, para.2 CPIL).

The interested party must present a true copy of the judgment, authenticated by the rendering court, and a certificate issued by the same court, to the effect that the said judgment has taken effect. These documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria (Article 119, para.2 CPIL).

The court shall of its own motion verify the conditions covered under Article 117 CPIL (Article 120, para.1 CPIL). The defendant in the proceedings for recognition and enforcement of foreign judgement may not invoke violations under point 2 of Article 117, which the defendant could have raised before the foreign court (Article 120, para.2 CPIL).

The Bulgarian law follows the commonly accepted types of recognition – *ipso jure* (Article 118, para.1 CPIL), by court decision (118, para.2 CPIL) and incidentally (as developed by the case law of the Supreme Court of Cassation considering Article 118, para.1 CPIL)[23]. According to the case law of the Supreme Court of Cassation, recognition carried out by the authority before which the foreign judgment is presented concerns only the jurisdiction and sphere of action of the relevant authority. In view of the Supreme Court of Cassation it does not have constitutive effect and does not bind the Bulgarian court[24].

2) *Foreign birth certificates and their registration in national registries*

The birth certificate under Bulgarian law is an official written document (Article 2, para.2 of the Law on Civil Registration). Birth certificates drawn up in accordance with the Bulgarian law prove the data reflected therein until their falsity is proven (Article 34, para.2 of the Law on Civil

[23] Decision No. 248 of 26 October 2012 in Civil Case No. 241/2012, Civil Chamber, Second Division, Supreme Court of Cassation and Decision No. 278 of 6 November 2013 in Civil Case No. 1108/2012, Civil Chamber, Fourth Division, Supreme Court of Cassation.

[24] Decision No. 242 of 25 May 2011 in Civil Case No. 811/2010, Civil Chamber, Fourth Division, Supreme Court of Cassation concerning the recognition of a foreign divorce judgment.

Registration). The birth certificate is drawn up by the civil status official in the municipality or mayoralty on whose territory the events occurred. The mayor of the municipality is the civil status official on the territory of the municipality (Article 35). Civil status certificates are drawn up on forms according to an established template (Article 37, para.1 of the Law on Civil Registration). The birth certificate is drawn up as a general rule on the basis of a written notification within 7 days, the day of birth not being counted (Article 42, para.1 of the Law on Civil Registration). When this term has expired and a birth certificate has not been drawn up, but the notification has been made or the official has learned of the birth during the same calendar year, he shall draw up the birth certificate. When the calendar year and the term for drawing up the birth certificate have expired, a birth certificate shall be drawn up only on the basis of a court decision, issued at the request of the parents, the person or the prosecutor (Article 44 of the Law on Civil Registration).

If the birth of a child occurred abroad and there is a foreign birth certificate the Bulgarian law requires a transcription in the Bulgarian Civil Registry. The legal rules are established in Ordinance Nr. RD-02-20-9 of May 21, 2012 on the functioning of the unified civil registration system[25]. A birth occurring abroad for persons who are Bulgarian citizens at the time of the event has to be registered on the basis of a transcript or extract from the civil status act drawn up by a foreign local authority or by a Bulgarian diplomatic or consular representative (Article 4, para. 1 of the Ordinance). For the registration of civil status events occurring abroad, civil status acts shall be drawn up in the administrative center of the municipality (Article 4, para. 2 of the Ordinance).

According to Article 12, para 1 of the Ordinance, when registering a birth that occurred abroad, the data on the name of the holder, the date and place of birth, the gender and the established origin shall be entered in the birth certificate as they are entered in the submitted transcript or in the Bulgarian translation of the foreign document.

---

[25] Published in the State Gazette (ДВ), issue No. 43, dated June 8, 2012, amended and supplemented in State Gazette, issue No. 4, dated January 14, 2014, amended in State Gazette, issue No. 2, dated January 9, 2015, amended and supplemented in State Gazette, issue No. 64, dated August 21, 2015, amended and supplemented in State Gazette, issue No. 22, dated March 22, 2016, amended and supplemented in State Gazette, issue No. 32, dated April 13, 2018, amended and supplemented in State Gazette, issue No. 68, dated August 17, 2021, amended and supplemented in State Gazette, issue No. 15, dated February 21, 2025

If the transcript does not contain the holder's patronymic, the same may be added to the birth certificate with a written application. According to para 3 of the same article, the patronymic and surname of the holder may be entered with the suffixes "-ов" or "-ев" and an ending according to gender, if this is stated in writing by the parents within three years of the person's birth. Article 12, para 3 of the ordinance further elaborates that when the origin from a parent (mother or father) is not established, when drawing up a birth certificate in the Republic of Bulgaria, the relevant field intended for the data on this parent shall not be filled in and shall be crossed out. If the transcript or extract does not contain all the necessary data regarding the parents, data from their identity documents or from the population register shall be used (Article 12, para 4 of the Ordinance). Article 12, para 5 of the Ordinance establishes that if a parent is entered in the transcript or extract with a name that is significantly different from the name under which he is entered in the population register, a document shall be presented for the drawing up of the birth certificate, from which it is evident that the names belong to the same person. When drawing up the birth certificate, the name of this parent shall be entered as it is entered in the population register.

According to Article 12, para 6 of the Ordinance, w birth certificate shall not be drawn up on the basis of a transcript or extract that does not contain data on the name, date of birth, place of birth or gender of the holder, and no other official documents certifying these data may be presented. Interested persons shall establish their rights in court.

When it cannot be established in an indisputable manner based on the data from the population register or from the submitted transcript or extract that at the time of birth the person had a parent who was a Bulgarian citizen, the birth certificate shall be drawn up after this has been established in accordance with Ordinance No. 1/1999. on the implementation of Chapter Five of the Bulgarian Citizenship Act (Article 12, para 7 of the Ordinance).

According to Article 13 of the Ordinance, when registering a birth that occurred abroad, the Bulgarian citizenship of the holder and the parent(s) shall be entered in the birth certificate.

Article 14, para 1 of the Ordinance establishes that after the birth certificate is drawn up, an original birth certificate shall be issued in accordance with an approved form. It shall be handed over to a parent or to a person expressly authorized by the parent. According to para 3 of the said Article 14 of the Ordinance, when a birth certificate is drawn up in

a Bulgarian diplomatic or consular mission, a full copy thereof shall be issued. What is more, according to Article 14, para 4 of the Ordinance when the birth occurred abroad, an original birth certificate shall be issued after drawing up a birth certificate in the Republic of Bulgaria.

On the occasion of issuance of birth certificate in Bulgaria a procedure before the mayor of Pancharevo Municipality was initiated, which led to the decision of the CJEU on the case C-490/20. The case refers to a Bulgarian female citizen, who married another female citizen of the United Kingdom. Later the couple settled in Spain. They had a baby there, and the baby received a birth certificate in Spain, which stated that the baby's parents are both mothers. The Bulgarian mother files an application before the mayor of Pancharevo for a birth certificate to be issued to the child and presents the Spanish birth certificate. The mayor refuses to issue a birth certificate containing information that both women are parents as the mayor states that it would be against the Bulgarian public order. The rejection of the application is appealed before the Administrative court of Sofia City. The judge referred the case for a preliminary ruling to the CJEU. The Bulgarian court asked if the Bulgarian's mayor refusal to issue a birth certificate violated free movement of citizens in the EU, or, on the contrary, Bulgaria can refuse to issue the birth certificate on bases of public order and protection of national identity. In the preliminary question the judge stated as a fact that the child is a Bulgarian citizen.

The Court of Justice of the European Union (CJEU), sitting in Grand Chamber and following the Opinion of the Advocate General (Case C-490/20), delivered a judgment holding that Bulgaria is under an obligation to issue identity documents (but not a birth certificate) to a child who is a Union citizen. Furthermore, the Court ruled that Bulgaria must recognize the birth certificate issued by another Member State indicating the child's parents, for the purposes of exercising the right to free movement and residence within the EU.

The Court's reasoning is primarily based on the principles of freedom of movement and the prohibition of discrimination, but above all, on the right to respect for private and family life and the best interests of the child, as enshrined in the Charter of Fundamental Rights of the European Union (CFR).

In balancing the relevant values, the CJEU categorically rejected the possibility for Bulgaria to invoke public policy or constitutional identity as grounds for refusal in this context. Following the judgment of the

Court of Justice of the European Union, the Bulgarian administrative court of first instance held - relying extensively on arguments derived from EU law, the Convention on the Rights of the Child, and the European Convention on Human Rights - that compliance with the CJEU ruling necessitates the issuance of a birth certificate by the mayor.

According to the presiding judge, the inability to issue such a document constitutes a national measure that hinders the exercise of the right to free movement, and, pursuant to EU law, such an obstacle must be removed.

The essence of the CJEU's judgment is unequivocal: a child with two mothers - one of whom is a Bulgarian national - must have their parentage legally recognized for the purposes for free movement and to have identity documents.

The Mayor of Pancharevo Municipality appealed the decision of the administrative court of first instance. This led to a ruling by the Supreme Administrative Court, delivered in Decision No. 2185 of 1 March 2023 in Administrative Case No. 6746/2022, Third Division.

To determine initially whether the child holds Bulgarian nationality under Article 25 of the Constitution in view of the Supreme Court of Cassation, parenthood must be established in accordance with Bulgarian law. Under Article 60, paragraphs 1 and 2 of the Family Code, motherhood is defined by birth, meaning the mother is the woman who gave birth, including cases involving assisted reproduction. In this case, identifying the woman who gave birth was essential, but the couple refused to provide this information. Consequently, parenthood with the Bulgarian mother could not be confirmed. The Supreme Court concluded that since it was established that the child is not a Bulgarian citizen under applicable law, Bulgaria is not obligated to issue a birth certificate. According to the Supreme Administrative Court of Bulgaria the child has the right to have Spanish citizenship, because he/she was born in Spain, and the countries of his/her mothers refuse to provide the child with citizenship.

In addressing the complex question of whether nationality or parentage is to be determined first - and which legal instruments govern this process - the Supreme Administrative Court reaffirmed the established position that nationality takes precedence, with the Bulgarian Constitution serving as the primary legal source. Had the opposite approach been adopted—determining parentage first by applying the rules of the Bulgarian Private International Law Code (PILC) - the outcome would have

been different. Pursuant to Article 83(1) of the PILC, parentage is determined according to the law of the state whose nationality the child acquired at the time of birth. If, as the Supreme Administrative Court asserts, the child had no nationality at birth, the next paragraph would apply. Under that provision, if more favorable to the child, either the law of the state in which the child had habitual residence at the time parentage was established, or the law applicable to the personal relationships between the parents at the time of birth, may be applied. In the present case, both of these rules point to Spanish law, under which the child is legally recognized as having two parents, one of whom is a Bulgarian national. Accordingly, Bulgarian private international law—which takes precedence over the Family Code as lex specialis - designates Spanish law as the applicable law, thereby precluding any inquiry into which woman physically gave birth to the child, as would otherwise be required under Article 60(1) of the Bulgarian Family Code.

The result from the decision of the Supreme Administrative Court is that the child is not considered a Bulgarian citizen, cannot become one, and therefore, cannot have a birth certificate. The question on recognition of parenthood by a same-sex couple remains unanswered.

Most likely soon there will be ruling on similar cases, where the mother of the child is a Bulgarian citizen. The problem is that when information is presented before the mayor who the biological mother is, if she is the Bulgarian, a birth certificate is issued, but only one of the parents is included in the certificate – the Bulgarian one. It is necessary for this ruling to then be appealed based on the Pancharevo case to base the need for issuance of identifying documents for the purpose of free movement. Indirectly, the question of the issuance of birth certificate will once again be raised, as it is a necessary document in order for a passport to be issued.

The forementioned development of case-law in Bulgaria shows that for issuing a birth certificate and recognition of origin of parenthood a special instrument of the European law must be developed.

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law).

Leo's birth is registered in your State.

Theoretically, as per the applicable law the child will be treated as Bulgarian national (Art. 48(2) CPIL), and the applicable law will be the Bulgarian pursuant to Art. 83(1) CPIL.

As long as the child's birth occurs within 300 days after the divorce, Jürgen is considered as the father of the child (Art. 61(1) of the Family Code where a presumption of parenthood is established in favour of the husband if a child is born while married or up to 300 days after the divorce). However, if Maria marries Jan prior to the birth of the child even if the birth occurs within the said 300 days after the divorce with Jürgen, according to Article 61, para 2 of the Family code, Jan would be considered father of the child.

Otherwise, in practice, the solution of this case will very much depend on the previous registration of the marriage of Maria and Jürgen in the population registry in Bulgaria. If there is no information regarding the marriage in the Bulgarian registries, the mother may be tempted not to provide the marriage certificate and the divorce decision and to opt for the child's recognition by Leo instead, i.e. concealing the fact that she was married, and the child is born prior to the expiration of the period of 300 days after the divorce. If so, the Bulgarian official would not be able to apply the presumption of Article 61 (1) of the Family code and Jan would be able, under Article 64 (1) of the Family code to recognize Leo as its own child.

The Bulgarian law does not provide for the possibility for the mother and the real father of the child to appear at the birth registry and register him as the father of the child. Therefore, if Jürgen is presumed to be fa-

ther of Jan due to the child being born within 300 days after the termination of the marriage between Jürgen and Maria and Maria and Jan had not entered into marriage before that, the only possible way for Jan to establish parenthood would be to challenge the parenthood of Jürgen in court proceedings and creating the possibility for the subsequent acknowledgement of the parenthood (Art. 62 and Art. 64 of the Family Code).

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

In course of the issuance of a Bulgarian certificate, based on the German one (Article 4 (1) of the ordinance), Leo's birth may be registered in Bulgaria. Maria will be registered as the mother and the only parent of the child (Art. 118 (1) CPIL). However, if the marriage appears in the Bulgarian population registry the authority may get confused and consider otherwise..

In Bulgaria, a German birth certificate is considered as a foreign official document – non-contentious (or protective) act (Art. 124 CPIL). As established in the case law (for instance Ruling No. 126 of 02.04.2021 in civil case No. 3822/2020, Civil Division, First Panel, Supreme Court of Cassation): "Judicial acts issued in non-contentious proceedings in Bulgaria do not have the force of res judicata. As official documents issued by a competent authority within the scope of its powers, they have binding evidentiary value for the court; however, this evidentiary force may be challenged and rebutted".

In this case, Jürgen may be registered as the child's father in Bulgaria, going for direct recognition before the major using the marriage certificate and the divorce decision or/and lodge a claim requesting establishment of his parenthood.

If the German birth certificate does not establish the father of Leo and if the marriage and the divorce are nor registered in Bulgaria, Maria may have the possibility to appear at the birth registry with another man

she says is the father (for instance, Jan). Leo may be acknowledged by Jan via declaration (Article 64 of the Family code). If the marriage is registered the authority will have to consider its effect over the parenthood and may decide against the acknowledgment. The way out will require again legal proceedings establishing the parenthood of Jürgen, rebutting it (article 71 of the Family code) and freeing the path for acknowledgment by Jan (Article 69 of the Family code).

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

In this case, Tom's birth can be registered in Bulgaria only if the biological mother is Valentina. The latter will be the only parent that will appear in the birth certificate.

The Dutch birth certificate will be treated in Bulgaria as foreign non-contentious (or protective) act, but it will be recognized only partially. The co-motherhood of the non-biological mother will be not recognised as being against the Bulgaria public policy.

The two women (Valentina and Jette) may not be considered to be the legal mothers of the child in Bulgaria.

B) *Parenthood following an International surrogacy agreement (hereinafter ISA)*

1) *Attitude vis-à-vis surrogacy and relevant rules on (international) surrogacy in the national legal order*

In Bulgaria there is a ban on surrogacy. This is established in paragraph point 5.7.9, Section IV of Ordinance No. N-2 of 12 July 2023 on Assisted Reproductive Activities, issued by the Minister of Health, published in the State Gazette, Issue No. 63 of 25 July 2023. Surrogacy is also prohibited under Articles 182a and 182b of the Penal Code.

In the case of children born abroad following a surrogacy agreement, if the foreign documents – birth certificate or court decision, do not contain information demonstrating a surrogacy situation, the standard track for recognition of birth certificates or decisions applies.

If there is a foreign decision with an operative part pointing at parenthood between a child and one/two parents, it is up to the eagerness of the requested authority (the major or the court) to dig into the details of the reasonings. It may happen that it stays focused on the operative part and thus decides to recognise the parenthood.

The most complicated solution is for the surrogate mother to renounce parental responsibility and thus to free the way for the intended mother to adopt the child.

Prohibition of surrogacy in Bulgaria is established in point 5.7.9, Section IV of Ordinance No. N-2 of 12 July 2023 on Assisted Reproductive Activities, issued by the Minister of Health, published in the State Gazette, Issue No. 63 of 25 July 2023, namely:

5.7. When using donor gametes, the following is not permitted:
5.7.9. achieving surrogate pregnancies;

Surrogacy is also prohibited under Articles 182a and 182b of the Criminal Code:

"*Art. 182a. (New - SG, No. 26/2004) (1) (Amended - SG, No. 26/2010) Whoever, for the purpose of material gain, persuades a parent by means of a donation, promise, threat or abuse of official position to abandon his or her child or to give consent to his or her adoption, shall be punished by imprisonment for a term of up to three years and a fine of up to two thousand leva.*

(2) The punishment under para. 1 shall also be imposed on whoever persuades a minor to give consent to his or her adoption, when the law requires it.

(3) Whoever, for the purpose of unlawful property gain, mediates between a person or family wishing to adopt a child and a parent wishing to abandon their child, or a woman agreeing to carry a child in her womb with the aim of handing it over for adoption, shall be punished by imprisonment for up to two years and a fine of up to three thousand leva.

(4) If the act under para. 3 is committed repeatedly, the punishment shall be imprisonment for up to three years and a fine of up to four thousand leva."

"*Art. 182b. (New - SG, No. 75/2006, effective 13.10.2006) (1) A female person who consents to the sale of her child in Bulgaria or abroad shall be punished by imprisonment for a term of one to six years and a fine of five thousand to fifteen thousand leva.*

(2) The punishment under para. 1 shall also be imposed on a pregnant woman who consents to the sale of her child before its birth."

2) *Relevant problems considered by the case-law in your legal order*

In Bulgaria, there have been no specific solutions adopted by the legal order with regard to the implementation of the indications provided by the ECtHR in its first Opinion rendered on Request No. P16-2018-001.

As concerns how Civil Registrars consider birth certificates of children born following surrogacy agreements, if there is no sign of a relationship pointing at the surrogate mother, the birth certificate will be reissued and the link between the child and the parents will be included in the Bulgarian civil status register. A new Bulgarian birth certificate will be issued and it will prove the parenthood in Bulgaria.

On the other hand, an adoption decision issued by a foreign court is a court decision within the meaning of the CPIL. Insofar as the legal relationship under it is outside the regulations for international adoption of a child, this decision of the foreign court falls within the scope of Art. 118, para. 1 of the CPIL and is to be recognized directly by the authority to which it was submitted. The Civil Registrar should establish the existence of the five conditions for recognition under Art. 117 of the CPIL. Once of the conditions is the public policy exception. If the Civil Registrar refuses to recognise the adoption decision its act is subject to court review.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.

Agnese gave birth to Maria and the foreign birth certificate from the third State recognizes Marco and Michela's legal parenthood of Maria.

Whilst Marco has a genetic link with Maria, Michela has not.

In Bulgaria, Marco's parenthood will be recognized if the birth certificate does not reveal any information regarding the surrogacy relationship.

If Michela is included in the birth certificate she will be registered as a mother of the child if the birth certificate does not reveal any information regarding the surrogacy relationship.

However, if there is a sign of surrogacy implication the Civil Registrar may resort to the public policy exception.

Accordingly, if two men were indicated as parents in the foreign birth certificate, the Civil Registrar will apply the public policy exception.

In cases in which only a father is indicated in the foreign birth certificate, while the mother is not, the Civil Registrar will transcribe a Bulgarian birth certificate including only the father. The mother must use other procedural tools to establish her parenthood, most likely adoption procedure.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.

Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.

Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

The Bulgarian legal order does not provide any rights to Michele stemming from the surrogacy agreement; even if such rights were agreed upon, they will be considered null and void as being contrary to the law and/or to the good morals (Art. 26, para. 1 Law on Obligations and Contracts).

The surrogacy agreement will be treated as null and void in any case, and no difference exists between the situations where the intentional parent asking for the recognition of parenthood is a man or a woman.

In order to allow the establishment of parenthood in favour of the non-biological (intentional) parent of a surrogacy agreement, the biological parent has to renounce his/her parenthood and free the way for the intentional parent to acknowledge/adopt the child. Therefore, the mere consent of the biological parent is not sufficient for the establishment of parenthood with regard to the non-biological (intentional) parent. The surrogate mother also must renounce the parenthood if another intentional parent has to step in as a father of the child.

Recognition of a foreign decision establishing parenthood

Clara (intending mother) and Peter (intending father), resident in Bulgaria, entered into a commercial gestational surrogacy agreement (i.e. the intentional parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not a EU country), allowing such agreements.

Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.

Clara and Peter come back to Bulgaria and require the recognition of the foreign judgment.

In cases such the one under examination, a *de facto* recognition may happen in case the birth certificate is a standard one not revealing the surrogacy background.

As concerns the procedure which might be applicable in case of recognition of a (foreign) adoption decision, please see the explanation above.

CROATIA

A) *Parenthood*

1) *Relevant private international law rules on parenthood*

The new Croatian Private International Law Act (hereinafter: PIL Act) of 4th October 2017 entered into force on 29th January 2019[1]. It holds rules on jurisdiction, applicable law and recognition and enforcement relevant for parenthood.

International Jurisdiction

Along with general jurisdiction based on the defendant's domicile, special jurisdiction criteria apply for parenthood matters.

There is a rule governing a special jurisdiction for personal status in Article 47:

(1) Unless otherwise provided by this Act, in proceedings concerning the personal status of natural persons, a court or other authority of the Republic of Croatia shall have jurisdiction — except as provided in Article 57 of this Act— if the person whose personal status is in question has a habitual residence in the Republic of Croatia or is a Croatian citizen.

(2) Paragraph 1 of this Article applies, for example, to proceedings concerning:

1. *granting permission to enter into marriage.*
2. *deprivation or restoration of legal capacity*
3. *establishment or termination of guardianship*
4. *establishment or contestation of maternity or paternity*
5. *establishment of adoption*
6. *declaration of a missing person as deceased.*

Article 51 governs the jurisdiction for maternity and paternity matters:

(1) In matters concerning the establishment or contestation of maternity or paternity, the courts of the Republic of Croatia shall have jurisdiction if

[1] Private International Law Act (PIL Act), OG 101/17, 67/2023.

at least one party has habitual residence in the Republic of Croatia, or if both the child and the person whose maternity or paternity is being established or contested are Croatian nationals.

(2) A declaration acknowledging paternity or maternity may be made before a competent authority of the Republic of Croatia:

1. if the child or the person making the declaration has habitual residence in the Republic of Croatia, or

2. if the child was born in the Republic of Croatia.

Parenthood may be relevant for the determination of other subject matters as a main cause of action. In those situations, the court dealing with different subject matter as a main cause of action may determine parenthood as a preliminary issue, according to Article 12 of the Civil Procedure Act[2]:

(1) When a court's decision depends on the prior resolution of an issue regarding the existence of a certain right or legal relationship, and no decision has yet been made on that issue by a court or another competent authority (preliminary issue), the court may resolve that issue itself, unless otherwise prescribed by specific regulations.

(2) The court's decision on the preliminary issue has legal effect only in the proceedings in which the issue was resolved.

(3) In civil proceedings, the court is bound by the final judgment of the criminal court declaring the defendant guilty, with respect to the existence of a criminal offense and the criminal responsibility of the perpetrator.

Also, it is possible to recognize a foreign judgment for the purpose of other proceedings, by Article 72(3) of the PIL Act:

(3) If a final decision on the recognition of a foreign court judgment has not been made, any court may decide on the recognition of that judgment as a preliminary issue in the proceedings, but only with effect for that specific proceeding.

Applicable Law

According to Article 41 of the PIL Act, the applicable law is determined by a listed connecting factors, which have to be established when

[2] Civil Procedure Act, OG SFRJ 4/77., 36/77., 36/80., 6/80., 69/82., 43/82., 58/84., 74/87., 57/89., 20/90., 27/90., 35/91, OG 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 148/1, 25/13., 89/14., 70/19., 80/22., 114/22., 155/23.

the procedure for establishing or contesting maternity or paternity is initiated. Hence, the law of the child's habitual residence, or if it is in the best interests of the child, the law of the State of the nationality of the child or the law of the State of which the persons whose maternity or paternity are established or contested nationals, is applied. Albeit the habitual residence of the child is set as the primary connecting factor, it can be superseded by the law of the nationality of either the child or the persons whose maternity or paternity are being established, subject to the test of the best interests of the child (alternatively).

For the establishment or contestation of maternity or paternity, the applicable law at the time of initiation of the proceedings is:

1. the law of the child's habitual residence, or

2. if it is in the best interest of the child, the law of the state of which the child is a national or the law of the state of which the persons whose maternity or paternity is being established or contested are nationals.

Material and formal validity of the confession of maternity or paternity is subject to any of the alternatively set applicable laws: the law of nationality or habitual residence of the child at the time of acknowledgement or the law of the nationality or habitual residence at the time the person is acknowledging maternity or paternity, according to the Article 42 of the PIL Act.

For the validity of the acknowledgment of motherhood or fatherhood, the applicable law is:

1. the law of the child's nationality or habitual residence at the time of acknowledgment, or

2. the law of the nationality or habitual residence of the person acknowledging motherhood or fatherhood at the time of acknowledgment.

There are no specific rules on law applicable to limitations, legal standing and evidence (including presumptions); hence, *lex causae* also applies to these matters.

If Croatian law is applicable, the Family Act[3] provides rules on these issues. The rules for establishing and contesting parenthood differ depending on the child's age. The law provides strict time limits for establishing or contesting parenthood.

[3] Family Act, OG 103/2015, 98/2019, 47/2020, 49/2023, 156/2023.

Establishing parenthood

A child may file a lawsuit to establish maternity or paternity up to the age of twenty-five (Article 383 of the Family Act). A lawsuit to establish paternity may be filed by the mother of the child up to eighteen (Article 384 of the Family Act). The same age limit applies if the social welfare centre files the procedure (Article 387 of the Family Act). A lawsuit to establish paternity may be filed by a man who considers himself the child's father within one year of receiving notification that consent of the mother before the civil registry (Articles 63-64 of the Family Act) has not been obtained, and no later than the child's eighteenth birthday. (Article 385 of the Family Act). If the person who is claimed to be the mother or father of the child is not alive, a lawsuit to establish maternity or paternity against her or his heirs may be filed within one year from the death of the person claimed to be the mother or father of the child or within six months from the finality of the decision on inheritance. (Article 396 of the Family Act).

Contesting motherhood

The child can file a lawsuit in court up to the age of 25, and if the child is a minor, then the lawsuit is filed by a special guardian appointed by the social welfare authority. A woman who is registered as a mother of a child may file a lawsuit to contest her motherhood within 6 months of learning of the fact that it excludes her motherhood and no later than the 7th year of the child's life. A woman who considers herself the mother of a child may contest the motherhood of a woman registered as the mother if she simultaneously seeks to establish her motherhood. The lawsuit may be filed within 6 months of acknowledging that she is the mother of the child, and no later than the 7th year of the child's life. The paternity of the mother's husband, i.e. the man whose paternity has been established by acknowledgement, is also considered contested by a final judgment on contesting maternity. (Articles 393 – 398 of the Family Act).

Contesting paternity

A child may file a lawsuit to contest paternity up to the age of 25, but if the child is a minor, the lawsuit is filed on his behalf by a special guardian appointed by the social welfare authority. A lawsuit to contest the paternity of a child born during the marriage or within 300 days following the dissolution of the marriage may be filed by the mother's husband if he considers that he is not the biological father, within 6 months from

the day of acknowledgement of the fact that casts doubt on the truthfulness of the registered paternity, but no later than the 7th year of the child's life.

A man who is registered as the father of a child based on the acknowledgement of paternity and later finds out about the fact that excludes his paternity can contest his paternity with a lawsuit within 6 months from the day of acknowledgement of that fact, but no later than child's 7 years of age. A man who has been forced to acknowledge the paternity of a child he claims does not originate from him may contest his paternity in a lawsuit within 6 months of the acknowledgement and no later than the 7th year of the child's life.

A man who considers himself to be the father of a child may file a lawsuit contesting the paternity of a person who has acknowledged that child as his own if he simultaneously seeks to establish his paternity. The lawsuit can be filed within 1 year of registering the acknowledgement of paternity in the birth register.

The mother may file a lawsuit to contest the paternity of the child born during the marriage or within 300 days following the dissolution of the marriage, but only within 6 months of the birth of the child. (Articles 400 - 404 of the Family Act).

Evidence, including legal presumptions, is also given by the Family Act. Presumptions refer to birth within marriage and birth within a certain period after remarriage. The child's mother is considered to be the woman who gave birth to him (Article 58 of the Family Act) (Presumption of motherhood).

The child's father is considered to be the mother's husband if the child was born during the marriage or within a period of up to 300 days from the termination of the marriage (Article 61(1) of the Family Act).

If the mother of the child has entered into a subsequent marriage within a period of up to 300 days from the termination of the marriage by death, the husband of the mother from the second marriage is considered the father of the child (Article 61(2) of the Family Act).

Recognition and enforcement of judgments

According to the Article 66(1) of the PIL Act a foreign court decision is equated with a decision of a court of the Republic of Croatia and has legal effect in the Republic of Croatia only if it is recognized by the court of the Republic of Croatia.

The foreign court decision shall be recognized if the applicant for recognition has submitted proof that foreign decision is *res iudicata* under the law of the state in which it was rendered (Article 67(1) of the PIL Act):

(1) A foreign court decision shall be recognized if the applicant for recognition submits, along with the decision, proof that the decision is final under the law of the country in which it was rendered.

(2) The applicant for the enforcement of a foreign court decision, in addition to the proof referred to in paragraph 1 of this Article, must also submit a certificate confirming the enforceability of the decision under the law of the country in which it was rendered.

The court competent for the enforcement are municipal courts in whose territory the party against whom recognition is sought has domicile. If the party against whom recognition is sought does not have a domicile in the Republic of Croatia and no enforcement is to be carried out in the Republic of Croatia, the proposal may be submitted to one of the courts with real jurisdiction in the Republic of Croatia (Article 72(1) of the PIL Act).

The court will refuse to recognize a foreign court decision in the following cases:

- *The court of the Republic of Croatia shall refuse to recognize a foreign court decision if, upon the objection of the party against whom recognition is sought, it determines that the party's right to participate in the proceedings in which the decision was rendered was violated. (Article 68)*
- *Recognition of a foreign court decision shall be refused if, in that matter, the court or another authority of the Republic of Croatia has exclusive jurisdiction.*
  Recognition of a foreign court decision shall be refused if the court that rendered the decision based its jurisdiction solely on the presence of the defendant or the defendant's property in the country of that court, and such presence is not directly connected to the subject matter of the proceedings.
  Recognition of a foreign court decision shall be refused if the court based its jurisdiction contrary to the provisions of Sections 3, 4, and 5 of Chapter II of the Brussels Ibis Regulation. (Article 69)

- *Recognition of a foreign court decision shall be refused if, in the same matter and between the same parties, there is a final judgment of a court of the Republic of Croatia or a decision of a foreign court that became final earlier and has been recognized or is eligible for recognition in the Republic of Croatia.*
  The court shall stay the proceedings for the recognition of a foreign court decision if a previously initiated proceeding in the same legal matter and between the same parties is pending before a court of the Republic of Croatia, until the final conclusion of that proceeding. (Article 70)
- *Recognition of a foreign court decision shall be refused if such recognition would clearly be contrary to the public policy of the Republic of Croatia. (Article 71).*

2) *Foreign birth certificates and their registration in national registries*

The authorities of the Civil Registry in Croatia act upon the domestic legislation: PIL Act, Act on Legalization of Documents in International Legal Transactions[4], the Civil Registers Act[5], the Same-sex Life Partnership Act[6], Personal Name Act[7], Citizenship Act[8], etc.

They also apply the following international conventions: 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents[9]; 1956 Paris Convention on the Issue of Multilingual Extracts from Civil Status Records to be used abroad[10], adopted within the framework of the International Commission for Civil Status (ICCS),

[4] Act on Legalization of Documents in International Legal Transactions, OG SFRY 06/73, OG 53/91.

[5] State Civil Registers Act, OG 96/93, 76/13, 98/19, 133/22.

[6] Same-sex Life Partnership Act, OG 92/14, 98/19.

[7] Personal Name Act, OG 118/12, 70/17, 98/19.

[8] Croatian Citizenship Act, OG 53/1991, 70/1991, 28/1992, 113/1993, 4/1994, 130/2011, 110/2015, 102/2019, 138/2021.

[9] HCCH, the Convention of 5 April 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. 12, OG IT 11/2011.

[10] ICCS, the Convention (no. 1) on the Issue of Multilingual Extracts from Civil Status Records to be used abroad was signed in Paris on 27 September 1956, OG SFRY 9/1967, OG IT 6/1994

as well as to the 1976 Vienna Convention on the Issue of Multilingual Extracts from Civil Status Records[11].

The authorities in the Civil Registry do not determine parenthood based on choice-of-law rules (note: all authorities, not just courts, should be bound by the PIL Act as ius cogens!). They will transcribe the foreign birth certificate as long as it complies with Article 40 of the Civil Register Act:

(1)The registration of facts of birth, marriage, or death of Croatian citizens occurring abroad is carried out on the basis of an extract from the civil register issued by a foreign authority. This extract must be submitted by the applicant, unless an international agreement provides that the foreign authority is obliged to forward such extracts to the competent authority in the Republic of Croatia.

(2) Exceptionally, a birth that occurred abroad may be registered in the birth register on the basis of a decision of the competent administrative authority, if the extract from the birth register maintained by the foreign authority could not be obtained in the manner prescribed in paragraph 1 of this Article. The competent administrative authority shall issue a decision at the request of the applicant, based on the evidence submitted by the applicant.

Any subsequent entries and annotations are regulated by the Articles 38 and 39 of the Civil Registry Act.

Article 38:

(1) Subsequent entries and annotations are additions and amendments to the original entry and relate to facts that occurred or became known after the original entry was made.

(2) Subsequent entries and annotations also include the registration of other facts that, under the law, must be recorded in the civil registers.

Article 39:

(1) Corrections of errors in original or subsequent entries in the civil registers are also entered as subsequent entries.

---

[11] ICCS, the Convention (no. 16) on the Issue of Multilingual Extracts from Civil Status Records was signed in Vienna on 8 September 1976,OG SFRY -8-26/1991, OG IT 6/1994.

(2) A correction of an original or subsequent entry may only be made based on a decision of the competent administrative authority.

(3) If the authority competent to determine the incorrectly entered fact in the civil register is a state administration body, the correction shall be entered based on the decision of the competent administrative authority in the area where the civil register is kept.

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law).

Leo's birth is registered in your State.

In order for mutual rights and obligations to arise between a parent and a child, the parentage of the child must be established. Article 60 of the Family Act stipulates that paternity may be established by a presumption of marital paternity, by acknowledgement, or by a court decision.

Although the legal effects of marriage and out of wedlock unions are almost entirely equal, the rules governing the determination of a child's parentage from the father when the child is born during the parents' marriage (and within a certain period after the marriage ends) still differ from the rules for determining paternity in the opposite situation. Marital paternity is established by presumption, while non-marital paternity is established by acknowledgement or by a court decision in legal proceedings.

When it comes to the presumption of marital paternity, it is a rebuttable presumption that a child born during the marriage or within 300 days after the marriage ends is considered to be the child of the mother's husband, as his father (Article 61 of the Family Act).

The Family Act provides the possibility for a third man, who is considered to be the father of a child born during the marriage or within 300 days after the marriage ends due to divorce or annulment, to acknowledge his paternity, but only with the consent of the mother and the mother's husband.

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

Leo's birth may be registered in Croatia. According to the Civil Registry Act, this matter concerns a subsequent entry into the Croatian registry of births based on a German birth certificate that does not include the father's information. Such an entry would be made under Article 40 of the Civil Registry Act.

According to Article 5(3) of the Croatian Citizenship Act, children born abroad to Croatian citizens who are registered in the registry office in the Republic of Croatia shall acquire Croatian citizenship by descent.

In order to have value in Croatia, the German birth certificate needs to be issued in accordance with the Public Documents Regulation or the Vienna Convention on the Issue of Multilingual Extracts from Civil Status Records. The Croatian Civil Registry authorities accept both equally.

The case constitutes a situation of subsequent entry into the Croatian birth registry where the father was not recorded in the initial registration. The marital status of the child's mother should be established in order to apply the provision on the presumption of marital paternity.

The mother would have to change her marital status in Croatia if she got divorced abroad. The question remains whether the mother has a legal interest in having the marital father recorded. Alternatively, if he provides the necessary documents or if she registers this in advance, then it is considered proven.

Leo cannot be registered if she has not regularized her status because, according to Article 9, everything must be aligned for all essential elements of the registration to be established. Otherwise, Jurgen must provide the German divorce judgment along with the relevant form in accordance with the Public Documents Regulation.

The Law on Civil Registers stipulates that this can be done until the registration is concluded. However, the question is when the registration is concluded: Is it when the fact occurred in our country, when the registration is required in Croatia, or when the registration took place in Germany? The answer will depend on which law is applicable, which will

be determined based on Article 42 of the PIL Act: At the moment the procedure is initiated, the applicable law may be the law of the habitual residence of the child (German law - if the child still resides there), or if it is in the best interest of the child, the law of the child's nationality – the child has German nationality but has become Croatian upon registration in the register of citizens; or the law of the nationality of the person whose paternity is being determined. Jurgen is not registered; we have Jana and the wife, and they are both Croatian nationals, so the third alternative can be considered, and the Croatian Family Act can be applied.

The presumption of paternity applies even if the child was born in Germany, just like in Croatia. The situation is different if the presumed father is not recorded in the German birth certificate. Despite the presumption, if the mother comes before the registrar with the biological father, the registrar cannot register the father based on the presumption.

In the case where the mother has previously regulated her marital status and has been divorced, and no one was recorded as the father in the first registration from the German register, they can all come before the registrar and make declarations according to the Family Act.

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

Tom's birth certificate could not be entered in the Croatian Birth Registry as such, namely having listed two legal mothers.

According to Article 12 of the Family Act, marriage is a legally regulated life union of a woman and a man, so Croatian law does not recognize same-sex marriage or same-sex spouses. Furthermore, in accordance with Article 185 of the Family Act, a child may be adopted by spouses and cohabitants jointly, one spouse or cohabitant if the other spouse or cohabitant is the child's parent or adopter, one spouse or cohabitant with the consent of another spouse or cohabitant and a person who is not married or cohabiting.

Adoption is the only option for a different-sex spouse to become the child's second parent because adopters acquire the right to parental care through adoption. A child may be adopted by spouses and cohabitants jointly, one spouse or cohabitant if the other spouse or cohabitant is the child's parent or adopter, one spouse or cohabitant with the consent of

another spouse or cohabitant and a person who is not married or cohabiting (Article 180(2) and Article 185 of the Family Act).

The same-sex partner cannot become the child's second parent, but alternatively, the life partner of the child's parent has the right to exercise parental responsibility for the child, *i.e.* the contents of parental care together with the parents or instead of the parent based on a court decision or alternatively the life partner may provide partner care which is a form of care for a minor child that can be provided by the live partner after the death of the life partner who was child's parent, and exceptionally during the life of the partner who is child's parent, if the other parent is unknown or is deprived of parental care due to child abuse. Partner care would be a mixture of parental responsibility and adoption because the partner becomes a partner-guardian of the child based on a court decision and between the partner-care provider of the child on the one hand and the child and his or her descendants on the other hand, permanent rights and duties are established that exist by law between the parents and the children and their descendants. However, partner care is not a permanent relationship like adoption because it can be terminated by a court decision. (Articles 40 – 49 of the Same-sex Life Partnership Act).

A case with similar facts was decided by the Administrative Court in Rijeka[12]. Two same-sex partners appealed the decision, rejecting their registration in the civil registers. The two of them entered into a civil partnership in the United Kingdom, where their daughter was born in 2021. In the British birth certificate of the child, one mother is listed under the "mother" section, and the other under the "parent" section. They argue that the child cannot independently enter or reside in the territory of the Republic of Croatia with the mother, who is not registered on the birth certificate. They refer to the judgment of the Court of the European Union C-490/20 V.M.A. The Court accepted the appeal and called upon Article 40 of the Civil Registry Act, Art 40. of the Same-Sex Partnership Act, Article 91(1) of the Family Act, Articles 2, 7,8 of ECHR and 7, 24 of the Charter of Fundamental Rights. Also, it called upon Article 21 of the TFEU. The case was returned to the new procedure without clear instructions on how the birth certificate would be entered into the Croatian Registry since the domestic form provides only for "mother" and "father". Following the decision, the biological mother could be registered on the birth certificate, while parental rights would be recognized for the other partner.

[12] Administrative Court of Rijeka, 5 Us I-477/2023-2, 30.8. 2023.

The difficulty arises in the not infrequent situations where the parties do not wish to declare which of them is the biological mother.

B) *Parenthood following an International surrogacy agreement (hereinafter ISA)*

1) *Attitude vis-à-vis surrogacy and relevant rules on (international) surrogacy in the national legal order*

Croatian legal order prohibits surrogacy. By the Croatian legislation the procedures establishing the relationship between parents and children occurs by the birth of a child, when both parents, by registering the birth in the birth registry, acquire the right to joint parental custody (Family Act, Articles 91–160).

Additionally, the establishment of a relationship between parents and children can be done through the procedures of the establishment of maternity/paternity and dispute of maternity/paternity (Family Act, Articles 55-90). The procedures under the Act on Medically Assisted Reproduction[13] are related to the above. Those procedures are available to married and extra-marital partners (who must be in one of the aforementioned types of unions at the time of embryo transfer into the woman's body), as well as to legally competent women who are not in a marriage, extra-marital, or same-sex union. The extra-marital partner is required to submit a statement acknowledging paternity before the procedure, and the woman must submit a certified statement acknowledging the father's declaration.

Surrogacy is expressly forbidden by the Act of Medically Assisted Reproduction and also derives from Article 58 of the Family Act, which states that the child's mother is considered to be the woman who gave birth to the child. Therefore, the provision as such excludes the legal possibility of surrogacy.

Article 31 of the Act of Medically Assisted Reproduction prohibits seeking or offering the service of bearing a child for another person (surrogacy) through public advertisement or in any other way. The Act prohibits the possibility of arranging or performing medically assisted reproduction for the purpose of bearing a child for another person and handing over a child born through medically assisted reproduction (surrogacy). Also, contracts, agreements, or other legal transactions regarding the bearing of a child for another person (surrogacy) and the handover

[13] Act on Medically Assisted Reproduction, OG 86/12.

of a child born through medically assisted reproduction, whether for financial compensation or without compensation, shall be null and void.

2) *Relevant problems considered by the case-law in your legal order*

Adoption is the only option for a different-sex spouse to become the child's second parent because adopters acquire the right to parental care through adoption. A child may be adopted by spouses and cohabitants jointly, one spouse or cohabitant if the other spouse or cohabitant is the child's parent or adopter, one spouse or cohabitant with the consent of another spouse or cohabitant and a person who is not married or cohabiting, according to the Article 180(2) and Article 185 of the Family Act).

Foreign birth certificates containing data on both different-sex parents would be entered into the Croatian Civil Registry if the conditions from Article 40 of the Civil Status Act were met. The practice pointed toward difficulties in situations where only the biological father is listed on the birth certificate, without information on the mother. In those situations, Adminsitrative Court rendered that, in accordance with the child's best interest, such a birth certificate should be entered without listing the information on child's mother (below). The practice also pointed toward difficulties of the birth certificates of the child of the same-sex partner, where the Administrative Court also took a stand on entry in such a circumstance. Still, the practical instructions are missing (below).

Foreign adoption decisions are subject to a procedure of recognition and enforcement governed by the PIL Act and on Extra-contentious Procedure Act[14]. When a foreign adoption judgement is recognized it is a acknowledged by Civil Registrars and registry is updated.

[14] Extra-contentious Procedure Act, OG 59/23.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.

Agnese gave birth to Maria and the foreign birth certificate from the third State recognizes Marco and Michela's legal parenthood of Maria.

Whilst Marco has a genetic link with Maria, Michela has not.

When such a foreign birth certificate is submitted to the competent registry office, the responsible official will verify whether the conditions under Article 40 of the Civil Status Act are met. If the foreign birth certificate meets these conditions, it will be entered into the Croatian civil registers as such. Officials at registry offices do not have a legal basis to examine circumstances that are, among other things, related to surrogacy.

There will be differences in the situation where, on a foreign birth certificate, the two men are indicated as parents. Such birth certificates would not be possible to recognise in Croatia, given that Croatian law knows no institute of same-sex marriage or same-sex spouse, but merely a life partnership and an informal life partnership. According to national law, a life partnership is a community of family life of two persons of the same sex concluded before a competent authority, while the informal life partnership is a union of family life of two persons of the same sex who have not entered into a life partnership before the competent authority. (Article 2 and Article 3 of the Same-sex Partnership Act). Adoption is also not possible.

There will be a difference if only a father is indicated in the foreign birth certificate, while the mother is not. This kind of legal situation was recently argued before the Croatian Courts, and it will be best described in this case example[15]. The child was conceived by the surrogacy agreement in the USA, concluded by the Croatian intended parents and surrogate mother from the USA. The intended father was also the biological father of the child. The intended parents returned to Croatia with the birth certificate, indicating only the father. The civil registry refused to

[15] Administrative Court of Zagreb, 32 UsI-2260/2023-8, 30.8.2023.

recognise such a birth certificate. This action was explained by the following facts: The Birth Registry of the Republic of Croatia requires the entry of data on both parents, and the Family Act prescribes who is considered a child's parent, including the legal framework for determining a child's origin and the presumption of motherhood — that is, the woman who gave birth to the child is considered the child's mother. Although the mother (the woman who gave birth to the child) is known at the time of the child's birth, it is considered that, therefore, there is no valid legal basis for the registration. Since surrogacy is prohibited in the Republic of Croatia, the status obtained by the claimant cannot be automatically recognised in Croatia, as this would amount to enforcing the consequences of a legal institute banned under Croatian law. Such recognition would violate domestic legislation and place Croatian citizens in an unequal position. Furthermore, the child possesses identification documents issued by the United States, so their rights are not endangered. The Administrative court called upon Articles 2, 7 and 8 of the CRC and to the ECHR practice in *Mennesson* and *Labassee*. The court determined that, in this particular case, all the conditions for registration based on the extract from the civil register of a foreign authority were met and that the birth certificate from the United States, certified with an apostille and translated, constitutes a valid legal basis for the registration in question. The document is indisputably authentic and truthful and contains all the information necessary for the registration. Namely, the Civil Registry Act and the accompanying Instruction clearly stipulate that a child is to be entered into the birth register even when information about one parent is unknown (Article 22.1 of the Instruction), without requiring an analysis of the reasons why the information about the parent is missing. Accordingly, the court carried out the registration in accordance with the provisions of the Civil Registry Act and the Instruction by recording the child's birth and the father's information while leaving the fields for the mother's information blank, adding a note that the mother's details are unknown because they were not included in the foreign birth certificate on which the registration was based. The decision was confirmed by the higher court[16].

[16] High Administrative Court of Republic of Croatia, Usž-3881/2023-3, 23.5.2024.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.

Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.

Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

As already mentioned Croatian law knows no institute of same-sex marriage or same-sex spouse, but merely a life partnership and an informal life partnership. Parenthood of the same-sex partner could not be establish within the meaning of the Family Act, as well he would be not able to adopt according to the Family Act.

The same-sex partner cannot become the child's second parent, but alternatively the life partner of the child's parent has the right to exercise parental responsibility for the child in accordance with the Articles 40 – 49 of the Same-sex Partnership Act.

There is a general discrepancy between the man and woman, regarding the establishment of the parenthood. The intended mother would not be able to recognize the maternity due to the presumption that the child mother is a woman who gave him a birth.

In practice there is a different handling of the cases where only father is evidenced in the Birth certificate, when the matter of motherhood is questioned (see case law above), but when the mother is the only parent listed in birth certificate there will be no issue, since the AR is allowed to single woman's.

Theoretically, such a woman could conceive and give birth to a child through artificial insemination, and her partner could obtain custody, while in the case of same-sex male partners, this would not be possible.

Adoption is the only option that different-sex spouse become the child's second parent because adopters acquire the right to parental care through adoption, and there is a special condition for the foreign adopters in the Article 186 of the Family Act.

(2) Exceptionally, an adoptive parent may also be a foreign national if this is in the best interest of the child.

(3) If the adoptive parent or the child is a foreign national, the adoption may be established only with the prior approval of the ministry responsible for social welfare.

Recognition of a foreign decision establishing parenthood

Clara (intending mother) and Peter (intending father), resident in Croatia, entered into a commercial gestational surrogacy agreement (i.e. the intentional parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not a EU country), allowing such agreements.

Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.

Clara and Peter come back to Croatia and require the recognition of the foreign judgment.

The court decision coming from the third state would need to go through the recognition procedure prescribed under the Croatian PIL act.

Such a decision would not be recognised as being contrary to Croatian public policy. A foreign judgement may have the same legal effect as a decision of a Croatian court, only if it has previously been recognized by a Croatian court in non-contentious proceedings Request for a recognition of foreign judgement must be accompanied with a copy of foreign court decision, for which recognition is sought, along with a proof that the foreign decision is final (*res iudicata*) under the law of the state of the decision. Recognition of the foreign judgement may be refused if the principle of the fair trial has been breached, if the court of origin grounded its jurisdiction of exorbitant grounds, it decision is manifestly contrary to the public policy, if already a Croatian decision has been rendered, or foreign decision has been recognized, in the same subject matter among the same parties. (Articles 67-71 of the PIL Act). However, the control of substantive law applied by the court of origin is confined to manifest breach of public policy (Art 71 of the PIL Act). Obligatory control of applied applicable law in personal status matters of Croatian citizens has been abolished with new PIL Act.

In the different case of recognition of a (foreign) adoption decision, a different procedure is envisaged. The Croatian PIL Act in Article 71a prescribes a special requirements that need to be fulfilled when it comes to the recognition of a foreign adoption.

(1) A foreign court decision on the adoption of a child from a country that is not a party to an international treaty regulating the issue of international adoption shall be recognized after the court verifies the authenticity of the decision through diplomatic channels, and if the applicant, along with the evidence referred to in Article 67, paragraph 1 of this Act, also submits proof of the legalization of the decision in accordance with the law governing the legalization of documents in international legal transactions.

(2) In the procedure referred to in paragraph 1 of this Article, the court of the Republic of Croatia shall request information from the ministry responsible for social welfare as to whether the adoptive parent was registered in the Register of Prospective Adoptive Parents in the Republic of Croatia, if the adoptive parent was, at the time the adoption was established, required to be registered in said Register.

(3) The court of the Republic of Croatia is obliged to forward the final court decision on the recognition of the foreign court decision referred to in paragraph 1 of this Article to the ministry responsible for social welfare and to the Croatian Institute for Social Work for the purpose of entry into the Adoption Register and monitoring of the child's adjustment in the adoptive family, in accordance with the law governing family relations.

This legal arrangement is of a new date, introduced in 2023 as an answer to the complex legal situation occurred. The case, which raised great public attention and provoked discussion at the end of 2022, at the same time, questions the existing legal framework which regulates intercountry adoptions with states that are non-parties of the Hague Adoption Convention. The case concerned eight Croatian citizens (four couples) who had adopted children in the DR Congo. The adoption procedure was conducted in the DR Congo, and each decision was recognised in Croatian before the courts under the Act on Private International Law.

During their travel back to Croatia, together with the children, the eight Croatian citizens were arrested by the Zambian authorities on suspicion of child trafficking. They were brought into custody, and the children were placed in the Zambian child protection institution. The couples were held in custody for months. The procedure before the Zambian authorities ended at the beginning of July 2023, when they were able to return to Croatia together with their adopted children. The case raised the question of the adequacy and sufficiency of the existing provision of the general recognition provisions in the Act on Private International Law that were applied in the case. The major concern was the authenticity of adoption decisions, such as those in the case concerned. This concern resulted in lightning changes to the Act on Private International

Law. The Act was amended with a new provision (above) providing additional presumptions for recognising a foreign adoption decision coming from a non-party state of the Hague Child Adoption Convention. The first paragraph of this new provision is not necessarily needed because the existing legal framework, the Act on Legalisation of Documents in International Legal Transactions, already provides for it.

ITALY*

A) *Parenthood*

1) *Relevant private international law rules on parenthood*

As far as the Italian legal system is concerned, the private international law (PIL) rules on parenthood are to be found in the Italian PIL Act (Law 31 May 1995, n. 218, *Riforma del sistema italiano di diritto internazionale privato)*[1].

International Jurisdiction

The Italian jurisdiction over parenthood matters with cross-border implications is established by Article 37, which attributes jurisdiction to Italian judges each time one of the parents or the child is an Italian citizen or resides in Italy: "*In addition to the cases where there is jurisdiction under Articles 3 and 9, Italian jurisdiction extends to matters of parentage and personal relations between parents and children where one of the parents or the child is an Italian citizen or resides in Italy.*"

The provision saves the application of the grounds of jurisdiction established by Articles 3 and 9. In particular, relevance should be made to the following provisions:

Article 3, para. 1: "*There is Italian jurisdiction when the defendant is domiciled or resident in Italy or has in Italy an agent authorized to appear in court for him/her in accordance with Article 77 of the Code of Civil Procedure, as well as in other cases provided by the law.*"

---

* By Laura Carpaneto, Francesca Maoli, Francesco Pesce and Ilaria Queirolo.

[1] The English version of the Italian PIL Act is retrieved from *National statutes: Italy*, in Basedow J., Rühl G., Ferrari F., de Miguel Asensio P., *Encyclopedia of Private International Law*, Elgar, 2017, p. 3329. However, the term 'parentage' has been substituted with the term 'parenthood', in coherence with the approach described in the introduction.

Article 9: "*There is jurisdiction in non-adversary proceedings when the relief sought concerns an Italian citizen or resident, or when such relief relates to situations or relations to which Italian law is applicable, as well as where the present law specifically so provides or where venue is proper before the Italian judge to whom the matter is brought.*"

From the above, it can be inferred that there are many cases in which a parenthood matter may be considered connected with the Italian legal system from the point of view of jurisdiction. Moreover, Article 37 seems to be interpreted in the sense that jurisdiction exists even if the parent who is an Italian citizen or resident is not the one involved in the proceeding.

Applicable Law

As concerns the applicable law, it should first be emphasised that the Italian legal system is based on the principle of the unicity of the status of a child and does not distinguish between legitimate and natural children. The establishment of parenthood with cross-border elements is determined by Article 33 of the Law 218/1995, according to which:

"*1. Parenthood of a child is determined by its national law at birth or, if more favourable, by the law of the State of which one of its parents is a citizen.*

2. The law applicable pursuant to par. 1 determines the requirements for and effects of establishing its parenthood as well as the grounds for contesting parenthood; if the applicable law does not permit establishing or contesting parenthood, Italian law applies.

3. Parenthood acquired on the basis of the national law of one of the parents may be contested only under such law; if such law does not permit contesting parenthood, Italian law applies.

4. The provisions of Italian law which confirm the abolition of any difference between legitimate and natural children must be applied, regardless of the provisions of any law otherwise applicable."

Thus, Article 33 introduces alternative connecting factors and favours the establishment of parenthood (*favor filiationis*). In fact, the latter (or its contestation) is disciplined by the law of nationality of the child or, if more favourable, the law of nationality of one of the parents (or both

parents) at the date of birth. Even in that case, if the applicable law does not allow for the establishment or contesting of parenthood, precedence is given to Italian law. Indeed, from the last mentioned provision, it should be noted that the favour towards the establishment of parenthood results to be balanced with the search for the "biological truth": in fact, the application of Italian law is permitted if the applicable law does not consent the establishment of parenthood, but also the contestation of the latter.

The last paragraph of Article 33 confirms the unity of the status of the child, qualifying any provision enshrining this principle as an overriding mandatory provision.

Article 35 of the Law 218/1995 refers to a specific modality of unilateral recognition of parenthood by a parent, contemplated by Italian law[2]:

"*1. The requirements for recognition of a son or daughter are determined by his/her national law at the time of birth or, if more favourable, by the national law at the time of recognition of the person recognizing the son or daughter; if such laws do not provide for recognition, Italian law applies.*

2. A parent's national law determines the capacity to recognise a son or daughter.

3. The law of the State where recognition takes place or the law governing the merits determines the form of recognition."

The applicable law regulates the conditions for the recognition. Even in this case, the inspiring principle is *favor filiationis*, expressed alternative connecting factors (among which the most "favourable" applies) and by the application of Italian law each time recognition is not possible according to the other legal systems. This, provided that the capacity of each parent to make a recognition is regulated by his or her national law.

As far as parenthood matters are concerned, it is relevant to recall that Italian PIL provides for the limit of public policy against the application of a foreign law (Article 16 of the Law 218/1995). This limit is to be applied *in concreto*, on the basis of the circumstances of the case concerned and on the effective impact over the national legal order.

The *renvoi* mechanism (Article 13) applies in parenthood matters, but is subject to a special rule (para. 3): "*In cases to which Articles 33 [...] and 35 apply,* renvoi *shall apply only if it results in applying a law which permits establishing filiation.*"

[2] Reference is made to Article 250 of the Italian Civil Code.

Under art. 12 Legge 218/1995, when the Italian courts have jurisdiction, the Italian law applies (*lex processualis fori*).

However, the legal standing (*legitimation ad causam*) shall be considered in light of the right/situation of the case and, therefore, in light of the *lex causae*.

The same reasoning applies to limitations.

With regard to evidence, it has been considered that it has to do both with the judicial procedure and with the substantial law applicable[3]. As a consequence, when the procedural aspects of the evidence are at stake, the *lex fori* applies and when the substantial ones are at stake, the *lex causae* will apply. However, presumptions are regulated by the *lex causae* (as an example, the presumption of paternity, see for example the decision of the Tribunal of Bologna decision n° 415/2010). It shall be also noted that under Italian law is open to use foreign instruments of proof, not envisaged by the *lex fori*. Under art. 69 of the Law 218/1995, Italian courts may take evidence following the decisions of foreign judges. At EU level, uniform rules are provided by Regulation 2020/1783 on cooperation between courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence).

Recognition and enforcement of judgments

The recognition and enforcement of judgment on parenthood matters is disciplined by Articles 64 ff. of the Law 218/1995. Article 64 provides that foreign judgments are automatically recognized in Italy, provided that they respect the requirements stated in the same provisions:

"*Foreign judgments shall be recognized in Italy without the need for resort to any proceedings when:*

a) The foreign judge rendering the judgment had jurisdiction according to Italian jurisdictional principles:
b) The defendant was given notice of the complain in accordance with forum law and essential rights of defence were not violated;
c) The parties appeared in accordance with forum law or default was declared in accordance with that law;

[3] See BARATTA R., *Article 12*, in BARIATTI S. (ed), *Legge 31 Maggio 1995 n. 218 Riforma del sistema di diritto internazionale privato*, in *Le Nuove leggi civili commentate*, 1996, p. 1002.

d) The judgment is res judicata *when pronounced;*
e) The judgment is not in conflict with another judgment rendered by an Italian judge which is res judicata;
f) There is no proceeding pending before an Italian judge involving the same subject matter and between the same parties which began before the foreign proceeding;
g) The effects of the judgment are not in contrary to public order"

At the same time, Article 65 e 66 provides for complementary rules on recognition, which apply respectively to foreign judgment and judicial order relating to capacity of persons or on the existence of family relations or personality rights, and to foreign judicial orders in non-adversary proceedings. If those judgments are adopted by the authorities of the State whose law is applicable under the connecting factors of the Law 218/1995, they are effective in Italy unless they are contrary to public policy or the essential rights of defence have been violated. Therefore, if the conditions are satisfied, only the above two conditions apply to those judgments in order to be recognized in Italy.

In case the decision is not complied with or there is a need to give execution to it, under Article 67 of the Law 218/1995, anyone having an interest is allowed to start a proceeding aimed at ascertaining the existence of the requirements for recognition.

According to Italian PIL rules, the seized judicial authority who holds jurisdiction over a cross-border dispute "*may decide, incidentally, issues not within Italian jurisdiction but whose resolution is necessary in order to decide the case before him/her*" (Article 6 Law 218/1995).

Similar provisions are to be found in EU PIL instruments which regulate jurisdiction over matter different from parenthood, but in the context of which parenthood issues may arise as incidental questions[4].

This means that, in general terms, the Italian judge hearing a case on another matter, is able to determine parenthood, if the resolution of this issue is necessary in order to pronounce on the main application.

Italy is not bound by multilateral international conventions on parenthood matters. Therefore, leaving aside particular cases in which a bilateral convention may apply[5], the general rules on recognition of foreign judgments apply (Article 64 ff. Law 218/1995).

[4] For a detailed analysis, see the European Impact Report.

[5] The multilateral and bilateral convention to which Italy is party can be found on the "Atrio" portal at https://itra.esteri.it/.

Decisions on parenthood may fall within the scope of application of Article 65, which specifically regards judgments on the capacity of persons, the existence of family relations and the rights of persons. Here, recognition based on the foreign law designated by means of the conflict-of-law rules. If the judgment has been issued by a judicial authority of the State whose law is recalled by the connecting factors of Articles 33 and 35, the judgment is automatically recognized in Italy without the need of any judicial proceeding. This, provided that the two conditions stated by Article 65 are met, namely:

a) the judgment is not contrary to public policy;
b) the essential rights of defence have been respected.

Judicial proceedings are required only if the recognition is contested, or for the purposes of the implementation of the judgment in case of non-compliance by the competent authority, such as the refusal of the civil status registrar to entry the judgment in the civil status registers (reference is made to Article 67 of the Law 218/1995).

The same holds true for judgments that do not fall within Article 65, which will follow the general rule of Article 64: the main consequence is that more conditions need to be met (see above). Therefore, the two provisions operate on a complementary basis[6].

The foreign judgment on parenthood can be directly submitted to the civil status registrar of the interested municipality[7], who shall verify whether the conditions provided in Article 65 (or Article 64) are met[8]. The request shall be formulated through a statutory declaration (*dichiarazione sostitutiva di atto notorio*, disciplined by Article 47 of the Presidential Decree 445/2000), certifying that the requirements are met, and should be accompanied by a duly legalized and translated copy of the full judgment.

In origin, according to the circular of the Ministry of Justice of the 7th January of 1997[9], the civil status registrar had the possibility of appealing

[6] See Corte di Cassazione, judgment no. 10378 of the 28th of May 2004 and judgment no. 17463 of the 17th of July 2013. On the topic MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale*, Vol. I, *Parte generale e obbligazioni*, Milan, 2024, p. 409.

[7] The civil status registrars may also receive the request from the Italian Consulate of the circumscription in which the judgment has been issued.

[8] Following the registration in the civil status registers, parenthood is registered as such also in the population registers (*registri anagrafici*).

[9] Ministero di grazia e giustizia, Circolare del 7 gennaio 1997 prot. l/50/FG/29(96)1227.

to the public prosecutor's office in the event of reasonable doubt as to whether the conditions for recognition existed. With the entry into force of the Presidential Decree of 3 November 2000, No. 396[10] (which now governs the registration of civil status events), the competence to update civil status registers has shifted to the local Prefect (*Prefetto*), to which the civil status registrar may refer in case of doubts and who shall decide whether the conditions for recognition are met or not met. The civil status registrar is required to act accordingly. It is only at this stage that the judicial proceedings regulated under Article 67 of the Law 2018/1995 can be initiated.

The last mentioned provision provides for a declaratory proceeding, which can be initiated by any interested party (therefore, both the party seeking the recognition or the party seeking to establish that the judgment lacks the required conditions for recognition). These proceedings are governed by Article 30 of the Legislative Decree of 1st September 2011, No. 150 and they shall be shall be initiated before the Court of Appeal of the place where the judgment must be implemented and conducted according to the simplified procedure regulated by Articles 218-*decies* ff. of the Italian Code of Civil Procedure.

The judicial decision ascertaining the conditions for recognition, together with the foreign judgment, constitutes title for implementation.

2) *Foreign birth certificates and their registration in national registries*

If the birth of a child occurred abroad and a birth certificate concerning an Italian citizen is formed abroad, the foreign birth certificate – duly legalized and translated[11] – shall be presented to the territorial competent Civil Registrar by (i) the Italian diplomatic/consular authorities of

[10] d.P.R. 3 November 2000, No. 396, *Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile.*

[11] Special rules concerning legalization and translation of the birth certificate may be provided by international convention such as (i) the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (available at https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille) or (ii) the 1976 Vienna Convention on the issue of multilingual extracts from civil-status records (https://ciec1.org/en/convention/convention-no-16-on-the-issue-of-multilingual-extracts-from-civil-status-records/) or by Regulation 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation 1024/2012 (https://eur-lex.europa.eu/eli/reg/2016/1191/oj/eng). On this topic, see R. Calvigioni, *Circulation of*

the State where the birth has taken place, or (ii) by the "persons registered" in the foreign birth certificates, or (iii) by any person interested in the registration of the birth certificate[12].

Under Italian law, the Civil Registrars do not have to determine parenthood and they do not have to determine it on the basis of choice-of-law rules.

In the Practice guide concerning the application of the rules on civil status, it is expressly clarified that Civil Registrars are not bound to apply foreign law (following the Italian private international law rules)[13]. Their role is to check:

1. whether the documents received are in compliance with the formal requirements of Italian law.
2. whether the child is born within or outside wedlock.
3. whether the child has been acknowledged by one or both parents.

Furthermore, the Civil Registrar does not have investigation powers. This fact has two consequences: on the one hand, the Civil Registrar cannot require any further document and, on the other hand, even if medical documents proving the existence of a genetic link with the child are provided, the Civil Registrar is not allowed to make use of them for the purposes of registration.

Despite this somehow "limited" role, the Civil Registrar is required by Italian law to refuse registration of an act when such act is contrary to Italian public policy[14].

The problem of a foreign act contrary to Italian public policy is expressly considered, whilst a correspondent duty on the Civil Registrar to consider the problem of the applicable law to the parenthood is not.

In this regard, it shall be considered that (i) the Civil Registry is the registry where civil status documents concerning Italian citizens shall be

---

public documents in the EU, available at https://aldricus.giustizia.it/circulation-of-public-documents-in-the-eu/?lang=en. More generally on the transcription of foreign birth certificates, see R. Calvigioni, *La trascrizione dell'atto di nascita formato all'estero ed il ruolo dell'ufficiale di stato civile*, in (edited by) F. Pesce, *La surrogazione di maternità nel prisma del diritto*, 2022, pp. 35-60.

[12] See Article 17 of the D.P.R. 396/2000.

[13] See *Massimario per l'ufficiale dello stato civile*, 2014, at p. 159 available at https://prefettura.interno.gov.it/sites/default/files/87/2024-07/massimario-ufficiale-stato-civile-2014-0.pdf

[14] See Article 18 of D.P.R. 396/2000.

registered[15] and (ii) under Italian private international law, the law applicable to filiation is Italian law any time the parents are Italian.

The Civil Registrars are not allowed to modify the registry *ex motu proprio*, they need to be requested to do so by any person having an interest[16].

[15] As far as foreign citizens (having their residence in Italy) are concerned, the information concerning their status are collected in a different registry, called "anagrafe".

[16] See Article 98 D.P.R. 396/2000.

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law).

Leo's birth is registered in your State.

Under Italian law, a presumption in favour of Jurgen exists to be Leo's father within 300 days from the date of divorce (as well as from separation as well as from annulment of marriage)[17].

Therefore, if Jurgen was not mentioned immediately in the birth registry, he will be easily registered within 300 days from the divorce.

Under Italian law, Maria is entitled to appear at the birth registry and to register Jan as Leo's father. Since this would be clearly a false statement, Maria is likely to be found guilty of a specific crime (called "alterazione di stato")[18].

Under Italian law, the declaration that the parent provides to the Civil Registrar prevails over the facts and as well as over the registered divorce decision.

On the other hand, the Civil Registry's function is to collect the declaration and, eventually, to refuse it in case he/she believes that it is contrary to Italian law or Italian public policy.

As mentioned, there is a legal presumption that Jurgen is Leo's father, therefore he can start an action claiming paternity ("azione di riconoscimento di stato").

It is also possible that Jan can start an action ("azione di contestazione di riconoscimento").

[17] See Article 232 Italian civil code.

[18] See Article 567 criminal code.

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

Leo's birth should be registered in the Civil Registry, since he is an Italian citizen. There is a specific section of the Civil Registry where births happened abroad are registered.

The request may come from the mother directly or through then Italian Consulate and the birth certificate will be registered in the Civil Registry of the place of residence (if any) or of the AIRE (i.e. the registry of the Italian citizens having residence abroad).

Thanks to the existence of the Regulation 2016/1191, once the multilingual standard form is attached to it, the German birth certificate has the same value as an Italian birth certificate (i.e. it has the value of a public act, which is presumed to state the truth)

Jurgen may be registered as Leo's father.

It is possible for Maria to appear at the birth registry and to declare that Jan is Leo's father.

However, it is also possible to start an action to have Jan recognized as Leo's father.

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

Tom's birth – once duly legalized and translated - can be surely registered in Italian birth registry, having the same value of an Italian birth certificate.

As regard the registration of the birth certificate mentioning the two mothers, the Italian Supreme Court have clarified that it is possible to register it[19]. This is not contrary to public policy (as in the case of two men), since no surrogacy occurred.

[19] See Cass. n° 14878/2017; Cass. SU n° 12193/2019; Cass. n° 23319/2021.

B) *Parenthood following an International surrogacy agreement (hereinafter ISA)*

1) *Attitude vis-à-vis surrogacy and relevant rules on (international) surrogacy in the national legal order*

The Italian legal order expressly prohibit surrogacy. Article 12, para. 6 of the Law 40/2004 (*Norme in materia di procreazione medicalmente assistita*) states that "*Anyone who, in any form, carries out, organises or advertises the commercialisation of gametes or embryos or maternity surrogacy shall be punished by imprisonment of from three months to two years and a fine of from 600,000 to one million euro. If the facts referred to in the previous sentence, with reference to surrogacy, are committed abroad, the Italian citizen shall be punished according to Italian law*". The last part of the provision, sanctioning surrogacy committed abroad by Italian citizens, has been recently introduced by the Law 169/2024 (in force since 3rd of December 2024).

2) *Relevant problems considered by the case-law in your legal order*

Being surrogacy a crime under Italian law, it generally takes place abroad and it comes to the attention of the Italian authorities mainly when the intended parents/parent require the registration of the foreign birth certificate in the Civil Registry.

In this situation, the Civil Registrar has the following alternatives:

1. To register the birth certificate (and to report a suspect situation to the General Prosecutor of the Italian Republic). This is in practice the most common outcome, even if up to now the General Prosecutor does not generally start any further investigation/proceeding (but the situation may change, given the recent entrance into force of the Italian legislation qualifying surrogacy as a universal crime).
2. To register the birth certificate, mentioning just the biological parent (frequently the father), with the consequence that the other parent (frequently the mother) shall (i) start the adoption in special situations procedure (art. 44, lit. d) of the Italian law on adoption) or (ii) shall apply before the court against the refusal of the Civil Registry to register. In the proceeding before the court, the circum-

stances of the case (such as for example whether the intended parents have made fraudulent declarations before the Italian diplomatic/consular authorities abroad) will be assessed. Practice shows that in the majority of the cases the decision of the Civil Registrar not to accept and register the certificate in case of birth following a surrogacy has been considered lawful.

The ECtHR's first Opinion has been *de facto* implemented by the Civil Registrars and by the courts by (i) recognizing filiation of the genetic (intentional) parent, (ii) denying recognition of the filiation of the non-biological (intentional) parent, being against public policy, with the consequence that the latter, in order to be recognized as parent, shall follow the path of the so-called "adoption in special situations".

The Constitutional Court has confirmed the need for specific legal provisions on this matter, since the above de facto solution has been considered not adequate for the protection of the best interests of the child (decision n° 33/2021).

With regard to adoption decisions, a distinction shall be made:

a) *International adoption decisions* shall be recognized through a procedure envisaged by the Italian law on adoption (Legge 184/1983, articles 35 and 36), which requires the intervention of the Tribunal of Minors, which may establish that the decision on international adoption shall be recognized in the Italian legal order and may also order the registration of the decision in the Civil Registry;
b) *Domestic adoption decisions* coming from the judicial of a foreign State may be brought to the attention of the Civil Registrars anytime they concern Italian citizens, having their habitual residence abroad and wanting to register in the Italian Civil Registry their parenthood. Since these decisions are automatically recognized in the Italian legal order (following the rules under art. 64-65 of the Italian law of private international law), the Civil Register shall (and will) register them. Hypothetically, if the Civil Register understand that the situation at stake may be characterized by international elements and may therefore be considered as an international adoption falling within the scope of application of the rules mentioned above under a), he/she may ask the intervention of General Prosecutor. But, as mentioned by Civil Registrars during interviews, this situation does not happen frequently in Italy.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy agreement

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.

Agnese gave birth to Maria and the foreign birth certificate from the third State recognizes Marco and Michela's legal parenthood of Maria.

Whilst Marco has a genetic link with Maria, Michela has not.

The foreign birth certificate concerning an Italian citizen is to be registered in the Civil Registry.

A foreign birth certificate – duly legalized and translated – has the same value of the Italian birth certificate, which is a public document, the content of which is considered true, unless a specific complain of forgery is made[20].

Following the ECtHS's opinion, Marco's parenthood is surely recognized (due to the genetic link). Michela's parenthood may be recognized, unless the Civil Registrar believes that the child is born following a surrogacy agreement, which is against Italian public policy.

In case of refusal, Michela shall start a proceeding for "adoption in special situations" (art. 44 lit. d) Law 183/1984).

If two men are indicated as parents in the foreign birth certificate, the following situations may take place:

1. the Civil Registrar will deny registration, assuming the existence of a surrogacy agreement which is against Italian public policy and that the couple will make an application against the denial. Following the ECtHR's opinion, it is likely that the court will order registration of the genetic father, whilst the non-genetic father will have to start the adoption in special situations proceeding.
2. Given that birth certificates from some (foreign) States record the parenthood establishing a first and a second parent, the Civil Registrar may recognize the first parent as the genetic one and the second parent will have to start the adoption in special situations proceeding.
3. The Civil Registrar has not the power to take into consideration documents different from the birth certificate (such as a DNA test) neither he/she has investigative powers. However, the Civil Registrar has

[20] See Article 2700 Italian civil code.

the power to ask to the parents requiring the registration to make a joint statement on the identity of the genetic father. In such case, the Civil Registrar shall register the genetic father as a parent (whilst the non-genetic father shall start the adoption in special situations proceeding).

In the case of a foreign birth certificate indicating the father of the child (and not the mother), the procedure does not change: the Civil Registrar will register the father and the (non-biological mother) shall start the adoption in special situations proceeding.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.

Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.

Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

Michele – lacking a genetic link with Maria – has not the right to be recognized automatically as the father of Maria, as it happened for Giovanni.

However, he has the possibility to start the adoption in special situation proceeding, which in principle allows him to be recognized as the adoptive father of Maria.

The above proceeding, however, is subject to Giovanni's consent.

In the Italian legal order, when the intentional parent is a man, he needs to go through the adoption in special situations procedure to be recognized as a father.

This is not a case when the international parent is a woman: in such a case, if the parenthood is registered in the birth certificate or recognized in a decision, it will be recognized in the Italian legal order.

The procedure for the establishment of parenthood in favour of the non-biological (intentional) parent of a surrogacy agreement is the adoption in special situation one, envisaged by art. 44 lit. d) of Law 184/1983[21].

The interested person shall make an application to the Tribunal of Minors, which shall evaluate the existence of the requirements envisaged by the law and shall also check whether the parent having parental responsibility gives his/her consent to the adoption.

In principle, the adoption in special situations is aimed at providing adequate moral and material assistance to the child which is deemed to be as abandoned or in a situation where he/she lacks adequate care from the parents. As a consequence, the adoption in special situations is not a full adoption.

The Italian Constitutional Court has recognized the existence of a discrimination vis-à-vis the children born after a surrogacy agreement and adopted by virtue of the procedure at stake and has requested an intervention of the Italian lawmaker (Constitutional Court decision n° 33/2021).

The Constitutional Court has further clarified that the solution of the adoption in special situations is not adequate for the children born after a surrogacy agreement also because it requires the necessary consent of the biological parent, which may not be given in the case of crisis of the couple, occurred after the surrogacy agreement.

Recognition of a foreign decision establishing parenthood

Clara (intending mother) and Peter (intending father), both resident in Italy, entered into a commercial gestational surrogacy agreement (i.e. the international parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not a EU country), allowing such agreements.

Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.

Clara and Peter come back to Italy and require the recognition of the foreign judgment.

[21] See Cass n° 12193/2019. As for a confirmation that the adoption in special situation procedure is in compliance with the ECHR, see the ECtHR's decision in the case Bonzano and others v. Italy, application n° 10810/20, 22 June 2023.

In principle, under Italian law (Law 218/1995), recognition of foreign decisions does not require any specific procedure, unless the decision does not respect some requirements, which in the case of parenthood relates to applicable law and public order.

Being surrogacy against public policy (and starting from the 3rd of December 2024 also a universal crime, to be punished independently from the fact that the conduct happened abroad), the foreign decision is very likely not to be recognized.

Problems may occur when the couple requires registration of their parenthood before the Civil Registrars or in the procedure following the denial of the competent Civil Registrar to register.

POLAND*

A) *Parenthood*

1) *Relevant private international law rules on parenthood*

International Jurisdiction

Jurisdiction in parenthood cases in Poland is governed by the Code of Civil Procedure (CCP)[1] and bilateral agreements on judicial cooperation (for example, 1961 Poland-Bulgaria bilateral agreement[2]). Polish courts have jurisdiction if the defendant is domiciled or habitually resident in Poland (Art. 1103 § 1 CCP). Additionally, Polish courts have jurisdiction if the child is a Polish citizen, domiciled or habitually resident in Poland (Art. 1103^2 § 1 CCP). Jurisdiction of Polish courts is exclusive if all parties are Polish citizens and have their domicile and habitual residence in Poland (Art. 1103^2 § 2 CCP). If a Polish court has jurisdiction over a case that involves the determination of a child's parentage, then the Polish court also has jurisdiction over other related claims connected to parentage (Art. 1103^3 § 3 CCP). This provision ensures that all related issues regarding parenthood are dealt with by the same court to avoid fragmentation of proceedings and potentially conflicting judgments.

Recognition of a foreign judgment on parenthood can be considered incidentally by a Polish court when deciding another case (e.g. child custody, inheritance), even if the court itself is not competent to determine parenthood directly in that matter. In practice (as we were informed during the UNIPAR National Seminar by practitioners) it happens that the

---

* By A. Wysocka-Bar and Ewa Kamarad.

[1] Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Dz.U. 2024 poz. 102).

[2] Umowa między Polską Rzeczą pospolitą Ludową a Ludową Republiką Bułgarii o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych i karnych, podpisana w Warszawie dnia 4 grudnia 1961 r., Dz.U.1963, nr 17, poz. 88. See the list of all bilateral agreements on judicial cooperation in civil matters to which Poland is party to in: KAMARAD E., WYSOCKA-BAR A., *Private International Law in Poland*, Alphen aan den Rijn, 2020, 25, p. 191-194.

court does not recognize a foreign judgment but instead orders applicants to provide a birth certificate transcribed into Polish Civil Status Registry (*Rejestr Stanu Cywilnego*).

Applicable Law

Conflict of law rules in parenthood cases in Poland are provided for in Private International Act (PILA)[3] and bilateral agreements on judicial cooperation (for example, 1961 Poland-Bulgaria bilateral agreement). Article 55 (1) PILA covers all means of determination of parenthood, except acknowledgement of a child. Therefore, it applies to establishing or denying both fatherhood and motherhood. Article 55 (1) PILA contains a general rule, according to which the determination and challenge of the child's filiation is governed by the child's law of nationality at the time of birth. Article 55 (2) PILA adds on that if the child's law of nationality at the time of birth does not provide for the judicial determination of fatherhood, the judicial determination of fatherhood is subject to the child's law of nationality as of the time when filiation is determined. If this law also does not provide for a judicial determination of fatherhood, then – as suggested in the legal literature - the public policy clause would have to be applied, causing the refusal of application of the foreign law and the application of the law that allows such determination[4].

The applicable law governs in particular the presumption of paternity of a child born in marriage, including its nature and conditions, as well as the admissibility of an action to determine the fatherhood of a child born in marriage and the main effect of the presumption of paternity, which is, inter alia, the kinship relationship between the child and the mother's husband. The applicable law also governs denial of parenthood. In this context, the law applicable determines substantive law premises, time limits, the circle of persons with legal standing, the participants in a proceeding and the effects of denial of parenthood[5].

---

[3] Ustawa z dnia 4 lutego 2011 r. – Prawo prywatne międzynarodowe (Dz.U. 2015 poz. 1792).

[4] PAZDAN M. (ed), *Prawo prywatne międzynarodowe, Komentarz*, Warszawa, 2018, p. 511.

[5] KAMARAD E., WYSOCKA-BAR A., *Private International Law in Poland*, cit., p. 134. In Polish literature see: MOSTOWIK P. in POCZOBUT J. (ed), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa, 2017, p. 855–858.

Article 55 (3) concerns acknowledgement of a child. Pursuant to this provision the declaration of acknowledgement is governed by the child's law of nationality as of the time of acknowledgment. If that law does not provide for the declaration of acknowledgement, the child's law of nationality as of the time of birth applies, as long as that law provides for acknowledgement. Similar to determination of the parenthood, it is possible to apply public policy clause if the law indicated as applicable does not provide for the acknowledgement of a child[6].

According to the principle of *lex fori processualis*, that the law of the forum governs the procedures and rules of evidence in a legal proceeding, including how evidence is gathered and presented. This means that the rules regarding the admissibility, relevance, and weight of evidence (e.g. DNA testing, documentary evidence – especially birth certificates, medical records from childbirth, hospital documentation, witness testimony, expert opinions, etc.) are determined by the law of the court where the case is being heard.

If the child has multiple nationality Article 2(1) and (2) PILA applies. The first one provides that Polish nationality prevails over any foreign nationality a Polish national may possess. According to the second one, when it comes to foreigners with multiple nationalities, the law of this state with which a foreigner is most closely connected prevails as national law. If the child is a stateless person or a refuge the law of domicile or habitual residence will be applied pursuant to Article 3(1)[7].

It is also possible to apply *renvoi* (Article 5(1) PILA) - if the foreign law that is indicated as applicable law, refers back to the Polish law, Polish law applies.

The declaration of acknowledgement of an unborn but already conceived child (*nasciturus*), according to Article 55(4) PILA is subject to the mother's law of nationality as of the time of acknowledgement. The phrase "the time of acknowledgement" used in Article 55 (1) and Article 55 (4) means the moment of submitting the declaration of acknowledgement by the person acknowledging the child[8].

Applicable law indicated by Article 55 (3) or (4) governs in particular the legal nature of the acknowledgement, the requirement of the

[6] PAZDAN M. (ed), *Prawo prywatne międzynarodowe, Komentarz*, cit., p. 512.

[7] PILICH M., *Zasada obywatelstwa w prawie prywatnym międzynarodowym* (Wolters Kluwer Polska) 2015, p. 341–369.

[8] PAZDAN M. (ed), *Prawo prywatne międzynarodowe, Komentarz*, cit., p. 512.

mother's consent, the requirement of a consent of the statutory representative of the child or the child himself, the content of the declaration of acknowledgement and the grounds for annulment and revocation of the acknowledgement[9].

Recognition and enforcement of judgments

Recognition and enforcement of foreign judgments (and also other decision of a foreign authority) in parenthood matters is regulated by Articles 1145–1149[1] CCP or bilateral agreements on judicial cooperation (for example, 1961 Poland-Bulgaria bilateral agreement). Under Article 1145 CCP, foreign civil judgments – including on parenthood – can be recognized automatically by courts or other authorities in the course of other proceedings (for example, aimed at updating civil status records), unless there is a ground for refusal. No special court procedure is required in such case. Grounds for refusal of recognition are listed in Article 1146 § 1 CCP and include, among others, violation of public policy (*ordre public*).

CCP provides also for a preventive procedure, which allows any person with a legal interest to apply to the court that it determines in a separate proceeding that a given foreign judgment is or is not recognised (Article 1148 § 1 CCP). The decision on recognition or non-recognition will then bind other courts and authorities in all other proceedings.

Once recognized (automatically or by a court decision), the foreign judgment can be used to modify civil status records (for example, a birth certificate).

2) *Foreign birth certificates and their registration in national registries*

If the birth of a child occurs abroad and there is a foreign birth certificate, the competent authority being the Head of the Civil Status Registry (*Kierownik Urzędu Stanu Cywilnego*) do not actively determine parenthood. Civil Status Registrars rely on: foreign birth certificates or foreign judicial decisions (establishing or denying paternity) and they will only verify whether the foreign document can be transcribed into Polish Civil Status Registry.

[9] MOSTOWIK P. in POCZOBUT J. (ed), *Prawo prywatne międzynarodowe. Komentarz*, cit., p. 858-860.

Transcription (*transkrypcja*), understood as entering a foreign civil status act into the Polish Civil Status Registry (provided for in Article 104(2) of Law on civil status records[10] – LCSR) is not required in every case. According to Article 104(5) it, however, may be mandatory:

1) when a Polish citizen concerned by a foreign civil-status document has a civil-status record confirming previous events drawn up on the territory of the Republic of Poland and requests that civil-status registration be carried out;

2) when the person needs a Polish civil status act for legal use in Poland (e.g., for a passport, ID, or PESEL – Polish personal ID number).

Civil Status Registrars can modify Polish civil records based on a foreign court judgment, but a special recognition procedure is required unless the judgment is automatically recognized (by operation of law) under Art. 1145 § 1 CCP.

Upon such recognized judgement Civil Status Registrars can amend civil records accordingly (for example, update a birth record to reflect the father's named in a foreign court judgment).

In some complex or contested cases (when automatic recognition is refused or when there is a case of serious factual dispute – i.e. when someone contests the foreign judgment or disagrees with its effect in Poland), a court decision given by a Polish court within the preventive procedure mentioned above is required to modify the registry based on foreign documentation.

According to Article 1138 CCP a foreign official document (birth certificate, marriage certificate, foreign court judgment) is treated as equivalent to a Polish official document for evidentiary purposes in court proceedings – even without its transcription - unless the authenticity or accuracy of the document is successfully challenged.

[10] Ustawa z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego, Dz.U. 2023 poz. 1378.

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law).

Leo's birth is registered in your State.

Jürgen will initially be registered as Leo's legal father in the Polish birth certificate, even though the couple divorced because of the presumption of paternity as designed in Polish law.

According to Article 55(1) determination of parenthood is governed by the by the child's law of nationality as of the time of his or her birth, therefore Polish law, since Leo acquired the Polish nationality at birth. Leo's German nationality is irrelevant in this case.

Under Polish law, the presumption of paternity depends on the marital status of the mother. According to Article 62 § 1 of the Family and Guardianship Code - FGC[11]: "If a child is born during a marriage or within 300 days after the marriage is dissolved or annulled, the husband is presumed to be the father." However § 2 adds: "If the mother remarries within those 300 days, the presumption applies to the new husband." In this case the couple (Maria and Jürgen) is divorced one month before child's birth. Leo was born within 300 days of the divorce, therefore Jürgen will be presumed to be the father under Polish law.

If Maria would like to appear before the Civil Status Registrar with the man, she says is the father (for instance, Jan), in order to register him as Leo's legal father, Polish law will prevent her to do so if the legal presumption of paternity applies (and points to Jürgen). The presumption must first be rebutted through a judicial procedure in Poland.

In order to establish Jan as the legal father in Poland Maria has to take two steps:

1) rebut the presumption of paternity (*zaprzeczenie ojcostwa*) – it has to be done via a court procedure in Poland, typically initiated by: the

[11] Kodeks rodzinny i opiekuńczy z dnia 25 lutego 1964 r., Dz.U.2023, poz. 2809.

mother (Maria), or ex-husband (Jürgen), or the child (Leo, represented by a guardian), within 6 months from when the person becomes aware of the facts;

2) voluntary acknowledgment (*uznanie ojcostwa*) – once the presumption is successfully rebutted, Jan may acknowledge paternity before: a Civil Status Registrar, or a family court. If there is a disagreement or uncertainty, parenthood can be established by a court judgment (*sądowe ustalenie ojcostwa*).

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

Leo's birth may be registered in Poland via transcription of the German birth certificate into the Polish Civil Status Registry. This would be possible because Leo is a Polish citizen (due to Maria's Polish nationality, under *jus sanguinis* rule). The application for transcription can be submitted by Maria or Leo's legal representative to a Polish Civil Status Registry.

As a rule, a foreign birth certificate as the German one has the same evidentiary value as a birth certificate issued by Polish authorities (Article 1138 CCP).

The German birth certificate is recognized as a civil status record, but to be used in some official situations in Poland (e.g., for ID documents), it generally must be: transcribed into the Polish system, or used directly if an international (multilingual) form is issued under the Vienna Convention of 1976[12] (to which both Germany and Poland are parties to).

However, (theoretically) even without transcription, the German certificate has evidentiary value as proof of facts (birth, maternity) for legal or administrative proceedings.

---

[12] Convention (No.16) on the issue of multilingual extracts from civil-status records signed at Vienna on 8 September 1976, English text available at the ICCS website, https://ciec1.org/en/.

In the Polish legal system, the answer to the question whether Jürgen should be registered as the child's father is not that straightforward. First, the answer depends on whether the registrar has knowledge of the marriage between Maria and Jürgen.

If Maria applied previously for transcription of the marriage certificate to the Polish Civil Status Registrar (in order to obtain new Polish passport or ID, for example following a change of her family name after the marriage), then Jürgen will be listed in Polish civil records as her husband. In such case, as results from the discissions during the UNIPAR National Seminar in Poland, the practice of Civil Status Registrars might differ. Some Civil Status Registrars would apply the presumption of paternity (pointing to Jürgen) and would enter Jürgen as father in the transcribed birth certificate. Others would simply transcribe the German birth certificate as it was presented by Maria without entering Jürgen as the father. Some would inform Jürgen that he can file a claim to the court to rebut the presumption of paternity.

If there is no mention about the marriage between Maria and Jürgen in Polish Civil Status Registry, Jürgen cannot be automatically registered as Leo's father in Poland, because the German birth certificate does not name Jürgen as the father. Jürgen might be recognized as the father in Polish records, if:

1) he voluntarily acknowledges paternity in accordance with Polish law (*uznanie ojcostwa*) —before a Civil Status Registrar in Poland or Polish consul abroad;

2) paternity is established by a German or Polish court judgment, which can then be recognized in Poland under Article 1145 CCP.

If Maria would like to appear in front of the Civil Status Registry in Poland with the man she says is the father (for instance, Jan), in order to register him as Leo's legal father, she will be prevented to do so, because, under Polish law, a father cannot be registered at birth without: a legal presumption of paternity, or voluntary acknowledgment of paternity, or a court ruling.

In case there is no presumption (Maria was divorced and no father is listed in the German certificate), Maria cannot register Jan as Leo's father while applying for the transcription.

In order to establish Jan's paternity, Jan has to agree to acknowledge paternity (*uznanie ojcostwa*). In this case both Maria and Jan must appear together before a Polish Civil Status Registry, or a Polish consul abroad and made a declaration of acknowledgement. If acknowledgment isn't

possible or contested, paternity can be established via a court procedure (*sądowe ustalenie ojcostwa*). In such case Maria or Jan may file a suit in Poland and a final court ruling will establish Jan as the father, which can then be entered into Polish civil records.

If Jürgen was listed in Polish civil records as husband and the presumption of his fatherhood was applied, Jan and Maria would have to first rebut the presumption of paternity in a procedure before a court (*zaprzeczenie ojcostwa* – see case study no 1 above) to be able then to proceed with establishing Jan's paternity.

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

Tom's birth can be registered in Poland via transcription of the Dutch birth certificate. However, if both women are listed as mothers, Polish authorities may refuse to transcribe the birth certificate due to the lack of legal basis in Polish law for recognizing two mothers. The transcription might be denied, or transcription might be performed partially (recording only the biological mother – Valentina – as the mother), unless ordered otherwise by a Polish court.

The Dutch birth certificate is recognized as a public document, and has evidentiary value under Polish law for civil/legal proceedings (Article 1138 CCP). However, it does not automatically produce full legal effects in Poland if it conflicts with Polish public policy (*ordre public*) — which is the case with same-sex parentage[13].

Initially, Valentina and Jette could not have been considered Tom's legal mothers under current Polish law, since Polish family law recognizes only one mother and one father as legal parents, the concept of two legal mothers is not acknowledged, and same-sex parentage is not regulated. Therefore, only Valentina, as the biological and Polish mother, would have been recognized. Jette would not have been recognized as a legal parent in Poland – even though the Dutch birth certificate legally

[13] See MOSTOWIK P., *Resolving Administrative Cases Concerning Child Under the Foreign Custody of Same-Sex Persons Without Violating National Principles on Filiation as the Ratio Decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019*, in *Prawo w Działaniu*, v. 46, 2021, p. 192-195.

recognizes both women, Polish law could reject transcription or recognition of Jette's parenthood due to the *ordre public* exception.

This position was confirmed in several rulings of Polish administrative courts[14]. In many cases Civil Status Registrars and later administrative courts refused to transcribe foreign birth certificates that listed two mothers. The refusal was based on the provisions of Polish family law, which only a mother (female) and a father (male) as parents and public policy clause (*ordre public*). Consequently, the transcription of two same-sex parents would violate the basic principles of Polish law. However, even then some courts presented divergent views, for example one of the administrative courts decided that the transcription of a foreign birth certificate in which two mothers are entered as parents is admissible[15]. This view was later confirmed in the ruling issued by Supreme Administrative Court[16].

A slightly different attitude was shown in a resolution of the Supreme Administrative Court of Poland of December 2019[17]. The background to the case concerned a child whose foreign birth certificate indicated two women of Polish nationality as parents: a biological mother and her partner in a *de facto* union. The parents applied for a transcription of the foreign birth certificate in order to apply subsequently for the child to be issued with a passport. The Supreme Administrative Court stated that it was not possible to transcribe into the domestic civil status register a foreign birth certificate indicating two persons of the same sex as parents. At the same time, it underlined that a transcription of the birth certificate into the domestic civil status register should not be indispensable for the child to obtain a passport, as the child has, by operation of law, already acquired Polish nationality. The Court stated that: *"Refusal to transcribe a foreign birth certificate on the grounds of violation of Polish law does not constitute a violation of the constitutional and international obligation of public authorities to take into account the best interests of the child, as a foreign birth certificate, even without transcription, is the sole evidence of*

[14] See for example: Judgment of the Supreme Administrative Court of 17 December 2014, signature: II OSK 1298/13.

[15] Judgement of the Voivodship Administrative Court in Kraków of 10 May 2016, signature: III SA/Kr 1400/15.

[16] Judgment of the Supreme Administrative Court of 27 February 2023, signature: II OSK 388/20.

[17] Resolution of the Supreme Administrative Court of 2 December 2019, signature: II OPS 1/19.

the events stated therein, and the applicant's child may rely on such a certificate in administrative and court proceedings concerning his or her rights."

In the light of the above approach, currently – most probably – both Valentina and Jette should be considered Tom's legal mothers, as the lack of transcription does not question their parentage. Please note however that during the UNIPAR National Seminar a judge suggested that without any legislative change within Polish substantive family law, the court would not recognise a parent-child relationship resulting from a foreign birth certificate as suggested in the above commented resolution of the Supreme Administrative Court for the purpose of other civil law proceedings, for instance in succession or maintenance proceedings pending in Poland.

It is worth mentioning the preliminary question referred to the Court of Justice of the EU by Polish court in the *Rzecznik Praw Obywatelskich* case[18]. In this case, two woman, one of Polish, the other of Irish, nationality, decided to have a child by using an artificial reproductive techniques. As a result, a child was born in Spain and, as in *Pancharevo* case, the Spanish birth certificate records both women as parents. The parents wanted the Spanish birth certificate to be transcribed into the Polish civil status register, which is a prerequisite for applying for a Polish identity document. The administrative authorities refused, explaining that such transcription would be contrary to the public policy clause. In June 2022 the Court of Justice of the EU ruled this case by reasoned order referring to *Pancharevo* on numerous occasions[19].

[18] Order of The Court (Tenth Chamber) of 24 June 2022, C-2/21.

[19] See WYSOCKA-BAR A., *Same-Sex Parenthood in the Cross-Border Landscape in Pancharevo*, in *Yearbook of Private International Law*, vol. 23, 2021/2022, p. 323-338.

B) *Parenthood following an International surrogacy agreement (hereinafter ISA)*

1) *Attitude vis-à-vis surrogacy and relevant rules on (international) surrogacy in the national legal order*

In Poland surrogacy, including international surrogacy, is neither expressly regulated nor expressly prohibited. Hence, the attitude of the legal order towards surrogacy might only be deducted from the existing legislation (for instance, Article 61[9] FGC, which provides that the mother of the child is only the woman who gave birth to the child). So far, such attitude was articulated in the case law of administrative courts (see answer to question B.2. below).

In Poland there are no specific rules which were designed to apply to children born abroad following a surrogacy agreement. Hence, the general rules (of PILA, CCP, FGC, LCSR) as described in this report apply to children born abroad following a surrogacy agreement.

2) *Relevant problems considered by the case-law in your legal order*

Parenthood of children born following a surrogacy agreement is discussed in Poland in administrative law cases concerning applications for transcription of foreign birth certificates[20] and applications for the confirmation of the acquisition of Polish nationality by birth[21]. We are not aware of cases in which common courts would discuss parenthood of children born following a surrogacy agreement for the purpose of civil matters (for instance, for the purpose of maintenance or inheritance).

In certain cases, concerning transcription of foreign birth certificates, the courts tried to explain the attitude of the legal order towards surrogacy and problems related to it. For example, in the relatively recent judgement of the Supreme Administrative Court of 13 December 2023 (signature: II OSK 641/21), the court upheld a judgement of the first instance court and consequently the decisions of the administrative authorities of two instances (including a Civil Status Registrar) refusing

[20] See, for example: Judgement of the Supreme Administrative Court of 13 December 2023 r., signature: II OSK 641/21

[21] See, for example: Judgement of the Supreme Administrative Court of 16 February 2022 r., signature: II OSK 128/19

transcription of the birth certificate of a child born through surrogacy based on public policy clause. Here, it should be reminded that in accordance with Article 107(3) LCSR the transcription of a foreign birth certificate is refused if the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland (public policy clause).

In this case, as the judgment explains, the foreign birth certificate and accompanying documents filed with the Civil Status Registry together with the application for transcription revealed that "*A. G. is the legitimate father and sole parent of D. G.*" and that "*after the birth of the child M. H., the surrogate mother (surrogate), voluntarily relinquished all her rights over the child (the applicant) in terms of inheritance, legal custody and other parental rights or obligations*"[22]. The Court explained that the foreign birth certificate does not provide information about the mother. In the box provided for data concerning the other parent, it is written: "*information not recorded*".

Firstly, the court confirmed the attitude of administrative authorities and the administrative court of the first instance that such transcription would violate the principle of Polish family law provided for in Article 61^9 FGC which stipulates that the mother of the child is the woman who gave birth to the child "*and would also sanction a surrogacy agreement, which is not allowed under Polish law* (…)".

Then, the Court explained the nature of transcription by stating that the authority transcribing a foreign civil status certificate into Polish Civil Status Registry, pursuant to Article 107 LCSR is obliged to examine whether this certificate does not contain contents contrary to the Polish legal order or whether there are any concerns as to its accuracy. The Court underlined that "*the effect of transcription is the creation of a Polish civil status certificate which, in a way, becomes detached from the certificate on which it was based and its further fate in the Polish legal order is independent of the fate of the foreign certificate constituting the basis for transcription.*" The Court, by referring to legal literature[23], explained that the purpose of transcription is the use of a Polish civil status certificate before Polish public administration authorities without the need for a sworn translation each time.

---

[22] Parts of judgements cited in this report are translated into English by the authors of the report.

[23] See WOJEWODA M. in PAZDAN M. (ed), *System prawa prywatnego. Prawo prywatne międzynarodowe. Tom 20c*, Warszawa, 2015, p. 595.

In view of the Court, it stems from the above that "*the transcription of a birth certificate must be carried out on the basis of the provisions of Polish law, and in the case of a birth certificate, the transcribed certificate must contain exactly the same data as the Polish birth certificate and that the meaning of the terms used in the birth certificate should be consistent with their understanding under Polish law. It follows that the data contained in a Polish birth certificate (including surnames, forenames and surnames at birth, date and place of birth of parents - Article 60(4) of the Civil Code), regardless of whether prepared on the basis of the event itself or as a result of a transcription, must consider the content of the provisions of the Polish law.*"

Than the Court referred to the above-mentioned resolution of the Administrative Supreme Court of 2 December 2019, signature II OPS 1/19 and tried to find similarities with the case at hand. The Court noted that in the case resulting in the above-mentioned resolution the Administrative Supreme Court considered whether, in the case of a foreign birth certificate in which the data of same-sex (female) parents are given, it is possible to leave the box designed for the data of the "father" blank, providing only the data of the mother - the woman who gave birth to the child. In the resolution it was pointed out that Polish law does not provide for the possibility of leaving the "father" box blank. The Court noted that pursuant to Article 61(2) LCSR: *"If there has been no acknowledgment of paternity or judicial establishment of paternity, the birth certificate contains as the father's forename the name indicated by the person declaring the birth, and in the absence of such an indication, the birth certificate contain as the father's forename the name chosen by the head of register office; the surname of the mother at the time of the child's birth shall be entered as the father's surname and his maiden name, with an indication of the entry of the mother's surname and chosen forename as the father's data.*" Then, the Court pointed out that since it is not possible to draw up the birth certificate leaving the box designed for data of the "father" blank, *a minori ad maius* it is impossible to leave the box designed for the data of the "mother" blank, bearing in mind the *mater semper certa est* principle provided for in Article 61^9 FGC.

Further the Court elaborated on the motherhood under Polish law. It stated that Article 61^9 FGC unambiguously resolves the question of the origin of the child from a particular woman, regardless of whether the source of the genetic material was another woman's gamete, and thus regardless of whether there is a genetic relationship between the woman

and the child. The Court underlined that "*the legal event creating the maternity relationship is the birth of a child by a woman*". It explained that even in a situation where the child does not genetically originate from the woman who gave birth, the current regulation of the FCG does not provide any possibility to claim the establishment of maternity by a woman who is the donor of genetic material. As a result, in a situation where a child is born by a surrogate mother whose genetic material was not used in the process of insemination, in accordance with Polish law, this surrogate mother would be entered in the birth certificate as the child's mother.

The Court also elaborated on Article 18 of the Constitution of the Republic of Poland, which reads: "*Marriage as a union between a man and a woman, family, maternity and parenthood are under the protection and guardianship of the Republic of Poland*". The Court explained that the legal protection of parenthood presupposes the right of the parents to establish the ties of kinship with the child in accordance with the actual state of affairs. This right partly overlaps with the child's right to establish their biological origin.

At the same time the Court underlined that in the case at hand the paternity of the man entered as "father" in the foreign birth certificate is not called into question. Similarly, Polish citizenship of the child was confirmed by a decision of a competent administrative authority in Poland. As a result, in view of the Court, in the case at hand the case-law of the ECtHR in *Mennesson v. France* (application no 65192/11) and *Labassee v. France* (application no 65941/11) is not relevant.

The Court also reflected on the case law of the CJEU in *Pancharevo* case (C-490/20) and similar Polish case in *Rzecznik Praw Obywatelskich* (C-2/21)[24]. It explained that the Court of Justice of the EU in these cases basically confirmed the view presented in the resolution of the Administrative Supreme Court of 2 December 2019 (signature II OPS 1/19) that the authorities of a Member State are obliged to issue to a minor who is a national of that State an identity card or passport, regardless of whether that Member State transcribes the foreign birth certificate of that child to its civil status register.

Surrogacy appeared and was discussed also in cases concerning acquisition of nationality by birth. For example, in its judgement of 6 May 2015 (signature: II OSK 2372/13) the Supreme Administrative Court when

[24] See WYSOCKA-BAR, A., *Same-sex Parenthood in a Cross-Border Landscape in Pancharevo*, cit., p. 333-348.

confronted with a foreign birth certificate indicating two males as parents refused to confirm that a child is a Polish national on the grounds that one of the parents is a Polish national[25]. In this case the child was born in the US by a married surrogate mother. The Court underlined that Polish law does not know the institutions of „same-sex parents", „surrogate mother" and does not recognize "surrogacy agreements". Then, the Court reminded that pursuant to Article 14(1) of the Law on Polish nationality[26], a minor acquires Polish nationality by birth, if at least one of the parents is a Polish national. The Court stated that for the purpose of applying the above-mentioned provision, parenthood must be established in accordance with Polish substantive family law, which in Article 61^9 FGC provides that a mother is a woman who gave birth to the child and in Article 62 § 1 FGC provides for the presumption of paternity of this woman's husband. The presumption can be rebutted only in a court proceeding.

Later a shift in the attitude of the Supreme Administrative Court in cases concerning confirmation of the acquisition of Polish nationality could be observed. An example can be the Supreme Administrative Court's judgement of 30 October 2018 (signature: II OSK 1871/16), which also concerns the child (the applicant in the case), who was born by a surrogate mother in the US. Polish citizen was entered in the US birth certificate as the father. The Court stated that "*the moment of birth (birth) of the child is decisive for the acquisition of Polish nationality. The applicant derives Polish citizenship from the fact that her father is a Polish citizen, and thus she acquired Polish citizenship by operation of law.* (…) *The issue of the admissibility in Poland of surrogacy contracts is also irrelevant in this case, as it was not in Poland that this type of contract was concluded and it was not in Poland that the child conceived through it was born.*"

---

[25] The case was widely commented in Poland. See for example: PILICH M., *Mater semper certa est? Kilka uwag o skutkach zagranicznego macierzyństwa zastępczego z perspektywy stosowania klauzuli porządku publicznego* in *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 2018, pp. 7-35. The case reached also ECtHR, which did not find violation of of Article 8 (respect for private and family life) or Article 14 (discrimination on grounds of parents' sexual orientation) of the European Convention on Human Rights: ECHR, 16 November 2021, S.-H. v. Poland, App. nos. 56846/15 and 56849/15.

[26] Ustawa z dnia 2 kwietnia 2009 r. o obywatelstwie polskim, Dz.U.2023, poz. 1989.

Than the Court explained that it does not dispute that there is no such institution in Polish family law as an "agreement on surrogate motherhood" and that agreement is invalid in Poland, as the child is treated then as an object. At the same time the Court noted that "*the refusal to confirm Polish nationality after the father, affects the legal status of the child in the country of the father's nationality. The best interest of the child is an overriding value, and any decision by a competent authority or court should be made in accordance with this value (Article 3(1) of the Convention on the Rights of the Child). For the legal status of the child (…) it is irrelevant whether the child was born to a surrogate mother, but that a human being endowed with inherent and inalienable dignity is born who is entitled to citizenship if one of the parents is a Polish citizen.*" As opposed to the case commented earlier, the fact that a child has a parent who is a Polish citizen was derived from the foreign birth certificate. The Court stated that the "*descent from a Polish citizen was established under US law*".

In the Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother requested by the French Court of Cassation (Request no. P16-2018-001), the ECtHR considered a situation, where a child was conceived using the gametes of the intended father and a donor and where only the parent-child relationship with the intended father has been recognised in France (but not with the intended mother). In accordance with the Opinion, the child's right to respect for private life (Article 8 of the ECHR[27]) requires that domestic law provide a possibility of recognition of a parent-child relationship also with the intended mother, who is designated in the birth certificate legally established abroad as the legal mother. Such recognition does not have to take the form of registration in France of the details of the foreign birth certificate. The ECtHR provided that, another means, such as adoption of the child by the intended mother, may be used.

Assuming that the parent-child relationship with the intended father is recognized in Poland, in case of a married couple (only of opposite-sex), there indeed is a possibility of adopting a child by the other spouse provided that the parents (the intended father and the surrogate mother) give their consent to adoption in front of the court or only the father gives

[27] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No.005.

such consent in case where the surrogate mother was beforehand deprived of the parental responsibility (Article 119[1a] FGC).

It was pointed out in the legal literature that Article 119[1a] FGC might serve exactly as a tool of "*legalisation*" of the effects of surrogacy agreements[28]. Different examples of such cases were given. First, a surrogate mother and the intended father (who acknowledged his paternity towards a child, with whom he is indeed genetically related) indicate the wife of the intended father as an adoptive mother. Second, a surrogate mother and the intended father (who acknowledged his paternity towards a child, with whom he is not genetically related), indicate the wife of the intended father (who is indeed genetically related to the child) as an adoptive mother. Third, a surrogate mother and the intended father (who acknowledged his paternity towards a child, with whom he is genetically related), indicate the wife of the intended father (who is also genetically related to the child) as an adoptive mother[29].

In that respect, one might argue that Polish law is consistent with the Opinion, however it is not that a new law was enacted in order to implement the indications of the Opinion. It is rather a "side effect" of Article 119[1a] FGC.

As mentioned above, a birth certificate of a child born following a surrogacy agreement – if the fact of the surrogacy is revealed - would be refused transcription into Polish Civil Status Registry based on public policy clause (see: for example, the judgement of the Supreme Administrative Court of 13 December 2023, signature: II OSK 641/21 described above).

On the contrary, a birth certificate of a child born following a surrogacy agreement – if the fact of the surrogacy is not revealed neither in the birth certificate itself or the accompanying documents filed together with the application for transcription – could be transcribed into Polish Civil Status Registry in accordance with general rules on transcription of foreign civil status records, including foreign birth certificates. Please note that this scenario would be possible to materialize only in case of a birth certificate indicating opposite-sex parents.

Foreign adoption decisions might provide basis for recording in the Polish Civil Status Registry if they are recognized in Poland. Recognition

---

[28] BAGAN-KURLUTA K in FRAS M., HABAS M (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2021, p. 1293.

[29] BAGAN-KURLUTA K in FRAS M., HABAS M (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* , Warszawa, 2021, p. 1293.

might be subject to domestic rules of CCP (in such case the decision might be recognized by the Civil Status Registry itself), bilateral agreements (in such case the decision might be recognized by the Civil Status Registry itself or might require recognition in a court proceeding) and multilateral agreements (for example, 1993 Hague Convention[30])[31].

There are no specific rules concerning recognition of adoptions by the intentional parent. We have not identified any case, in which the adoption by the intentional parent would be discussed.

[30] Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

[31] See GNELA B. in PAZDAN M (ed), *System prawa prywatnego. Prawo prywatne międzynarodowe. Tom 20c* (Warszawa, 2015, p. 426; KASPRZYK P., *Przysposobienie zagraniczne i jego rejestracja*, in MOSTOWIK P., *Międzynarodowe prawo rodzinne. Filiacja. Piecza nad dzieckiem. Alimentacja*, Warszawa, 2023, p. 202-205.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.

Agnese gave birth to Maria and the foreign birth certificate from the third State recognizes Marco and Michela's legal parenthood of Maria.

Whilst Marco has a genetic link with Maria, Michela has not.

If the birth certificate or documents accompanying the application for the transcription of the foreign birth certificate do not reveal the fact that the child was born following a surrogacy agreement, a foreign birth certificate could be transcribed in accordance with the standard procedure of transcription of foreign civil status certificates, including foreign birth certificates.

If, on the contrary, the birth certificate and documents accompanying the application for the transcription do reveal the fact that the child was born following a surrogacy agreement, transcription of the birth certificate might face refusal due to public policy clause. During the UNIPAR National Seminar we were informed about the case where an opposite-sex couple applied for a transcription of two birth certificates. The birth certificates themselves did not reveal the fact of surrogacy. The doubts of the Civil Status Registrar as to possibility of transcription were induced by the fact that the second child was born fourth months after the first one. We do not know what the outcome of this particular case was.

In the case of opposite-sex parents the arguments, which might be used against transcription would become weaker than in the identified case-law (for example, when the data of the mother is missing or same-sex couple is mentioned as parents in the foreign birth certificate).

One might only suspect that in practice such birth certificates (where two opposite-sex intending parents are indicated, while the child was born by a surrogate mother) might indeed be transcribed into Polish Civil Status Registry, as within the case-law concerning refusal of the transcription of foreign birth certificates no case concerning opposite-sex couple was identified.

Please note that the refusal of the transcription of a foreign birth certificate does not necessarily amount to the challenge of the parenthood

resulting from the foreign birth certificate. For example, in the judgement of 10 September 2020 (signature II OSK 3362/17) concerning the confirmation of the acquisition of Polish nationality by birth, the Supreme Administrative Court stated that "*the refusal to transcribe a foreign birth certificate for the reason that it is contrary to the fundamental principles of the legal order of the Republic of Poland due to the indication in it that the child was born by an unknown surrogate mother (Article 107, point 3 of the Law on Civil Status Records) does not prevent the child from acquiring Polish citizenship as of the date of birth* (...) *if in the light of that certificate the father is a man who is a Polish citizen.*"

Additionally, as explained in the (above-mentioned) resolution of the Administrative Supreme Court of 2 December 2019 the refusal of a transcription based on public policy clause does not mean that public authorities can disregard the constitutional and international principle of the best interest of the child. As a result, in view of the Court, a foreign birth certificate (even without its transcription, which was refused based on public policy clause) constitutes exclusive evidence of the events stated in it. Consequently, the parents of the child and the child should be able to rely on such a certificate in all administrative and judicial proceedings concerning their rights.

Please note however that the lack of transcription, in practical terms, does condemn parents of the child and the child on prolonged administrative hurdles (for example, when it comes to issuance of identity documents in cases when the administrative authorities do not follow the views presented in the above-mentioned resolution)[32].

The above reasoning will apply also to the recognition of Michela's parenthood.

To summarize transcription of the foreign birth certificate might be refused based on public policy clause. However, as explained, in accordance with the existing case-law a foreign birth certificate constitutes in Poland exclusive evidence of the events stated in it. Consequently, the parents of the child and the child should be able to rely on such a certificate in all administrative and judicial proceedings concerning their rights.

[32] See the official intervention of the Polish Ombudsman to the Ministry of Internal Affairs and Ministry of Foreign Affairs available at the website of the Ombudsman at https://bip.brpo.gov.pl/pl/content/rpo-dzieci-ze-zwiazkow-osob-jednej-plci-bez-prawa-do-polskich-dokumentow (accessed 21 April 2025).

The above-mentioned considerations will also apply, with the exception of parts specifically related to opposite-sex parents, to the case in which two men are indicated as parents in the foreign birth certificate, or to the case in which only a father is indicated, while the mother is not.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.

Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.

Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

Under Polish law Michele has no right to be recognize as a parent. Neither surrogacy nor same-sex parenthood is regulated and consequently there is no procedure by which Michele (who is not a biological father, but a same-sex partner of the biological parent and party to the surrogacy agreement) could try to enforce his rights (for example, to have his parenthood established or to adopt Agnese).

As surrogacy is not regulated in Poland, there are no differences in the situation where the intentional parent asking for the recognition of parenthood is a man or is a woman. Either a man or a woman may successfully ask for the recognition of parenthood based on the fact of being an "intentional parent" in the surrogacy agreement.

As surrogacy is not regulated, there are also no rules (and therefore no requirements) for the establishment of parenthood in favour of the non-biological (intentional) parent of a surrogacy agreement.

Recognition of a foreign decision establishing parenthood

Clara (intending mother) and Peter (intending father), resident in Poland, entered into a commercial gestational surrogacy agreement (i.e. the intentional parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not a EU country), allowing such agreements.

Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.

Clara and Peter come back to Poland and require the recognition of the foreign judgment.

Please note that we are not aware of cases where recognition of a foreign decision establishing parenthood following a surrogacy agreement was sought. We have only identified cases in which transcription of foreign birth certificates of children born following a surrogacy agreement was sought. In practice – as we were informed during the UNIPAR National Seminar in Poland - it happens that the court does not recognize a foreign judgment itself but instead orders applicants to provide a birth certificate transcribed into Polish Civil Status Registry.

Theoretically, in a case as the one of Clara and Peter, parents could seek judicial recognition of a foreign decision. We assume that in such case, the following scenarios could be envisaged.

If the foreign judgement or documents accompanying the application for the recognition of the foreign judgment do not reveal the fact that the child was born following a surrogacy agreement, a foreign judgement could be recognised based on the standard procedure provided for in the CCP.

If, on the contrary, the foreign judgment or documents accompanying the application for the recognition of the foreign judgment do reveal the fact that the child was born following a surrogacy agreement, a foreign judgement might be refused recognition due to public policy clause if the common court adheres to the standpoint presented by administrative courts in cases concerning transcription or (some of) administrative courts in cases concerning confirmation of acquisition of nationality. We cannot exclude also the possibility that the common court would not find such recognition as violating public policy and would rather focus on the best interest of the child and would recognize the foreign decision.

Since there are no specific rules in Poland concerning recognition of adoptions by the intentional parent, there would be no different procedure in case of recognition of a foreign adoption decision. Existing rules would apply, meaning that foreign adoption decision may be recognized in Poland (based on domestic rules of CCP, rules provided for in bilateral agreements and rules provided for in multilateral agreements, for example, 1993 Hague Convention). Please note however that we have not identified such case (where the recognition of adoption by the intending parent would be discussed) in Poland.

SPAIN*

A) *Parenthood*

1) *Relevant private international law rules on parenthood*[1]

In the absence of uniform European rules on the subject or an international convention, questions relating to cross-border parenthood must be resolved under national private international law rules. In the case of Spain, these are:

International Jurisdiction

In matters of international jurisdiction, reference should be made to the rules set out in the Judicial Branch Act (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial) (JBA).

Art. 22 quater d) JBA states that, *"in the absence of the aforementioned criteria, Spanish Courts shall have jurisdiction (…):*

d) In matters of parent- child relationship and paternal relations, protection of minors and parental responsibility, when the child or minor is habitually resident in Spain at the time of lodging the claim or the claimant is Spanish, or is habitually resident in Spain or, in any case, at least six months before the claim is lodged"[2].

---

* By Ottavia Cazzola; Cristina González Beilfuss; Mónica Navarro-Michel; Beatriz Añoveros Terradas.

[1] Translations of the legal provision of the Judicial Branch Act, the Legal International Cooperation in Civil Matters Act and of the articles 9(4) and 9(9) of Spanish CC have been sourced from the Encyclopedia of Private international Law. Any other translations of legal texts quoted in this document have been translated by the submitter. *See* Spain National Statutes and Provisions in Basedow J. et al. (eds.), *Encyclopedia of Private International Law. Legal Instruments A-Z*, vol. IV, Cheltenham, 2017.

[2] Legal writing has criticized the poor drafting of the provision, which makes it difficult to understand, however, it is understood that the forum of the plaintiff's residence is limited by the requirement that this residence be at least 6 months before filing the lawsuit. *See* FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado,* 13ª edición, Madrid, 2024, p. 376.

They are all alternative fora, so any of them grant international jurisdiction to Spanish courts. Moreover, they apply regardless of whether the person whose parenthood is in question is of legal age[3].

The JBA also contemplates the general forum of the defendant's domicile (Art. 22 ter) which is concurrent with and alternative to the special forums of Art. 22 quater. The general forum attributes international jurisdiction to Spanish courts *"irrespective of the subject matter of the proceedings (contractual, non-contractual obligations, etc.), the type of claim (pure declaratory, constitutive or declaratory of condemnation) or the spatial location of the facts or rights in dispute (i.e. whether the dispute concerns facts or rights located within Spain or outside, including territories not subject to state sovereignty)"*[4] with the exceptions of exclusive jurisdiction rules[5].

On the other hand, if the lawsuit concerns the validity of the registration of parenthood in a Spanish public register, Spanish courts have exclusive jurisdiction (Art.22 c) JBA).

Regarding whether a competent authority hearing a case on a different matter could determine parenthood, actions for the determination of parenthood can be joined and brought together with other actions such as maintenance claims, access rights, inheritance claims, among others[6]. Nevertheless, parenthood actions will be the main actions since the others depend on the prior determination of parenthood.

Applicable Law

The conflict of law rule for parenthood is contained in the Spanish Civil Code (CC), more specifically in Article 9(4) I.

Unlike the rules of jurisdiction, Art. 9(4) of the Spanish CC establishes subsidiary connecting factors, that is, the next one applies only in the absence of the previous one. Therefore:

---

[3] CARRASCOSA GONZÁLEZ J., *La filiación en el Derecho internacional privado*, in CUENA CASAS M., YZQUIERDO TOLSADA M. (eds.), *Tratado de derecho de la familia: Las relaciones paterno-filiales (I)*, 2.ª ed., vol. 5, Navarra, 2017, p. 510.

[4] GARCIMARTÍN ALFÉREZ F.J., *Derecho internacional privado*, 7.ª ed., Navarra, 2023, 5.2 (online version).

[5] In matters of parenthood, the *prorrogatio fori* is not admissible since parenthood is not a matter subjected to the parties' discretion.

[6] GARCÍA VICENTE J.R., *Las acciones de filiación*, in CUENA CASAS M., YZQUIERDO TOLSADA M. (eds.), *Tratado de derecho de la familia: Las relaciones paterno-filiales (I)*, cit., p. 390

Article 9(4) Spanish Civil Code:

4. The determination and nature of a parent- child relationship shall be governed by the law of the child's habitual residence at the time of the establishment of the parent- child relationship. Absent the child's habitual residence, or if that law does not allow the establishment of the parent-child relationship, then the child's national law at that time shall be applied. If that law does not allow the establishment of the parent- child relationship or if the child lacks habitual residence and nationality, then Spanish substantive law shall be applied. Paragraph 5 shall be adhered to with regard to the establishment of a parent-child relationship by adoption.

Art. 9(4) I of the Spanish CC *"is a materially oriented conflict rule"*, that is *"the determination of the law applicable to the establishment of parenthood is made with regard to the material content of the applicable law and the material result to which the practical application of this content leads in the concrete case"*[7]. In other words, it pursues the achievement of a material and specific result, i.e. the determination of parenthood.

There are some doubts as regards the interpretation of the phrase "*at the moment of establishing the parent- child relationship*". The prevailing opinion in legal writing is that this 'moment' is the moment when the claim is filed and that it is then that the criteria for the applicable law must be considered[8]. It is, therefore, a variable rule, whose connection is examined at the moment when parenthood becomes relevant, such as the moment of filing the claim or of registration in the Civil Register.

The habitual residence of the child is a fact and, in today's increasingly globalized world, can be a much closer point of connection than nationality, even from the point of view of cultural identity[9]. Nevertheless, if this law does not allow the child's parenthood to be established or if the

---

[7] CARRASCOSA GONZÁLEZ J., *Ley aplicable a la filiación por naturaleza: de la ley nacional a la ley de la residencia habitual del hijo*, in *Revista Española de Derecho Internacional* , 2016, p. 171.

[8] *See* ADAM MUÑOZ M.D., *La nueva regulación de la filiación natural en el derecho internacional privado español*, in *Cuadernos de derecho transnacional*, 2016, p. 42; ÁLVAREZ GONZÁLEZ S., *La ley aplicable a la filiación por naturaleza*, in ÁLVAREZ GONZÁLEZ S. et al. (eds.), *Relaciones transfronterizas, globalización y derecho: Homenaje al Prof. Dr. José Carlos Fernández Rozas,* Navarra, 2020, p. 91.

[9] This, however, will depend on circumstances, with some individuals feeling more identified with their state of origin and others with their state of residence. *See* GONZÁLEZ BEILFUSS C., *Party Autonomy in International Family Law*, in *Recueil Des Cours/ Collected Courses of The Hague Academy of International law*, 408, 2020, p. 184.

child has no habitual residence, the Spanish CC appeals to the 'more classical' criterion, if you will, of the child's nationality.

The nationality criterion raises a few issues. The first of these issues concerns the attribution of nationality: if the child was born in a State that uses *ius soli* as the principle for attributing nationality, the child will have the nationality of that State regardless of whether the parenthood of the child has been established. However, if the child was born in a State that uses *ius sanguinis* as the principle for attributing nationality and the law of that State requires parenthood to be established before nationality can be granted, two possible scenarios may arise: he or she may have the nationality of one of the parents whose parenthood has already been determined, or he or she may have no nationality, as parenthood has not been determined in respect of either parent. The previous wording of Art. 9(4) of the Spanish CC established the personal law of the child as the first point of connection. While this version was in force, the Spanish Supreme Court, in its judgment of 22 March 2000[10], resorted to the anticipated application of Spanish law in a case involving a claim for the establishment of parenthood against a Spanish man. In that case, the child was of French nationality (the nationality of the mother), whose law did not allow parenthood to be established since the period of two years from the birth, which French law establishes for the exercise of the action under penalty of prescription, had already elapsed. The Supreme Court anticipated the application of Spanish law, which did allow the action to be brought, on the understanding that, if parenthood with respect to the Spanish man were established, the minor would have Spanish nationality. This interpretation was based on the *favor filii* principle and Spanish public policy. However, the former wording of Art. 9(4) of Spanish CC did not establish the relevant moment for determining the personal law of the child, which allowed for a more flexible interpretation. Now, with the current wording, it seems that the doctrine of anticipation of national law is less meaningful, since if there is no nationality or if the law of the nationality does not allow parenthood to be established, substantive Spanish law would anyhow apply[11].

In specific cases of dual nationality, Art. 9(9) of the Spanish CC establishes that *"for the purposes of the present chapter, the provisions of the*

[10] Supreme Court Judgment of 22 March 2000 (Rec.289/2000).

[11] RODRÍGUEZ PINEAU E., *Determinación de la filiación con elemento transfronterizo tras la reforma del Art. 9.4 CC. Comentario a la STS de 17 de abril 2018 (RJ 2018, 1902)*, in *Cuadernos Civitas de Jurisprudencia Civil*, 2019, p. 95.

international treaties shall apply to situations of dual nationality provided under Spanish law, and, in the absence of such provisions, the nationality of the last place of habitual residence and, in the absence thereof, the last nationality acquired shall be preferred. In any event, Spanish nationality shall prevail for persons who also hold another nationality that is not provided for in Spanish statutes or international treaties (…)". The wording of the article would mean that, if the minor has Spanish nationality, Spanish nationality must always prevail. However, one could argue that, based on the *favor filii* principle, the more advantageous law would prevail[12].

Finally, when the minor lacks nationality or, when they have one, and the national law prevents the establishment of parenthood, Spanish law refers to Spanish substantive law. However, it should be noted that Spain has more than one legal system and, therefore, certain Autonomous Communities (territorial units) have their own rules of law in respect of parenthood. To resolve intra-regional conflicts, the conflict of laws rule of Article 9(4) of Spanish CC also applies. Therefore, for example, if the minor has habitual residence in Catalunya, the referral made by Article 9(4) of the Spanish CC to the law of the minor's habitual residence is to Catalan law. However, the final clause that refers to substantive Spanish law leaves open the question of which substantive Spanish law applies. It could be argued that *"the Spanish law allowing the determination of parenthood, whatever that law may be, would apply"*[13].

As to the scope of the applicable law, Art. 9(4) I refers to : (i) *"the ways of establishing parenthood"* (whether by registration in a register, by document, judgment, matrimonial presumption, *possession 'détat*, etc.); (ii) *"parenthood legal actions"* (types, time limits, legal standing, etc.); (iii) *"the means of proof and attribution of parenthood"* (i.e. presumptions of paternity and grounds for destroying such presumptions, the rules of attribution of parenthood, etc)[14]. Matters which, initially, could appear to be of a procedural nature and, therefore, regulated by the *lex fori*, such

---

[12] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, cit., p. 480: *"An orientation based on the principle of favor filii would allow, in cases of dual nationality, to choose the law that is most favorable from a combined perspective of articles 9(4) and 9(9). In this way, the residual connection of article 9(4) (Spanish law) would be reserved for cases of absolute indeterminacy of habitual residence and nationality (statelessness)."*

[13] FONT I SEGURA A., *Conflictes interns de lleis*, in FONT I SEGURA A. et al. (eds.), *Lliçons de dret internacional privat*, Barcelona, 2023, p. 247.

[14] CARRASCOSA GONZÁLEZ J., *La filiación en el Derecho internacional privado*, in CUENA CASAS M., YZQUIERDO TOLSADA M. (eds.), *Tratado de derecho de la familia: Las relaciones paterno-filiales (I)*, cit., p. 562.

as the means of proof, standing or the time limits for the exercise of parenthood actions, fall under the scope of the applicable law according to Art. 9(4) of the Spanish CC due to the substantial effect they have on the merits of the case[15].

Recognition and enforcement of judgments

The recognition of judgments on parenthood in Spain can be done either through the courts or through the Civil Registry. Judicial recognition can be made by way of a specific procedure of recognition (*exequatur*) and by way of incidental recognition, the effects of which are limited (see *infra*). On the other hand, an incidental recognition may be made before the Registrar or the facts may be registered by virtue of a judicial resolution, once the latter has obtained the *exequatur.*

Therefore, if we go through the judicial proceedings, for cases in which the foreign decision derives from a State with which Spain does not have a bilateral agreement, the Legal International Cooperation in Civil Matters Act (Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil) (LICCMA) will be applied for the recognition of foreign judgments, as a general regime[16].

In accordance with Art. 41 and 42 of the LICCMA, only final foreign judgments[17] can be recognised and enforced. Moreover, interim and provisional measures may also be recognised and enforced, provided that (i) refusal to recognise them would violate effective judicial protection and (ii) the measure has been adopted after hearing the opposing party.

Furthermore, the LICCMA allows for the recognition of judgments that contemplate measures unknown to Spanish law[18]. Art. 44(4) LICCMA provides for the adaptation of the unknown measure to a known measure that *"has equivalent effects attached to it and which pursues similar aims and interests"*, limiting the effects of such a measure to those provided for in the law of the State of origin.

---

[15] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, cit., p. 480.

[16] This is the general regime which is, in turn, subsidiary, as it must be borne in mind that, in matters of adoption, certificates issued by a foreign registry and voluntary jurisdiction proceedings, there are special regulations.

[17] One against which no appeal is possible in the State of origin. Article 43 b) LICCMA.

[18] Explanatory Memorandum LICCMA.

Art. 44(2) LICCMA provides for the possibility of an incidental recognition of a foreign judgment, however, the effects of such recognition will be limited to that procedure[19].

That being said, the grounds for refusal of recognition are set out in Art. 46 LICCMA and constitute a closed list. The wording of the provision establishes that:

1. Foreign definitive judgments shall not be recognized:

(a) if they are contrary to public policy;

(b) where the judgment has been given with a manifest infringement of the rights of the defence of any party. Where the judgment was given in default of appearance, it is deemed that there is a manifest infringement of the rights of the defence if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

(c) where the foreign judgment had decided on a matter within the exclusive jurisdiction of Spanish courts or on any other matter if the jurisdiction of the court of origin is not the result of a reasonable connection. The existence of a reasonable connection with the dispute shall be presumed when the foreign court had relied for its international jurisdiction on grounds similar to those provided for under Spanish law;

(d) if the judgment is irreconcilable with a judgment given in Spain;

(e) if the judgment is irreconcilable with an earlier judgment given rendered in another state, provided that the earlier judgment fulfils the conditions necessary for its recognition in Spain.

(f) if proceedings between the same parties and having the same subject matter are pending in Spain and those proceedings were instituted first.

2. Foreign court settlements shall not be recognized if they are contrary to public policy.

Art. 48 LICCMA explicitly prohibits the review of the merits of the decision that is the object of the application for *exequatur* and establishes that even though the foreign court has applied a different law from that *"which would have been applicable according to the rules of Spanish private international law"* is not a cause for refusal of recognition. It also provides

[19] Article 44(2) LICCMA: *"2. When the recognition of a foreign judgment is raised as an incidental issue in judicial proceedings, the court shall decide on the recognition in each proceeding in accordance with procedural law. The effects of incidental recognition shall be limited to the main proceedings and shall not prevent a request for exequatur of the foreign judgment."*

for both partial recognition and partial enforcement (Art. 49 and 50(3) LICCMA) of judgments when they deal with different claims and not all of them can be recognised.

Having said the above, the recognition of foreign judgments by way of registration will be developed below (see *infra*). However, it is now relevant to mention the recognition of foreign decisions of voluntary jurisdiction[20].

Acts of voluntary jurisdiction are those where the authority (not always judicial) mainly records private declarations, acting more as a formality to give them legal effect than as an administrator of private rights[21]. That being said, a foreign final decisions of voluntary jurisdiction issued by a judicial body[22], is subject to recognition and enforcement in Spain by virtue of the analysed provisions of the LICCMA (Art. 41(2) LICCMA), however, as regards their registration on the Civil Registry, we must refer to the Law on Voluntary Jurisdiction (Ley 15/2015, de 2 de julio, de la Jurisdicción Voluntaria) (LVJ).

More specifically, Art. 11 LVJ establishes *"a double or alternative system for a registral recognition"*[23]. *"Foreign final decisions of voluntary jurisdiction issued by a judicial body may be registered in the Spanish Civil*

---

[20] According to Article 1 LVJ, *"for the purposes of this Law, voluntary jurisdiction proceedings are considered to be all those that require the intervention of a court for the protection of rights and interests in matters of civil and commercial law, without there being a controversy that must be substantiated in a contentious proceeding."* In other words, voluntary jurisdiction proceedings are non-contentious proceedings, contentious being understood as those where there are conflicting interests of the parties.

[21] *See* FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 13ª ed., Madrid, 2024, p. 179: "*those acts of voluntary jurisdiction in which the authority (not necessarily judicial) develops a mere receiving function of declarations of private will, acting more as a condition of formal effectiveness of the business than as an administrator of private rights (ad ex. approval of the recognition of parenthood, renunciation).*"

[22] This terminology has been interpreted by legal scholars as referring *"to decisions in which the intervention of the judicial authority has a constitutive or decision-making character (adoption, disability support measure, declaration of absence) and it is, therefore, this constitutive effect of the decision that is the object of recognition; these are acts in which the authority not only intervenes passively, as a mere spectator, authorising or authenticating officer, as a condition of the form of the act provided for by law, but also, in a broad sense, decides, interpreting and applying the law, assessing and sanctioning in one sense or another the constitution of the act and the rights deriving from it." See* FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 13ª ed., Madrid, 2024, p. 179.

[23] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 13ª ed., Madrid, 2024.

Registry": (i) if they have already been recognised by *exequatur* or incidentally[24] or (ii) when the Registrar of the corresponding Civil Registry deems it necessary and, provided that he verifies the concurrence of the requirements for this purpose[25]. This regime also *"extends to foreign decisions adopted by non-judicial authorities in the case of acts whose competence in Spain implies cognizance, under the voluntary jurisdiction regime, by judicial authorities".*[26]

The recognition of foreign acts and files of voluntary jurisdiction is automatic without the need for an *exequatur*[27]. Therefore, either the *"Spanish judicial body or the competent Public Registrar"* may recognise such acts, after having verified that none of the causes for refusal of recognition established in Art. 12(3) LVJ apply, which are:

(a) if the act was adopted by a foreign authority which manifestly lacks jurisdiction. The foreign authority shall be deemed to have jurisdiction if the case has a well-founded connection with the foreign State whose authorities have granted the act. In any case, the foreign authorities shall be considered to be manifestly lacking jurisdiction when the case involves a matter whose exclusive competence corresponds to the Spanish judicial bodies or authorities.

(b) if the act has been agreed in manifest breach of the rights of defence of any of the parties involved.

c) If the recognition of the act would produce effects manifestly contrary to Spanish public policy.

d) If the recognition of the act would imply the violation of a fundamental right or public freedom of our legal system.

Finally, with respect the recognition of a foreign judgment on parenthood, as explained above, the recognition of judicial decisions in Spain can be done either through judicial or registry proceedings. In the first case, it is possible to carry out recognition by *exequatur* and/or incidentally the effects of which will be limited to this procedure. On the

---

[24] If they have not been previously recognised, only preventive annotation is possible.

[25] Legal writing understands that a reference is being made to Article 46 LICCMA. *See* FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 13ª ed., Madrid, 2024, p. 179.

[26] Article 11(3) LVJ. FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 13ª ed., Madrid, 2024, p. 179.

[27] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 13ª ed., Madrid, 2024, p. 178.

other hand, through the registral proceeding, an incidental recognition can be made before the Registrar, or the facts may be registered by virtue of a judgment, once it has obtained the *exequatur*.

By judicial proceedings:

With respect to the incidental recognition of a judgment in a judicial proceeding we refer to what has already been mentioned above.

In order to recognise a foreign judgment in matters of parenthood in Spain, an *exequatur* procedure must be carried out in accordance with the provisions of the LICCMA.

The *exequatur* procedure is regulated in articles 51 to 55 LICCMA[28]. It is a contradictory proceeding, with the intervention of the Public Prosecutor's Office in all cases. It is initiated by means of a lawsuit[29], which is filed before the court of first instance of: (i) the domicile of *"the party against whom recognition or enforcement is is sought, or of the person to whom the effects of the foreign judgment refer."* (Art. 52 LICCMA) or, subsidiarily, (ii) those of the place *"of enforcement or by the place where the judgment is intended to produce its effects, and in the last instance the Court of First Instance before which the claim is lodged shall be competent"*.

Any person with a legitimate interest (Art. 54 LICCMA) may file the claim. The LICCMA provides that the assistance of a lawyer and a Court representative is mandatory.

The recognition may be refused for the reasons set forth in Art. 46(1) LICCMA (already explained above).

Art. 48 LICCMA explicitly prohibits the review of the merits of the decision that is the object of the application for *exequatur* and establishes that the fact that the foreign court has applied a different law to that *"which would have been applicable according to the rules of Spanish private international law"* is not a cause for refusal of recognition.

The procedure ends by means of an Court Order[30] and, once the judgment is recognised in Spain, it will produce *"the same effects as in the State of origin"* (Art.44(3) LICCMA), which means that, following the

[28] This is the general procedure, which is, in turn, subsidiary, since it must be taken into account that, in matters of adoption, certifications issued by a foreign Registry and records of Voluntary Jurisdiction are subject to special regulations.

[29] Accumulation of *exequatur* claim and request for enforcement, without proceeding to enforcement until the *exequatur* order has been issued. Article 54 LICCMA.

[30] Subject to appeal and, subsequently, to cassation or extraordinary appeal for breach of procedure. Article 55 LICCMA.

same solution that inspires the European texts, *"the scope of res judicata of a foreign judgment is set by the law of the State of origin, not by Spanish law"*[31].

Through the Civil Registry:

After a foreign decision concerning a Spanish citizen is recognised by means of *exequatur* the birth is recorded in the Civil Registry.

It is also possible to request an incidental recognition by the Registrar which would not have the effect of *res judicata* [32] and would not prevent the parties from requesting an *exequatur* at a later date or from filing an appeal before the Directorate General of Registries and Notaries (since 2020 renamed Directorate General for Legal Security and Public Trust). The Registrar must verify: *"(i) the regularity and formal authenticity of the documents presented; (ii) that the Court of origin had based its international jurisdiction on criteria equivalent to those contemplated in Spanish law; (iii) that all parties were duly notified and had sufficient time to prepare the proceedings; (iv) that the registration of the decision is not manifestly incompatible with Spanish public policy".*(Art. 96(2) 2º CRA). There is no control of the applicable law to the merits of the case[33].

2) *Foreign birth certificates and their registration in national registries*

According to the provisions of Art. 9 CRA, *"the Civil Registry will contain the inscribable facts and acts that affect Spaniards and those referring to foreigners, which took place in Spanish territory. Moreover, the facts and acts that have taken place outside Spain will be registered, when the corresponding inscriptions are required by the Spanish Law"* [34].

---

[31] GARCIMARTIN F., *Lecciones: reconocimiento y ejecución de sentencias extranjeras en España*, in *Almacén de Derecho*, 2015.

[32] GARAU JUANEDA L., *La Ley 20/2011, del Registro Civil, y sus efectos en el Derecho internacional privado español*, in *Revista Española de Derecho Internacional*, 2017, p. 25; HEREDIA CERVANTES I., *La Ley del Registro Civil de 2011 y la inscripción de las resoluciones judiciales extranjeras*, in FONT I MAS M. (ed.), *El Documento Público Extranjero en España y en la Unión Europea*, Bogotá, 2014, p. 308.

[33] GARAU JUANEDA L., *La Ley 20/2011, del Registro Civil, y sus efectos en el Derecho internacional privado español*, in *Revista Española de Derecho Internacional*, 2017, p. 26.

[34] An example of the latter is Article 29 of the International Adoption Act, which establishes that *"when the international adoption has taken place abroad and the adopters have their habitual residence in Spain, they must request the registration of the birth of the*

Furthermore, Art. 68 Civil Registry Regulation (CRR) establishes that births *"(...) shall be registered in the Municipal or Consular Registry of the place where they occur (...) and when a Consular Registry is competent, if the promoter is domiciled in Spain, the registration must first be made in the Central Registry, and then, by transfer, in the corresponding Consular Registry"*. That is to say, if there is evidence that one of the promoters is domiciled in Spain, the registration must be made in the Central Civil Registry (Madrid) and not in the Consular Civil Registry, even if the event to be registered (for example, the birth) has occurred abroad[35].

Now, in matters of parenthood, the following scenarios may occur in relation to the Civil Registry:

(1) Registration of foreign judicial rulings: Already explained above (see *supra*).

(2) Registration of foreign public documents of extrajudicial nature: In matters of parenthood, the most common situation is to find *certificates of entries issued in foreign Registries*, such as birth certificates, which, despite being a foreign public document[36], have their own regulation within the CRA. The transcription in the Spanish Civil Registry of the foreign certificate requires that the legality of the fact be verified under Spanish law[37]. As only those registry entries with constitutive effect may be subject to recognition, what is truly being recognised is the legal fact or act that has been registered in another State, rather than the registry certificate itself. Ultimately, the certificate is merely a foreign public document that serves as evidence of the registered act[38]. It functions as a means of proof, establishing both the occurrence of the fact and its legality under foreign law. However, since what is being recognised is the fact itself—not the certificate—the Civil Registry official must determine

child and of the adoption in accordance with the regulations contained in the Civil Registry Law so that the adoption is recognised in Spain."

[35] Article 10 of the CRA establishes that "*if the (events) take place abroad, registration shall be requested and, where appropriate, carried out at the Consular Office of the corresponding district. In the latter case, registration may also be requested and carried out at any of the General Offices."*

[36] GARAU JUANEDA L., *La Ley 20/2011, del Registro Civil, y sus efectos en el Derecho internacional privado español*, in *Revista Española de Derecho Internacional*, 2017, p. 28.

[37] OREJUDO PRIETO DE LOS MOZOS P., *Reconocimiento en España de la filiación creada en el extranjero a través de una maternidad de sustitución*, in NAVAS NAVARRO S. et al. (eds.), *Iguales y diferentes ante el derecho privado*, Valencia, 2012, p. 484.

[38] Article 81 Civil Registry Regulation.

whether that fact (for instance, the birth of a child) can be registered under national law[39].

As per Art. 98 CRL, the Registrar must verify: *"(i) that the certification has been issued by a competent foreign authority in accordance with the legislation of its State; (ii) that the foreign Registry of origin has, as for the facts to which it attests, analogous guarantees to those required for registration by Spanish law; (iii) that the fact or act contained in the foreign registration certification is valid under the legal framework designated by the Spanish rules of private international law; (iv) that the inscription of the foreign registration certification is not manifestly incompatible with Spanish public policy"*. The third requirement, *"that the fact or act contained in the foreign registration certification is valid under the legal framework designated by the Spanish rules of private international law"*, implies that the parenthood contained in the foreign birth certification must be valid under the law that would be applicable under the Spanish conflict of law rules, in other words, according to the aforementioned Art. 9(4) of the Spanish CC[40].

It is also interesting to note that if, for example, a foreign ruling establishes parenthood and is then registered in the foreign Civil Registry, what should be requested in Spain is the recognition of the ruling, not the foreign registry certification (Art. 98.2 CRA)[41].

Art. 85 CRR establishes that *"the lack of registration in the foreign registry does not prevent registration in the Spanish registry by means of a sufficient title"*. Therefore, a person of Spanish nationality could request

---

[39] OREJUDO PRIETO DE LOS MOZOS P., *Reconocimiento en España de la filiación creada en el extranjero*, cit., p. 484.

[40] CARRASCOSA GONZÁLEZ J., *Filiación natural*, in CALVO CARAVACA A.L. et al. (eds.), *Tratado de Derecho Internacional Privado. Tomo II*, Valencia, 2020, p. 1807 and p. 1865.

[41] Which they did not do in the case that led to the Supreme Court judgement of 6 February 2014. In this case, the intended parents asked the Registrar of the Spanish Consular Civil Registry in Los Angeles (U.S.) to register the birth of the children (resulting from a surrogacy agreement) by providing the U.S. Registrar's certificates, despite the existence of an American court ruling declaring the parenthood. The Spanish Supreme Court, while noting that it *"could be questioned whether the decision of the foreign authority to be recognised is that of the practice of the registry entry in which the parenthood of the minors is recorded or that of the previous sentence issued by the judicial authority that determined such parenthood based on the surrogacy agreements and by application of the laws of California,* recognises that *this issue has not been raised at any point in the litigation, and it is not essential to address it in order to decide the relevant issues that are the subject of the appeal, so that entering into considerations about it would completely change the terms in which the procedural debate has taken place and would only obscure the solution to the appeal."*

the registration of the birth and, therefore, parenthood of a minor, by means of the declaration of birth and not by providing certifications of entries made in foreign registries. That is to say, we would be in a situation where the access to the Spanish Civil Registry would not be made through a public document or foreign judicial ruling, but through a declaration[42]. E.g.: the father (of Spanish nationality) declares the birth of the child before the Consular Registrar of the place where the child was born.

The Consular Registrar must determine whether the fact or act is valid according to the applicable law under Spanish conflict of law rules, that is, whether this - fact or act – is in accordance with the law that would be applicable under the Spanish rules of Private International Law (Art. 99(1) CRA). This implies that the determination of parenthood will depend on the law designated by Art. 9(4) of the Spanish CC (see *supra*).

Moreover, the law applicable to the capacity and legitimacy of the declarant must also be considered. It will be determined by the national law of the declarant, as established in the conflict of law rule of Art. 9(1) of the Spanish CC[43].

The act or fact (in this case the declaration of birth) will have access to the Registry according to the forms, procedures and modalities established in the Spanish Civil Registry Act (Art. 99(2) CRA).

All documents submitted to the Registry must be drafted in official Spanish languages. If they are written in another language, they must be translated by the competent body or official, unless the Registrar *"is aware of the content of the document",* in which case, the translation may be dispensed with (Art. 95(1) CRA). Documents issued by a foreign official or authority must be legalized, except when the authenticity of it is known to the Registrar (Art. 95(2) CRA). The aforementioned notwithstanding, there are specific European provisions on this matter stated in the Regulation (EU) 2016/1191 on the requirements of public documents in the EU[44].

---

[42] The CRA makes a distinction between, on one hand, authentic documents for making entries (public documents and judicial rulings), which are regulated in Article 27 CRA, and, on the other hand, the declarations of the persons obliged to make entries, which are regulated in Article 29 CRA.

[43] *See* SÁNCHEZ JIMÉNEZ M.A., *Artículo 99*, in COBACHO GÓMEZ J.A., LECIÑENA IBARRA A. (eds.), *Comentarios a la Ley del Registro Civil*, Navarra, 2012, p. 1369.

[44] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements

The facts registered in the Civil Registry are presumed to be correct, since *"the Civil Registrars are obliged to ensure the concordance between the registered data and the extra-registral reality (...) it is presumed that the registered facts exist and the acts are valid and accurate as long as the corresponding entry is not rectified or cancelled* (Art. 16(1) and (2) CRA), and only *when the acts and facts registered in the Civil Register are judicially challenged, should the rectification of the corresponding entry be requested"*[45] (Art. 16(3) CRA). Moreover, Art. 82 CRR establishes that "*final judgments and resolutions are sufficient titles to register the fact that they constitute or declare",* but if they contradict facts already registered, they must order the rectification of what was previously inscribed to be registrable. That said, for a foreign judgment to be registrable, it must be previously recognised in Spain through the *exequatur* procedure (see *supra*) (Art. 83 I CRR). Once the *exequatur* of the foreign judgment has been obtained, is it possible to proceed to request the rectification of the inscription of the birth that appears in the Spanish Registry.

for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012.

[45] Judgment of the Provincial Court of La Rioja, of March 10, 2021. Rec. 173/2020 and Court Order of the Provincial Court of Barcelona, of February 11, 2020. Rec. 245/2019

CASES

Establishment of parenthood of a child born in the forum

A bi-national married couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, is habitually resident in Germany. One month before the child's (Leo) birth in your State, the couple divorces in Germany. Parenthood between the child Leo and Maria is established at birth by operation of law and Leo acquires the nationality of your State due to the legal relationship established with Maria or the birth in your State (as the case may be under nationality law).

Leo's birth is registered in your State.

As this case contains a foreign element, the Registrar, when determining parenthood for the purposes of registering the birth, will have to apply the law resulting from the conflict rules contained in Article 9(4) of the Spanish Civil Code.

Leo is born in Spain, and his habitual residence is therefore considered to be in Spain[46]. By virtue of Art. 9(4) of the Spanish CC, Spanish law would be applicable as it is the law of the habitual residence of the child at the time of registration of the parenthood in the Civil Registry.

Spanish law contemplates a series of presumptions regarding the mother's husband "*as a rule for the attribution of the parenthood of those born of a married mother*"[47]. Therefore, as established by the Spanish CC in its Art. 116, "*children born after the celebration of the marriage and before the three hundred days following its dissolution or the legal or de facto separation of the spouses* will be presumed to be *children of the husband.*" The moment from which the 300 days start to count is from the legal or *de facto* separation and not from the final divorce judgment[48], since, by itself, the lodging of the annulment, separation or divorce claim

[46] Since, for example, María moved to Spain after the divorce.

[47] VAQUERO PINTO M.J., *La filiación matrimonial*, in CUENA CASAS M., YZQUIERDO TOLSADA M. (eds.), *Tratado de derecho de la familia: Las relaciones paterno-filiales (I)*, cit., p. 135.

[48] "*As this would imply maintaining the presumption of matrimonial paternity in force during a period in which the spouses would normally no longer live together*". NANCLARES VALLE J., *Artículo 116*, in DE PABLO CONTRERAS P., VALPUESTA FERNÁNDEZ R.(eds.), *Código Civil comentado. I: Título preliminar, de las normas jurídicas, su aplicación y eficacia; Libro 1, de las personas; Libro 2, de los bienes, de la propiedad y de sus modificaciones (artículos 1 a 608)*, 1ª ed., Madrid, 2011, p. 620.

implies the disappearance of the presumption of marital cohabitation (Art. 102(1) of the Spanish CC).

In this case, whether Jürgen will be registered (or not) as Leo's father will depend on when the divorce application was filed[49]: if less than 300 days have passed between the filing of the divorce application and the birth of Leo, then Jürgen will be registered as Leo's father.

As stated above, Spanish law as the law of the child's habitual residence applies. If the birth has taken place "*before 300 days have elapsed since the legal or de facto separation of the spouses, it is obligatory to register the matrimonial parenthood, given the probative force (Art. 113 of the Spanish CC) of the presumption of paternity of the mother's husband (Art. 116 of the Spanish CC)"* [50].

Therefore, in principle, Jan could not be registered as Leo's father because the presumption of paternity of Jürgen would apply. Even though, the presumption of paternity is a rebuttable (*iuris tantum*) presumption (Art. 385 CPA), i.e. it can be rebuttted by providing, for example, proof of the *"legal or de facto separation of the spouses at least 300 days before the birth"* [51] and Art. 185 CRR establishes that the non-marital parenthood, when the declaration is made within the term[52], "*of the child of a married woman, as well as the recognition of the paternal parenthood of a parent other than the husband,* may be registered *if it is proven before the registration that the legal presumption of paternity of the latter does not apply"* in practice, it is very likely that the presumption of paternity will be difficult to challenge through the Civil Registry process. Consequently, the child will generally be registered as the child of the mother's husband, and it will be necessary to initiate judicial proceedings in order to overturn this presumption.

---

[49] Example of this RDGRN, 7 January 2009 (RJ 2010, 98661).

[50] RDGRN of 10 October 2018 (RJ 2019, 344068); RDGRN (54th) of 15 December 2023, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes.* Year LXXIX, January 2025, no. 2.283, 42.

[51] RDGRN (9th) of 19 September 2019, *Bulletin of the Ministry of the Presidency, Justice and Relations with the Courts.* Year LXXIV, September 2020, no. 2.233, 09.

[52] *"(...) And when the registration is requested after the deadline, if what emerges from the file is that the aforementioned presumption applies, but the child does not have the status of matrimonial parenthood, only the maternal parenthood may be registered, and the paternal parenthood corresponding to the husband must not appear, although the paternal parenthood with respect to another parent other than the husband may not appear as long as the legal presumption of Article 116 CC is not destroyed".* RDGRN (12th) of 23 September 2019, *Bulletin of the Ministry of the Presidency, Justice and Relations with the Courts.* Year LXXIV, September 2020, no. 2.233, 17.

If it is not possible to destroy the presumption of paternity of Jürgen and it is Jürgen who is registered as Leo's father, under Spanish law, Jan's paternity can be determined in court through the actions of determination and contestation of parenthood.

Establishment of parenthood of a child born abroad

A bi-national couple, the mother (Maria) being a national of your State and the father (Jürgen) being a national of Germany, are habitually resident in Germany. One month before the child's (Leo) birth in Germany, the couple divorces in Germany. The child's birth is registered in Germany and German authorities issue a birth certificate recording that Maria is the child's mother. Jürgen is not mentioned.

"In order for a birth occurring abroad to be registered in the Spanish Civil Register, it is necessary that it affects a Spanish citizen (cfr. Art. 15 CRA and 66 CRR)" [53]. As Maria (the mother) is of Spanish nationality, Leo's birth can be registered in the Spanish Civil Registry, through the procedure established in Art. 98 CRA (see *supra*).

Now, following the rule explained in the previous case, the Registrar will have to check that the parenthood to be registered is valid under the law that would be applicable according to Art. 9(4) of the Spanish CC, in this case, Leo's habitual residence is in Germany and therefore the applicable law will be German law.

In Spain, the foreign birth certificate has the status of a foreign public document[54]. Art. 27.1 CRA establishes that, like Spanish public documents, foreign public documents that meet the requirements established by law, will be sufficient title to register the event or act that enters the Civil Registry[55].

Births may be registered by transcription of the foreign certification "*provided that there is no doubt as to the reality of the registered fact and its legality under Spanish law (Art. 23, II, CRA) and provided that the foreign registration is regular and authentic, so that the entry certified, as re-*

[53] RDGRN (32nd) of 22 December 2023, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes.* Year LXXIX, January 2025, no. 2.283, 32.

[54] GARAU JUANEDA L., *La Ley 20/2011, del Registro Civil, y sus efectos en el Derecho internacional privado español*, in *Revista Española de Derecho Internacional*, 2017, p. 28.

[55] RUIZ SUTIL C., *Artículo 97*, in COBACHO GÓMEZ J.A., LECIÑENA IBARRA A. (eds.), *Comentarios a la Ley del Registro Civil*, Navarra, 2012, p. 1331.

gards the facts to which it attests, has guarantees analogous to those required for registration under Spanish law (Art. 85, I, CRR)"[56]. For their part, "*the Registrars of the Civil Registry shall verify ex officio the reality and legality of the facts and acts whose registration is sought, as shown by the documents that accredit and certify them, examining in all cases the legality and accuracy of the said documents*" (Art. 13 CRA).

Therefore, the German birth certificate will commonly be sufficient to register Leo's birth in the Spanish Civil Registry and can be recognised as long as it meets the requirements of Spanish law (see *supra*).

Jürgen is not mentioned in the German birth certificate. The Registrar will check the content of the document to determine that it is in accordance with German law, which is the law applicable to parenthood. This implies that Jürgen will only be registered if there is a paternity presumption under German law applying to the case.

Regarding the possibility for Maria to appear at the Civil Registry with Jan and register him as Leo's legal father, in this case we would no longer be dealing with a transcription of a foreign birth certificate but with a declaration in the Spanish Civil Register by Jan. Declarations of knowledge or will are regulated in Art. 99 CRA, which establishes that *"the facts and acts that affect the civil status of persons and whose access to the Civil Registry is by means of a declaration of knowledge or will, must comply with the corresponding applicable legal system, determined in accordance with the Spanish rules of private international law".*

Therefore, if the parenthood (the act to be registered) is in accordance with German law, which would be the applicable law according to Art. 9(4) of Spanish CC, Jan can be registered as Leo's father.

Co-motherhood

Valentina, a national of your State, and Jette, who is Dutch, are the legal mothers of a child (Tom) born in the Netherlands.

"In order for a birth occurring abroad to be registered in the Spanish Civil Registry, it is necessary that it affects a Spanish citizen (cfr. Art. 15

[56] RDGRN (32nd) of 22 December 2023, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes.* Year LXXIX, January 2025, no. 2.283, 32-33.

CRA and 66 CRR)"[57]. As Valentina (the mother) is of Spanish nationality, Tom's birth can be registered in the Spanish Civil Registry (see considerations made in point 3 *infra*).

In Spain, the foreign birth certificate has the status of a foreign public document[58]. Art. 27.1 CRA establishes that, like Spanish public documents, foreign public documents that meet the requirements established by law, will be sufficient title to register the event or act that enters the Civil Registry[59].

The Dutch birth certificate is sufficient to register the birth in the Spanish Civil Registry and can be recognised, as long as it complies with the requirements of Spanish law (see *supra*). Valentina and Jette will be considered as legal mothers for all purposes.

The law applicable to parenthood is Dutch law which we assume is the law of the habitual residence of the child, since the child was born in the Netherlands and there is no indication that habitual residence is in Spain. Public policy is not applicable since dual maternity was introduced by article 7(3) of the Assisted Human Reproduction Techniques Act (AHRTA)[60].

Art. 7(3) AHRTA establishes that "*when the woman is married, and not legally or de facto separated, to another woman, the latter may declare in accordance with the provisions of the Civil Registry Act that she consents to the determination of parenthood in her favour in respect of the child born to her spouse*". Following the entry into force, in 2023, of the Law for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people, Art. 120 of the Spanish Civil Code was modified, which regulates non-marital parenthood, and replaces the term "father" with "father or non-gestational parent", which *"implies the possibility, for female couples, and male couples when one of the members is a trans man with gestational capacity, of proceeding to non-marital parenthood by declaration of consent in the same terms as in the case of*

[57]RDGRN (32nd) of 22 December 2023, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes*. Year LXXIX, January 2025, no. 2.283, 32.

[58] GARAU JUANEDA L., *La Ley 20/2011, del Registro Civil, y sus efectos en el Derecho internacional privado español*, cit., p. 28.

[59] RUIZ SUTIL C., *Artículo 97*, in COBACHO GÓMEZ J.A., LECIÑENA IBARRA A. (eds.), *Comentarios a la Ley del Registro Civil*, Navarra, 2012, p. 1331.

[60] BARBER CÁRCAMO R., *Doble Maternidad Legal, Filiación y Relaciones Parentales*, in *Derecho Privado y Constitución*, 2014, p. 93.

heterosexual couples"[61]. This law also modifies Art. 44 CRA, to allow the registration of non-marital maternity of female couples.

Hence, after the 2023 reform, it would no longer be possible to refuse registration on the grounds that the two mothers were not married. On the other hand, it does not seem to be necessary to justify the use of assisted reproduction techniques in order to register the marital maternity of the non-pregnant woman. An example of this is the RDGRN (1st), of 7 February 2017[62] which accepts the registration of the marital maternity of the spouse of the biological mother, even if no evidence of the use of assisted reproduction techniques was provided, understanding that *"the intention of the legislator has been to facilitate the determination of the parenthood of children born within the framework of a marriage formed by two women, regardless of whether or not they have resorted to assisted reproduction techniques."*

[61] Explanatory Memorandum Law 4/2023, of 28 February, for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people.

[62] RDGRN (1st), 7 February 2017, *Bulletin of the Ministry of the Presidency, Justice and Relations with the Courts.* Year LXXII, February 2018, no. 2.205, 9-12.

B) *Parenthood following an International surrogacy agreement (hereinafter ISA)*[63]

1) *Attitude vis-à-vis surrogacy and relevant rules on (international) surrogacy in the national legal order*

Under Spanish law, the surrogacy agreement[64] is null and void and is, in itself, contrary to Spanish public policy[65]. Therefore, in principle, parenthood based on a surrogacy contract cannot be recognised in Spain. This, however, does not prevent the determination of the parent-child relationship by the legal means established in Spanish law if the best interest of the child so requires.

The contravention of Spanish public policy concerning surrogacy agreements is explicitly and clearly addressed in the recent judgment of the Spanish Supreme Court dated December 4, 2024. The Court affirms that:

"(...) what violates the dignity and free development of the personality of both the surrogate mother and the children born under the surrogacy agreement is the conclusion of the surrogacy contract itself, in which the woman and the child are treated as mere objects, as well as the claim that a contract, however "validated" by a foreign judgment, can determine a parent-child relationship. The pregnant mother is obliged from the outset to give up the child she is going to gestate and renounces before the birth, even before conception, any right derived from her maternity. The future child, who is deprived of the right to know its origins, is "objectified" because it is conceived as the object of the contract, which the pregnant woman (and, in this case, also her husband) undertakes to hand over to the commissioning parent or parents". (LB 3°)

[63] All in-line quotations have been translated by the submitter.

[64] Understood as "*whereby gestation is agreed, with or without price, at the expense of a woman who renounces maternal parenthood in favour of the contracting party or a third party*". Article 32 of the Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act.

[65] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024); Supreme Court Judgment of 31 March 2022 (Rec.277/2022); Supreme Court Judgment of 6 February 2014 (Rec. 835/2013).

Furthermore, the recent Law 1/2023, of 28 February, which amends the Sexual and Reproductive Health and Voluntary Termination of Pregnancy Act, establishes that surrogacy is a form of violence against women[66], along with sterilisation, forced contraception and forced abortion. Moreover, this Law reinforces the illegality of surrogacy by prohibiting advertising by intermediary agencies and modifying its Art. 10 quinques and establishing the obligation of public administrations to promote and encourage advertising *"campaigns that demystify all forms of violence in the reproductive sphere contained in the present law, such as surrogacy"*.

Finally, the Supreme Court has been forceful in its pronouncements on surrogacy and the sale of children. Thus, in its Judgment of 31 March 2022, it relies on the Report of the United Nations Special Rapporteur on the sale and sexual exploitation of children and states that *"as highlighted in the Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, UN General Assembly, 15 January 2018, the expression "for any purpose or in any form" used in the aforementioned Article. 35 of the Convention implies that surrogacy is not an exception to the prohibition on the sale of children in the Convention. And that commercial surrogacy falls squarely within the definition of "sale of children" in Article 2(a) of the Optional Protocol when all three elements required by that definition are present: a) "remuneration or other consideration"; b) the transfer of the child (from the woman who has gestated and delivered the child to the principals); and c) the exchange of "a)" for "b)" (payment for the delivery of the child). The delivery to which the surrogate mother is obliged does not necessarily have to be present (i.e. of a child already born), it can be future, as is the case in the surrogacy contract. It is seriously detrimental to the dignity and moral integrity of the child (and may also be detrimental to its physical integrity given the lack of control of the suitability of the commissioning parents) to consider it as the object of a contract, and it also violates its right to know its biological origin"*[67].

Spain indirectly prohibits surrogacy agreements. Art. 10 of the Assisted Human Reproduction Techniques Act (Ley 14/2006, de 26 de

[66] This classification of surrogacy as a form of reproductive violence against women has also been affirmed in the recent Supreme Court Judgement of 4 December 2024 (RJ 1626/2024) LB 3º.

[67] Supreme Court Judgment of 31 March 2022 (Rec.277/2022) LB 3º.

mayo, sobre técnicas de reproducción humana asistida) establishes the full nullity of surrogacy contracts, and as such:

1) Motherhood is determined by childbirth, that is to say, the mother will be the gestational mother, since in Spanish law the principle of *mater semper certa est* applies.

2) Fatherhood (of the biological father) will be determined by the possible paternity claim action. In other words, the determination of the biological paternal link will be made through the judicial route by virtue of the actions for claiming parenthood.

Article 10. Surrogacy (Assisted Human Reproduction Techniques Act):

1. A contract by which it is agreed that a woman who renounces maternal parenthood in favour of the contracting party or a third party shall be deemed null and void.

2. The parenthood of children born through surrogacy shall be determined by birth.

3. The possible claim of paternity against the biological father shall remain unaffected, in accordance with the general rules.

2) *Relevant problems considered by the case-law in your legal order*

The main issue facing the courts in these cases is whether, in the best interests of the child, parenthood (validly determined abroad) should be recognised despite the fact that surrogacy is contrary to Spanish public policy.

In addressing this problem, the Spanish Supreme Court has concluded that "*the protection of the interests of the minors cannot be based on the existence of a surrogacy contract and on the parenthood in favour of the intended parents provided for in* foreign *legislation, but must be based, if such data are true, on the severance of any link between the children and the woman who gestated and gave birth to them, the existence of a biological paternal parenthood and of a family unit in which the children are integrated*"[68]. It further adds that "*the determination of what in each case constitutes the interest of the child should not be made according to the*

[68] Supreme Court Judgment 06 February 2014 (Rec. 835/2013) and Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024).

interests and criteria of the commissioners of surrogacy, but taking into consideration the values assumed by society as its own, contained both in the legal rules and in the principles that inspire national legislation and international conventions on civil status and childhood (...) The interest of the minor is not a cause that allows the judge to attribute parenthood. It is the legislator who, in establishing the system for determining parenthood and the actions to contest and claim parenthood, must assess in the abstract the best interests of the child alongside the other interests present (freedom of procreation, the right to know one's origins, the certainty of relationships, the stability of the child)"[69]. Finally, it understands that *"a surrogacy contract such as the one validated by the judgment of the* foreign *court whose recognition is sought in this appeal entails exploitation of the woman and harm to the best interests of the child. Therefore, the recognition of the effects of that judgment, which entails the recognition of the effects of the surrogacy contract validated in that judgment, is contrary to public policy"*[70].

Furthermore, since 2014 the Supreme Court has been warning that *"the indiscriminate invocation of the "interests of the child" would thus serve to make a clean sweep of any violation of the other legal interests taken into consideration by the national and international legal system that may have occurred (...)"*[71] and *"it cannot be accepted that the only way to satisfy the best interests of children born through surrogacy is to recognise the bond of parenthood validly established abroad in favour of those who have used this practice to become parents, on the grounds that they are in a better position to provide the child with the care and protection necessary for its well-being than the surrogate (....)"* since "*the acceptance of such arguments should lead to admitting the determination of parenthood in favour of persons from developed countries, in a good economic situation, who have managed to have a child delivered to them from dysfunctional families or from problematic environments in impoverished areas, whatever the means by which they have achieved it, since the best interests of*

[69] Among others Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 5º.

[70] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024); LB 3º.

[71] Supreme Court Judgment of 06 February 2014 (Rec. 835/2013) LB 5º.

the child would justify its integration in a family in a good position and interested in them"[72].

It also accepts that always recognising parenthood based on surrogacy, by virtue of the best interests of the child, could result in more violations of the rights and interests of children and surrogate mothers. This is what the Supreme Court makes clear when it warns that "*the rights of surrogate mothers and of children in general (...) would be seriously harmed if the practice of commercial surrogacy were to be promoted by facilitating the activities of surrogacy agencies, in the event that they were able to ensure their potential clients the almost automatic recognition in Spain of the parenthood resulting from the surrogacy contract, despite the violation of the rights of the surrogate mothers and of the children themselves, who are treated as mere merchandise and without even checking the suitability of the principals to be recognised as holders of parental authority over the child born of this type of gestation*"[73].

In short, case law does not recognise parenthood derived from a surrogacy agreement based on the best interests of the child since such agreements are contrary to Spanish public policy (for the reasons mentioned above, see *supra*) and the best interests of the children are guaranteed by *"the provisions of the laws and conventions applicable in Spain, and by the case law that interprets and applies them, taking into consideration their current situation, establishing the relationship of parenthood through the determination of biological paternal parenthood, adoption, or allowing the integration of minors into a family nucleus through the figure of foster care"*[74]. Following the same argumentation, the Supreme Court responds to the question of whether there is a violation of Art. 8 of the ECHR when parenthood is not recognised: the Court understands that there is not, since the Spanish legal system provides for the possibility of determining parenthood through the legal means established for this purpose. This last point will be discussed below (see *infra*).

According to the Advisory Opinion No. P16-2018-001 recognition of a foreign decision or document may be refused on grounds of public policy if (i) there is the possibility, within the national legal system, of deter-

[72] Constitutional Court Judgment 28/2024, of 27 February 2024. Individual opinion by Judge María Luisa Balaguer Callejón. LB 3º; Supreme Court Judgment of 06 February 2014 (Rec. 835/2013) LB 5º.

[73] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 5º.

[74] Among others, Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 5º.

mining parenthood with the commissioning father when he is the biological father and (ii) there is the possibility, within the national legal system, of recognising a parent-child relationship between the commissioning mother and the child, for example, through adoption, and procedures are resolved in a timely manner.

Even before the Advisory Opinion No. P16-2018-001 was issued, the Spanish Supreme Court acknowledged, in its Judgment of 06 February 2014, that the decision not to recognise a parent-child relationship based on a surrogacy contract due to its contravention of Spanish public policy, could be harmful to the children whose parenthood was in dispute.[75] The best interests of the children were, however guaranteed because the Spanish legal system allowed for the determination of biological paternity and family integration: *"Art. 10 of the Law on Assisted Human Reproduction Techniques, in its third paragraph, allows the claim of paternity with respect to the biological father, so that if any of the appellants were the biological father, paternal parenthood could be determined with respect to him. Moreover, legal figures such as foster care or adoption allow the legal formalisation of the real integration of the minors in such a family unit"*[76].

In the Judgment of 31 March 2022, the Spanish Supreme Court expressly refers to Advisory Opinion P16-2018-001 and states that *"the route by which the determination of parenthood should be obtained is that of adoption. The Opinion of the European Court of Human Rights of 10 April 2019 accepts as one of the mechanisms to satisfy the best interests of the child in these cases "adoption by the commissioning mother [...] to the extent that the procedure established by national law ensures that they can be applied promptly and effectively, in accordance with the best interests of the child"*[77].

Finally, in the most recent judgment, dated 4 December 2024, it again stresses this point, even more explicitly, saying that *"the protection to be granted to these minors must be based on the provisions of the laws and conventions applicable in Spain, and the case law that interprets and applies them, taking into consideration their current situation, establishing the relationship of parenthood by determining biological paternal parenthood, adoption, or allowing the integration of the minors into a family nucleus through foster care. This solution satisfies the best interests of the child, assessed in concrete terms, as required by the aforementioned Opinion of*

[75] Supreme Court Judgment of 6 February 2014 (Rec. 835/2013) LB 5º.
[76] Supreme Court Judgment of 6 February 2014 (Rec. 835/2013) LB 5º.
[77] Supreme Court Judgment of 31 March 2022 (Rec. 277/2022) LB 4º.

the European Court of Human Rights, but at the same time attempts to safeguard the fundamental rights that the aforementioned court has also considered worthy of protection, such as the rights of expectant mothers and children in general (judgments of 24 January 2017, Grand Chamber, Paradiso and Campanelli case, paragraphs 197, 202 and 203, and of 18 May 2021, Valdís Fjölnisdóttir and Others v Iceland , paragraph 65) (...)"[78].

Regarding the matter of how foreign birth certificates of children born through surrogacy agreements are considered by the Civil Registrars in Spain, Art. 2(1) II CRA[79] establishes that *"the Civil Registrars must comply with the orders, instructions, resolutions and circulars of the Ministry of Justice and the Directorate General of Registers and Notaries"*. Moreover, the Explanatory Memorandum of the CRA states that *"the unity of action is guaranteed by the binding nature of the instructions, resolutions and circulars of the General Directorate of Registries and Notaries, as well as by the establishment of a system of appeals"*. This duty of compliance imposed by the aforementioned provisions is a consequence of the hierarchical structure of the Civil Registry, *"insofar as the civil service relationship, of a statutory and objective nature, subjects civil servants to a special dependency and hierarchical subjection"*[80].

Prior to the entry into force of the Instruction of 28 April 2025 of the Directorate General for Legal Security and Public Trust, on updating the registration system for the filiation of births through surrogacy, the regime for the registration of the parenthood of children born through surrogacy was established by two Instructions of the former Directorate General of Registries and Notaries that are relevant: The first was the Instruction of 5 October 2010[81] and the second was the Instruction of 18 February 2019[82] which updated it.

---

[78] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 5º; also, in Supreme Court Judgment of 31 March 2022 (Rec. 277/2022) LB 4º.

[79] Civil Registry Act.

[80] GUILLAMÓN ROCA J., *Artículo 2*, in *Comentarios a la Ley del Registro Civil*, ed. COBACHO GÓMEZ J.A., LECIÑENA IBARRA A. (eds.), *Comentarios a la Ley del Registro Civil*, Navarra, 2012, p. 92.

[81] Instruction of 5 October 2010, of the Directorate General of Registries and Notaries, on the registry system for the parenthood of children born through surrogacy (BOE-A-2010-15317).

[82] Instruction of 18 February 2019, of the Directorate General of Registries and Notaries, on updating the registry system for the parenthood of children born through surrogacy (BOE-A-2019-2367).

The Instruction of 5 October 2010, issued by the Directorate General of Registries and Notaries, allowed the registration of the birth of a minor born abroad as a result of surrogacy, provided that the application for registration was accompanied by a judicial decision[83] issued by the competent court in which the parenthood of the child was determined[84]. Prior to the registration of the birth, the decision had to be subject to an *exequatur* procedure in accordance with the rules established for it in Spanish law. Nevertheless, the Instruction of 5 October 2010 also provided for the possibility of such a decision being recognised incidentally by the Registrar of the Civil Registry *"in the event that the foreign court decision originated in a procedure analogous to a Spanish voluntary jurisdiction procedure"*[85].

In addition, the criteria for the incidental control carried out by the Registrar were those established by the Instruction of 5 October 2010 itself and not those established by the Civil Registry Act in its Art. 96(2) for incidental recognition before the Registrar (see *supra*). It could be deduced, comparing both precepts, that they were equivalent, however, the criteria established by the Instruction of 5 October 2010 did not contemplate the verification of the compliance of the judicial resolution with Spanish public policy, which is required by Art. 96(2) CRA[86]. Therefore, and ultimately, under the previous regime, if the Registrar considered

[83] *"The requirement of a judicial decision in the country of origin has the purpose of controlling the fulfilment of the requirements of perfection and content of the contract with respect to the legal framework of the country where it has been formalised, as well as the protection of the interests of the minor and of the gestational mother. In particular, it makes it possible to verify the full legal capacity and the capacity to act of the pregnant woman, the legal effectiveness of the consent given because she has not incurred in an error as to the consequences and scope of the same, nor has she been subjected to deception, violence or coercion or the possible foreseeability and/or subsequent respect for the right to revoke consent or any other requirements provided for in the legal regulations of the country of origin. It also makes it possible to verify that there is no simulation in the surrogacy contract that conceals the international trafficking of minors*". (Instruction of 5 October 2010).

[84] Instruction of 5 October 2010, of the Directorate General of Registries and Notaries, on the registry system for the parenthood of children born through surrogacy (BOE-A-2010-15317), p. 3.

[85] The distinction between acts of non-contentious jurisdiction and contentious proceedings also becomes relevant because only final foreign judgments in contentious proceedings must be subject to *exequatur* (Article 41 LICCMA), relegating acts of non-contentious jurisdiction to incidental recognition *"by the organ or authority before which the particular effects deriving from them are to be asserted."*(Supreme Court Order of 31 July 2003 (Rec. 815/2002)).

[86] Article 96(2) CRA: *"provided that it verifies (...) that the registration of the decision is not manifestly incompatible with Spanish public policy."*

that the foreign decision determining parenthood by virtue of a surrogacy agreement was a decision issued in the framework of a procedure analogous to a Spanish voluntary jurisdiction procedure, he could recognise it incidentally provided that it complied with the criteria established in the Instruction of 5 October 2010, which did not include public policy control. This is notwithstanding the Public Prosecutor being able to appeal against the decision taken by the Civil Registrar.

That said, the Instruction of 28 April 2025, which came into force on 1 May 2025, repeals the Instruction of 5 October 2010 and the Instruction of 18 February 2019 and completely changes the landscape by establishing that:

"Under no circumstances shall the Registrar of civil registries, including consular civil registries, accept as a valid document for the registration of the birth and parenthood of children born through surrogacy a foreign registry certificate, or a simple declaration accompanied by a medical certificate relating to the birth of the child, or a final judgment of the judicial authorities of the country concerned" [87].

This change in regime is due, as the Instruction of 28 April 2025 states, to the fact that *"the situation has changed since the publication of the ruling of the First Chamber (Plenary) of the Supreme Court 1626/2024, of 4 December, which ratifies the refusal to recognise the effects of a foreign ruling in a case of surrogacy"*[88]. In this ruling, the Spanish Supreme Court declared that the surrogacy agreement is in itself contrary to Spanish public policy and a foreign judgment that determines parenthood as a consequence of a surrogacy agreement cannot be recognised in Spain[89]. The fact that the surrogacy contract is contrary to Spanish public policy

[87] Second Guideline. Instruction of 28 April 2025, from the Directorate General for Legal Security and Public Trust, on updating the registration system for the filiation of births through surrogacy (BOE-A-2025-8647), p. 3.

[88] Instruction of 28 April 2025, from the Directorate-General for Legal Security and Public Trust, on updating the registration system for the filiation of births through surrogacy (BOE-A-2025-8647), p. 2.

[89] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 3º.

is an issue already established in the Supreme Court Judgments of 6 February 2014 and 31 March 2022[90], a fact acknowledged in the Instruction of 28 April 2025.

The new Instruction also states that, although the purpose of the Instruction of 5 October 2010 *"was fundamentally aimed at providing full legal protection for the best interests of minors, as well as protecting other competing interests in such cases of surrogacy"*, the Supreme Court, in the aforementioned ruling of 4 December 2024, declares that:

"The determination of what constitutes the best interests of the child in each case should not be made in accordance with the interests of the commissioning parents, but rather by taking into consideration the values assumed by society as its own, contained both in legal rules and in the principles that inspire national legislation and international conventions on civil status and childhood. (...) the protection of children cannot be achieved by uncritically accepting the consequences of the surrogacy contract signed by the appellants (...) The protection of the interests of children cannot be based on the existence of a surrogacy contract and on the parenthood in favour of the intended parents provided for by [foreign] *legislation, but must be based (...) on the severing of all ties between the children and the woman who carried and gave birth to them, the existence of a biological paternal filiation and a family unit in which the children are integrated. Therefore, the protection to be granted (...) must be based on the provisions of the laws and conventions applicable in Spain and the case law that interprets and applies them, taking into account their current situation, establishing the parent-child relationship by determining biological paternal filiation, adoption or allowing the integration of the children into a family unit through foster care. This solution satisfies the best interests of the child, assessed on a case-by-case basis, (...) but at the same time seeks to safeguard the fundamental rights (...) that would be seriously harmed if the practice of commercial surrogacy were to be promoted (…)"*[91].

Therefore, based on the Spanish Supreme Court's interpretation of how the best interests of the child should be protected, as well as the

[90] Supreme Court Judgment of 06 February 2014 (Rec. 835/2013); Supreme Court Judgment of 31 March 2022 (Rec.277/2022), and now also on the Supreme Court Judgment of 25 March 2025 (Rec. 496/2025).

[91] Instruction of 28 April 2025, from the Directorate-General for Legal Security and Public Trust, on updating the registration system for the filiation of births through surrogacy (BOE-A-2025-8647), p. 2.

Court's repeated rulings that surrogacy contracts are contrary to Spanish public policy and the consideration of surrogacy as a form of violence against women as established in Organic Law 2/2010 on sexual and reproductive health and voluntary termination of pregnancy and the European Parliament Resolution of 17 December 20 on the annual report on human rights and democracy in the world and the European Union's policy, the Directorate General, *"in accordance with the interpretation made by the Supreme Court and in order to ensure that the registration treatment in cases of surrogacy is in line with our legal system and international standards on the rights of minors and pregnant women"*[92], repeals the two previous Instructions and modifies the registration regime for the parenthood of births through surrogacy.

Additionally, in its Fourth Guideline, the Instruction of 28 April 2025 establishes that *"applicants may obtain from the local authorities, if applicable, the passport and corresponding permits for minors to travel to Spain and, once there, the determination of parenthood shall be carried out through the ordinary means provided for in Spanish law: biological filiation, where applicable, with respect to one of the intended parents, and subsequent adoptive filiation when the existence of a family unit with sufficient guarantees is proven"*. The Instruction of 18 February 2019, which updated the Instruction of 5 October 2010, already provided for a similar guideline[93] for cases where the birth could not be registered in the Consular Registers. However, it contemplated the possibility that once in Spain, *"the corresponding proceedings for the registration of filiation could be initiated, with the intervention of the Public Prosecutor's Office"* before the Registrar of the Civil Registry *"in order to ensure that all guarantees are met with the necessary evidentiary rigour"*. Under the new regime, this possibility no longer exists, and the determination of parenthood will be carried out through the ordinary means provided for this purpose under Spanish law.

Continuing now with the recognition in Spain of adoptions constituted abroad, these are carried out through their registration in the Civil

[92] Instruction of 28 April 2025, from the Directorate-General for Legal Security and Public Trust, on updating the registration system for the filiation of births through surrogacy (BOE-A-2025-8647), p. 2.

[93] Instruction of 18 February 2019, of the Directorate General of Registries and Notaries, on updating the registry system for the parenthood of children born through surrogacy (BOE-A-2019-2367), p. 1.

Registry as an "*act of voluntary jurisdiction that does not necessarily require exequatur*"[94]. This is established in Art. 29 of the Law on International Adoption (IAA): *"When the international adoption has been constituted abroad and the adopters have their habitual residence in Spain, they must request the registration of the birth of the minor and of the adoption in accordance with the rules contained in the Civil Registry Act in order for the adoption to be recognised in Spain"*. Therefore, the role of the Civil Registry is essential in cases of intercountry adoptions.

However, it must be taken into account that Spain is a Contracting State to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (HC 1993) and, therefore, a distinction must be made between adoptions that fall under the Convention's scope and adoptions that are constituted outside of the Convention's scope.

a) *Foreign adoptions constituted under the HC 1993*:

HC 1993 shall apply *"where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin"* (Art. 2(1) HC 1993).

The HC 1993 establishes a system of recognition by operation of law[95], without detriment to the public policy exception[96]. On the other hand, the certificate of conformity to the HC 1993 issued by the State of origin is required, which will include the conformity of the Spanish au-

[94] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 9.ª ed., cit., p. 490.

[95] Article 23(1) HC 1993: *"An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given"*.

[96] Article 24 HC 1993: *"The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child"*.

thorities (receiving State) with the procedure of the foreign adoption required by Art. 17 c) of the HC 1993[97] under penalty of non-application of the Convention itself (Art. 3 HC 1993)[98].

The role of the Registrar in cases of adoptions under the HC 1993 is to carry out an incidental control of the validity of the adoption. As stated in Art. 27 I IAA *"(....) the Registrar of the Civil Registry in which the registration of the adoption constituted abroad is instigated for its recognition in Spain, shall check, incidentally, the validity of the said adoption in Spain in accordance with the rules contained in the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, by means of the presentation of the certificate in accordance with the provisions of Article 23 thereof and that the cause for non-recognition provided for in Article 24 of the said Convention has not been incurred".*

As regards what could be considered contrary to Spanish public policy, see *infra.*

Finally, simple adoptions, i.e. adoptions that do not break the link with the family of origin, can also be constituted under the HC 1993, and these are covered by the system of recognition by operation of law stated in the Convention. The treatment in Spain of simple adoptions constituted by a foreign authority will be regulated by the specific regulations contemplated in Art. 30 IAA, since HC 1993 does not regulate issues regarding registration or nationality. Both points will be developed in more detail below.

b) *Foreign adoptions constituted outside the scope of application of the HC 1993*:

Adoptions constituted in a country that is not a Contracting State to the HC 1993 fall under the Intercountry Adoption Act (IAA).

As established in Art. 27 II of the IAA, *"in the cases of minors coming from non-signatory countries* (referring to the HC 1993), *the Registrar will carry out this incidental control verifying whether the adoption meets the conditions of recognition foreseen in Articles 5.1.e), 5.1.f) and 26."*

---

[97] Article 17 c) HC 1993: *"the Central Authorities of both States have agreed that the adoption may proceed".*

[98] *See* FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 9.ª ed., cit., p. 495.

Art. 26 of the IAAestablishes the requirements for the validity in Spain of adoptions arranged by foreign authorities which are the following:

1º. *That* (the adoption) *has been constituted by a competent foreign authority. The foreign authority shall be considered competent if the case has reasonable links with the foreign State whose authorities have constituted it. In any case, it shall be presumed that they are competent by reciprocal application of the rules of competence provided for in Article 14 of this Act.* That is, jurisdiction shall lie with the foreign public authority of the nationality or habitual residence of the adopter or the adoptee. This reasoning is based on the fact that, under Art. 14 IAA, the jurisdiction of the Spanish authority derives precisely from the fact that either the adopters or the adoptee are Spanish or have their habitual residence in Spain[99].

2º. That the adoption doesn't contravene Spanish public policy, understanding as contrary to public policy *"those adoptions in whose constitution the best interests of the child have not been respected, in particular when the necessary consents and hearings have been disregarded, or when it is established that they were not informed and free or were obtained by payment or compensation".*

On the other hand, when the adopter or adoptee is Spanish, recognition of the foreign adoption will only be possible in Spain if the legal institutions for adoption are substantially equivalent (Art. 26(2) IAA)[100]. This is especially important when we are dealing with the recognition of simple adoptions, since said article requires that the basic elements of adoption in Spanish law be present in the foreign adoption, namely: *"in particular, the Spanish authorities will control that the adoption constituted by a foreign authority produces the extinction of substantial legal ties between the adoptee and his previous family, that it gives rise to the same ties of parenthood as those of parenthood by nature and that it is irrevocable by the adopters".* Moreover, it is required that *"when the foreign law admits that the adoption constituted under its protection may be revoked by the adopter, it will be an indispensable requirement that the latter, before the transfer of the minor to Spain, renounces the exercise of the right to revoke*

[99] ÁLVAREZ GONZÁLEZ S., *Reconocimiento e inscripción en el registro civil de las adopciones internacionales*, in *Revista española de derecho internacional*, 2006, p. 687.

[100] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 9ª ed., cit., p. 491.

it. The renunciation must be formalised in a public document or by appearance before the Registrar of the Civil Registry".

That said, it is understood that, provided that neither the adoptee nor the adopter is of Spanish nationality and without detriment to the public policy exception of Art. 31 IAA[101], it is possible to recognise a simple adoption *"that is in accordance with the applicable law according to Article 9(4) of the CC, which will determine its conditions of validity and effects and the attribution of parental authority"*[102]. Simple adoptions, however, may not be registered in the Spanish Civil Register[103] as an adoption (only as a marginal annotation) and will have no evidentiary effect but only informative[104]. Moreover, *"simple adoptions do not entail the acquisition of Spanish nationality"* (Art. 30(3) IAA).

When the adopter is Spanish and resident in Spain, a declaration of suitability must be made, prior to the establishment of the adoption by the foreign authority, by the Spanish Public Entity, which will not be required in cases where it would not be required either if the adoption had been established in Spain (on this point see in more detail below *Please describe the requirements for the establishment of parenthood in favour of the non-biological (intentional) parent of a surrogacy agreement).*

Finally, as established in Art. 26(4) IAA "*if the adoptee was Spanish at the time of the constitution of the adoption before the competent foreign authority, the consent of the Public Entity corresponding to the last residence of the adoptee in Spain will be necessary*".

---

[101] Article 31 IAA: *"In no case shall the recognition of a foreign decision of simple or less than full adoption proceed if it produces effects manifestly contrary to Spanish public policy. For this purpose, the best interests of the child shall be taken into account".*

[102] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 13ª ed., cit., p. 386.

[103] It should be noted that the IAA provides for the possibility of converting a simple adoption into a full adoption provided that the requirements of Article 42 of the Law on Voluntary Jurisdiction and Article 30(4) IAA are met. Such conversion shall be governed by the law determined by virtue of the law of its constitution. *See* FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 9ª ed., cit., p. 494.

[104] SÁNCHEZ CANO M.J., *Hacia la recuperación de la adopción simple en el Derecho español*, in *Cuadernos de Derecho* Transnacional¸ 2018, p. 668.

CASES

Recognition and transcription of a foreign birth certificate establishing parenthood following a surrogacy

Marco (commissioning father) and Michela (commissioning mother) made a surrogacy agreement in a third State with Agnese.

Agnese gave birth to Maria and the foreign birth certificate from the third State recognises Marco and Michela's legal parenthood of Maria.

Whilst Marco has a genetic link with Maria, Michela has not.

No, Marco and Michela's parenthood cannot be recognised by virtue of the foreign birth certificate, as this certificate cannot be registered in the Spanish Civil Registry.

As established in the Instruction of 28 April 2025, *"under no circumstances shall the Registrar of civil registries, including consular civil registries, accept as a valid document for the registration of the birth and parenthood of children born through surrogacy a foreign registry certificate, or a simple declaration accompanied by a medical certificate relating to the birth of the child, or a final judgment of the judicial authorities of the country concerned"*[105].

Additionally, *"applications pending of registration of the parenthood of children born through surrogacy on the date of publication (1 May 2025) of this Instruction in the Official State Gazette"* will not be processed either[106].

Given the impossibility of registering the foreign birth certificate, parenthood shall be established by the ordinary means provided in Spanish law for the determination of biological paternity and adoption. The procedures to be followed will be those proper to these means of determination.

The Fourth Guideline of the Instruction of 28 April 2025 states that: *"(…) parenthood shall be determined through the ordinary means provided for in Spanish law: biological filiation, where applicable, with respect to one*

[105] Second Guideline. Instruction of 28 April 2025, from the Directorate General for Legal Security and Public Trust, on updating the registration system for the filiation of births through surrogacy (BOE-A-2025-8647), p. 3

[106] Third Guideline. Instruction of 28 April 2025, from the Directorate General for Legal Security and Public Trust, on updating the registration system for the filiation of births through surrogacy (BOE-A-2025-8647), p. 3

of the intended parents, and subsequent adoptive parenthood when the existence of a family unit with sufficient guarantees is proven".

To summarize, the Directorate General, *"in accordance with the interpretation made by the Supreme Court and to ensure that the registration process in cases of surrogacy complies with our legal system and international standards on the rights of children and pregnant women",* establishes, in its Second Guideline, a prohibition on the registration of the birth and filiation of children born through surrogacy.

Under the previous registration regime, a foreign birth certificate that did not include the mother's name was not considered a valid document for registering the birth and parenthood of the child. This was established in the second guideline of the Instruction of 5 October 2010, which stated that:

"Second. -In no case shall a foreign registration certificate or a simple declaration, accompanied by a medical certificate relating to the birth of the child, in which the identity of the pregnant mother is not stated, be accepted as a suitable certificate for the registration of the birth and parenthood of the child".

Therefore, without a foreign judicial decision determining parenthood, the foreign birth certificate where two men were stated as parents and, therefore, where the pregnant mother was not mentioned, could not be registered in the Spanish Civil Registry as it was not an apt title[107].

It is worth mentioning that by virtue of this second guideline, which established the obligation for the identity of the pregnant mother to be stated in the foreign registry or medical certificates, registrations were also refused in cases where a foreign birth certificate is provided which stated a maternal parenthood that did not coincide with the information stated in the medical birth certificate[108].

---

[107] See as an example the RDGRN (88th) of 22 December 2023, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes.* Year LXXIX, January 2025, no. 2.283, p. 36.

[108] *See* RDGRN (3rd) of 19 June 2020, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes.* Year LXXV, July 2021, no. 2.242, 46; RDGRN (4th) of 23 September 2023, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes.* Year LXXVIII, July 2024, no. 2.277, 20; RDGRN (32nd) of 25 August 2021, *Boletín del Ministerio de la Presidencia, Justicia y Relaciones con las Cortes.* Year LXXVI, April 2022, no. 2.250, p. 42.

That said, this problem seems to have been overcome with the new registration regime established by the Instruction of 28 April 2025, since, in principle, it seems to follow from it that whether or not two men are listed on the foreign registration certificate or whether or not the surrogate mother is listed, if the parenthood derives from a surrogacy agreement, it cannot be registered in the Civil Registry on that basis alone.

Adoption by the non-biological intentional parent

Giovanni is the biological father of Maria, who is born in Canada following a surrogacy agreement with Agnese.

Michele is the intentional father of Maria and wants to adopt her. Agnese agrees to the adoption, whilst Giovanni does not anymore.

Giovanni admits that he and Michele had a common parental project of having babies through a surrogacy agreement with Agnese, but he refuses to give his consent to adoption since, after Maria's birth, Michele has never had any affective relationship with her and abandoned both, his partner and the child.

Regarding the existence in the Spanish legal system of Michele's right to be recognise as a parent, as mentioned above and following the line of the Spanish Supreme Court, the intended parents, who are not the biological parents, must resort to the figure of adoption to establish the bond of parenthood with the child. This solution is also supported by the Spanish Constitutional Court[109].

Under Spanish law parenthood does not derive exclusively from the biological fact, since *"alongside the biological fact there are other links, such as those derived from adoption (...) From these other possible links determining parenthood it also follows that parenthood can be legally determined with respect to two persons of the same sex. This recognises that not only biological factors, but also other factors of a social and cultural nature have a bearing on the legal determination of parenthood"*[110].

There is, however, neither a right to adopt nor a right to be a parent in the Spanish legal system. This is established by the Constitutional Court when it states that *"no constitutional precept recognises a fundamental right to adopt and as this court has underlined, following the jurisprudence of the European Court of Human Rights, adoption is 'giving a family*

[109] Constitutional Court Judgment 28/2024 of 27 February 2024.

[110] Supreme Court Judgment of 06 February 2014 (Rec. 835/2013) LB 3º.

to a child, and not a child to a family'"[111]. The Supreme Court also emphasises the non-existence of a right to be a parent, alleging not only that no such right exists in the Spanish legal system, but recalling that Art. 8 of the ECHR does not guarantee a right to found a family or the right to adopt as the right to respect for family life does not protect the simple desire to found a family. There is also the Report of the Spanish Bioethics Committee of 2017 (cited by the Supreme Court), which states that *"the desire of a person to have a child, however noble it may be, cannot be realised at the expense of the rights of other people"*[112].

In short, Michele does not have a right, *per se*, to be recognised as a parent. However, it must be borne in mind that, if viewed from the child's perspective, where there is a *de facto* family life between the child and the intended father (which does not appear to be the case here), the best interests of the child and the right to respect for private and family life enshrined in Art. 8 ECHR, require that *"if the child has de facto family relations with the person seeking recognition of the paternal or maternal-filial relationship in his or her favour, the solution to be sought both by the applicant and by the public authorities involved should be based on this fact and allow the development and protection of these links, in accordance with the case law of this Court and of the European Court of Human Rights, which has recognised the existence of a de facto family life even in the absence of biological ties or a legally recognised bond, provided that certain personal emotional ties exist and have a relevant duration"*[113].

If the intended father is not the biological father, the treatment will be the same as that of the intended mother, i.e., they will have to resort to the figure of adoption to have the parental relationship recognised. In the context of adoption, no distinction is made according to whether the adopter is a man or a woman.

However, the difference lies when the intended father is also the biological father. Art. 10(2) and (3) AHRTA[114] establishes that the maternity

---

[111] Constitutional Court Judgment 28/2024, of 27 February 2024. LB 5º; Constitutional Court Judgment 198/2012, of 6 November 2012. LB 12º.

[112] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 3º.

[113] Supreme Court Judgment of 31 March 2022 (Rec.277/2022) LB 4º.

[114] It will apply when Spanish law is applicable. The conflict rule contained in 9(4) of the Spanish CC establishes that *"the determination and character of parenthood by nature shall be governed by the law of the habitual residence of the child at the time of the establishment of parenthood"*. In cases of international surrogacy, the child will almost always, if not always, have his or her habitual residence in Spain by the time the recognition of the parent-child relationship is requested.

of the children born by surrogacy shall be determined by birth, and that actions to claim paternity with respect to the biological father are still possible. Therefore, if the intended father is the biological father, the father-child relationship will be determined through the exercise of a paternity claim before the courts.

Regarding the mother-child relationship, as the principle of *mater semper certa est* applies, this will be determined by the birth, that is, regardless of whether or not the intended mother has provided her genetic material, as she is not the one who gives birth, she must resort to the figure of adoption to establish parenthood regarding the child, following the line of Advisory Opinion No. P16-2018-001[115], as explained above.

Given the fact that the biological parents must resort to the adoption of the child, the requirements[116] to establish parenthood will be the same as for this figure.

Art. 175 of the Spanish CC establishes, with regard to the adopter, that he/she must be:

a) Over twenty-five years of age. If there are two adopters, it shall be sufficient for one of them to have reached that age.

b) In any case, the difference in age between the adopter and the adoptee shall be at least sixteen years and may not exceed forty-five years[117], except in the cases provided for in Article 176(2). If the prospective adopters are in a position to adopt siblings or minors with special needs, the maximum age difference may be greater.

Moreover, the adopter must have full capacity to grant the necessary consent required by Art. 177(1) of the Spanish CC for the constitution of

[115] It is worth mentioning that, in this Advisory Opinion, the ECtHR emphasises and considers it important to highlight that when the child has been conceived using the intended mother's eggs *"the need to provide for a possibility of recognition of the legal relationship between the child and the intended mother applies with greater force in such a case."* par. 47, p. 11.

[116] This question will be answered under Spanish common civil law, however, please note that there may be further requirements depending on the Autonomous Community concerned.

[117] Reference must be made to the Supreme Court Judgment 31/03/2022 where the Court stated that *"The issue of the age difference between the child and the commissioning mother does not appear to constitute an excessive obstacle, bearing in mind that the maximum age difference of 45 years between adopter and adoptee requirement established under the regulations governing adoption is not of an absolute nature (Article 176.2.3º in relation to Article 237 of the Civil Code), all the more so given that the facts established by the Provincial Court revealed the child's integration into the family unit and the care he has received for several years".* (Supreme Court Judgment of 31 March 2022 (Rec.277/2022) LB 4º)

the adoption and must not incur in any prohibition. Specifically, a descendant, a relative in the second degree of the collateral line by blood or affinity or a ward may not be adopted by his or her guardian until the justified general account of the guardianship has been definitively approved (Art. 175(3) of the Spanish CC)[118].

On the other hand, adoption proceedings may not be initiated without the prior proposal[119] of the Spanish Public Entity in favour of the adoptive parent. In turn, the said Public Entity may not make the proposal without the prior declaration of suitability of the adopter for the exercise of parental responsibility (Art. 176(1) of the Spanish CC). As established in Art. 176(3) of the Spanish CC, *"suitability is understood as the capacity, aptitude and adequate motivation to exercise parental responsibility, taking into account the needs of the minors to be adopted, and to assume the peculiarities, consequences and responsibilities that adoption entails"*[120].

However, it should be mentioned, as it is especially relevant in situations of surrogacy, that this proposal of suitability by the Public Entity will not be necessary when the adoptee is *"the child of the spouse or of the person united to the adopter by an analogous relationship of affectivity to the conjugal one"* (Art. 176(2) 2nd). This does not mean that the suitability of the adopter will not be considered in these cases, but that such consideration will be made exclusively by the judge taking into account, in addition, the best interests of the adoptee (of the child)[121].

---

[118] PÉREZ ÁLVAREZ M.A., *Artículo 175*, in DE PABLO CONTRERAS P., VALPUESTA FERNÁNDEZ R.(eds.), *Código Civil comentado. I: Título preliminar, de las normas jurídicas, su aplicación y eficacia; Libro 1, de las personas; Libro 2, de los bienes, de la propiedad y de sus modificaciones (artículos 1 a 608)*, 1ª ed., Madrid, 2011, p. 903.

[119] *See* Article 35 Law 15/2015, of 2 July, on Voluntary Jurisdiction (LVJ).

[120] *"The declaration of suitability by the Public Entity shall require a psychosocial assessment of the personal, familial, relational and social situation of the adoptive parents, as well as their capacity to establish stable and secure ties, their educational skills and their aptitude to care for a minor according to their unique circumstances. Said declaration of suitability shall be formalised by means of the corresponding decision. Those who are deprived of parental authority or whose exercise of parental authority has been suspended, or those who have entrusted the care of their child to the Public Entity, may not be declared suitable for adoption".* (Article 176(3) II and III of the Spanish CC).

[121] *"Adoption shall be constituted by judicial decision, which shall always take into account the interests of the adoptee and the suitability of the adopter or adopters for the exercise of parental authority".* (Article 176(1) of the Spanish CC).

The consent of the biological father and of the surrogate mother is necessary to establish the parenthood of the intended parent insofar as such parenthood is established through adoption.

Art. 177(2) of the Spanish CC establishes that: *They shall assent*[122] *to the adoption:*

1. The spouse or person united to the adopter by an analogous relationship of affectivity to the spousal relationship, unless there is a legal separation or divorce or a break-up of the couple that is reliably recorded, except in cases in which the adoption is to be formalised jointly.

2. The parents of the adoptee who is not emancipated, unless they are deprived of parental authority by a final judgement or have legal grounds for such deprivation. This situation may only be assessed in the contradictory judicial procedure which shall be processed in accordance with the Law on Civil Procedure.

In cases of surrogacy, the biological parent is normally the spouse/partner of the other intended parent and therefore he must assent to the adoption as the biological parent and as the spouse of the adopter.

Moreover, it is worth noting that the consent of the surrogate mother *"cannot be given until six weeks have elapsed since the birth, and consent given by the mother before* this time *has elapsed will be null and void"*[123][124]. This requirement responds, in the words of the Spanish Supreme Court, to the "*need to guarantee the full concurrence of the essential faculties of freedom and conscience in the biological mother, to calibrate and carefully*

---

[122] Article 177(2) of the Spanish CC: "*Assent shall not be necessary when those who should give it are unable* (death, absence or incapacity) *to do so, an impossibility which shall be assessed with reasons in the judicial decision constituting the adoption. Nor will the consent of the parents whose parental authority has been suspended be necessary when two years have elapsed since the notification of the declaration of abandonment, in the terms provided for in Article 172.2, without opposition to it or when, if filed within the time limit, it has been rejected."*

[123] PÉREZ ÁLVAREZ M.A., *Artículo 177*, in DE PABLO CONTRERAS P., VALPUESTA FERNÁNDEZ R.(eds.), *Código Civil comentado. I: Título preliminar, de las normas jurídicas, su aplicación y eficacia; Libro 1, de las personas; Libro 2, de los bienes, de la propiedad y de sus modificaciones (artículos 1 a 608)*, 1ª ed., Madrid, 2011, p. 914.

[124] *"The effect of the contravention of a mandatory rule is none other than nullity as of right (Art. 6.3 CC). The nature of the defect is such that it extends to the entire content of the document, conceived with a view to obtaining expeditiously (and, of course, contra legem) the authorisation to adopt, especially when the identity of the reason for considering the prior consent invalid subsists, in accordance with Art. 173 with regard to fostering".* (Supreme Court Judgment of 21 September 1999 (Rec. 2854/1994) LB 4º).

and serenely consider the abdication of the exercise of her maternity with the transfer of the child for adoption"[125].

Finally, the consents (and the assents) must be granted freely, in writing and in the required legal form, having previously informed of the consequences thereof (Art. 177(4) of the Spanish CC) before the judge or public entity; or in a public document (Art. 37(1) II LVJ).

Recognition of a foreign decision establishing parenthood

Clara (intending mother) and Peter (intending father), resident in Spain entered into a commercial gestational surrogacy agreement (i.e. the intentional parents provide their gametes and both have genetic links with the child) with Natasha who lives in the State X (which is not an EU country), allowing such agreements.

Under the law of the State X, parenthood is established by virtue of a court order and the birth certificate is amended accordingly.

Clara and Peter come back to Spain and require the recognition of the foreign judgment.

In the absence of European regulations on the matter and of an international convention, the procedure to be followed for the recognition of the foreign judicial decision is the *exequatur,* regulated in arts. 41 to 55 of the Legal International Cooperation in Civil Matters Act and explained above (see *supra* part A).

Art.46 LICCMA establishes the grounds for refusal of recognition of the foreign decision, among them the violation of Spanish public policy.

On 4 December 2024, the Supreme Court issued a ruling declaring the surrogacy agreement itself to be contrary to Spanish public policy. This judgment is particularly relevant as it is the first time that the Spanish Supreme Court has ruled on the possibility of recognising a foreign judgment that determines parenthood resulting from surrogacy[126] and it does so, moreover, without any dissenting opinions.

The Court declares, therefore, the impossibility of recognising the foreign judgment[127] as the recognition of the effects of the judgment would

[125] Supreme Court Judgment of 21 September 1999 (Rec. 2854/1994) LB 4º.

[126] It had previously ruled on the possibility of the registration in the Civil Registry of a foreign registration certificate (Supreme Court Judgment 06/02/2014) and on the determination of the parenthood of the mother of intention by possession of state (*possession d'état*) (Supreme Court Judgment 31/03/2022).

[127] Judgment of the 73rd Judicial District Court of Bexar County, Texas (U.S.).

imply the recognition of the effects of the surrogacy agreement validated by said judgment and this - the contract - is contrary to Spanish public policy[128].

"A surrogacy contract such as that validated by the judgment of the Texas court whose recognition is sought in this action entails exploitation of the woman and harm to the best interests of the child. Therefore, recognition of the effects of that judgment, which entails recognition of the effects of the surrogacy contract validated in that judgment, is contrary to public policy"[129].

The compatibility between the protection of the best interests of the child and this decision, according to the Court, is to be found, on the one hand, in the possibility of determining parenthood by the legal means established in Spanish law, such as the judicial claim for determination of parenthood by the biological father and adoption; and, on the other hand, in the possibility of integrating the children into a household through foster care. This argumentation is understood to respect and follow the line of the ECHR Advisory Opinion No. P16-2018-001[130].

The recognition of adoptions made abroad in Spain is carried out through the registration of the adoption in the Civil Registry as an "*act of voluntary jurisdiction that does not necessarily require exequatur*"[131] (see *supra).*

[128] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 3º.

[129] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 3º.

[130] Supreme Court Judgment of 04 December 2024 (Rec. 1626/2024) LB 5º.

[131] FERNÁNDEZ ROZAS J.C., SÁNCHEZ L.S., *Derecho Internacional Privado*, 9ª ed., cit., p. 490.

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

The present Conclusions and Recommendations represent the final output of the research undertaken under the EU co-funded project UniPAR – *Towards Universal Parenthood in Europe* (JUST-JCOO-AG-2023-101137859). In the light of an overall examination of the current legislation, case law and practices on the private international law issues concerning parenthood in the European judicial space, the present document aims at rationalizing the main issues on which further reflection and possible intervention by the lawmaker should be considered. This, also in light of the practical problems addressing current practice by professionals in the EU Member States.

The Conclusions and Recommendations are rationalized in six Sections addressing respectively issues of jurisdiction, applicable law, adoption, recognition of decisions and of birth certificates, cooperation and with a final part on the possible advantages of adopting common rules.

Particular reference is made to the Commission's Proposal for for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(20220) 695 final), in the light of its potential in enhancing, *inter alia*, legal certainty and predictability about the rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations and on the recognition of parenthood. At the same time, private international law issues surrounding parenthood are addressed globally, also considering the relationships occurring with third Countries.

The present Conclusions and Recommendations are thus designed to be addressed not only to lawmakers at national and EU level, bot also to lawyers, judges, notaries, staff at central authorities, civil servants, as well as authorities in the field of children's rights, child welfare organizations or authorities, academics, mediators, NGOs, interest groups and professional associations.

RECOMMENDATIONS ON PRIVATE INTERNATIONAL LAW RULES ON PARENTHOOD

JURISDICTION

The rules on jurisdiction in parenthood matters determine the courts of which state are competent when judicial intervention is needed, for instance, in order to establish or contest parenthood in cross-border situations, setting the framework for all subsequent questions of applicable law and recognition. These rules should be distinguished from the ones which regulate the system of civil status, including birth registration.

Jurisdition under Current National Rules

Currently, jurisdiction in parenthood matters is regulated in EU Member States both in their domestic statutes and bilateral agreements.

General jurisdictional rules apply and provide for the jurisdiction of the courts of a given state on the basis of domicile or habitual res-idence of the defendant (*actor sequitur forum rei* principle). Other general rules, like the one on forum necessitatis, come into play as well. Additionally, special jurisdictional rules apply. They provide for alternative grounds of jurisdiction, so that each of them might grant jurisdiction to the courts of a given Member State in addition to the grounds listed in general provisions. Different combinations of jurisdictional grounds are used, but some common denominators can be identified. Jurisdictional grounds are of personal nature, as they refer to the child or a parent, parents or parties to the proceedings and their nationality, domicile, habitual residence or residence. If a time factor is clearly stated, it is the time when the proceeding was initiated.

Domestic laws differ as to jurisdiction for the purpose of establishing parenthood being an incidental question in proceedings on other matters.

The above multitude of rules is supplemented with such rules included in bilateral agreements in place in different Member States.

Jurisdition under the Parenthood Proposal

Adoption of common jurisdictional rules in parenthood matters on the basis of Article 81(3) TFEU would limit the number of different private international law regimes applicable in EU Member States. Adoption of these rules within enhanced cooperation mechanism leaves the space for jurisdictional rules resulting from the network of bilateral agreements in place in different EU Member States. These abundance of legal sources hinders predictability and stability of the legal status.

Recommendations

1. It is advisable that the potential future instrument on parenthood provides for exclusivity of its jurisdictional rules, and therefore no residual jurisdiction derived from domestic rules exists. Such an approach was already adopted in other, modern EU private international law instruments (for instance, Maintenance Regulation).

2. Shaping grounds of jurisdiction regires a carful consideration taking into account an adequate degree of proximity between the forum and a child. Mechanisms aimed at addressing challenges linked with migration, like subsidiary jurisdiction based on the presence of a child and forum necessitatis needs to be included.

3. Exclusion of party autonomy would be justified by the nature of parenthood as a legal institution, which affects the civil status and fundamental rights of a child.

4. A clear rule on incidental question inspired by its counterpart included in Brussels II ter Regulation is welcomed. Similarily, procedural mechnisms (for instance, lis pendens rule) can also be modelled after other EU PIL instruments.

APPLICABLE LAW

1. *Clarification regarding the subject matter of the connecting factors for the applicable law - whether limited to "parenthood" or covering "the establishment, contestation, extinction, or termination of parenthood."*

Article 17 of the Proposal determines the law applicable to the establishment of parenthood. However, this does not mean that other matters relating to parenthood are not covered by said applicable law. Article 4(3) defines the establishment of parenthood as "*the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously*". The contesting is also referred to in Article 18, letter „a". Recital 33 expressly states that where relevant, the Regulation should also apply to the extinction or termination of parenthood. All these confirm that the establishment of parenthood encompasses a broad range of matters beyond the initial connection between the child and his or her parent. For the sake of clarity and legal certainty, it is recommended that, when determining the applicable law, reference be made either exclusively to "parenthood" (as in Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.7.2012, pp. 107–134) as regards the notion of succession) or alternatively to "the establishment, contestation, extinction, or termination of parenthood" (as employed in Regulation (EU) 2019/1111 (Brussels II ter) on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)(OJ L 178, 2.7.2019, pp. 1–115) in relation to the concept of parental responsibility).

2. *Introduction of specific rules on post-birth establishment or contestation of parenthood*

Article 17(1) of the Parenthood Proposal establishes that the law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth. While this provision serves as a practical rule for the determination of the applicable law in cross-border parenthood cases, it presents certain challenges. Specifically, this rule is not applicable in situations where a significant period of time has elapsed between the birth of the child and the moment when parenthood needs to be established or contested.

Furthermore, the alternative connecting factor - the law of the state of birth of the child - is only applicable in the event that the habitual residence of the person giving birth cannot be determined. This leaves unresolved situations, such as cases where parenthood is contested years after birth and the habitual residence of the person giving birth is known.

It is suggested that the text be refined to include provisions addressing cases where parenthood is contested or established post-birth. A dedicated conflict-of-laws rule based on the child's habitual residence at that moment should be introduced to cover such scenarios.

3. *Ex officio application of the exception introduced by Article 17(2), ensuring legal recognition of both parents and broadening the scope of the exception.*

Article 17(2) of the Parenthood Proposal provides an exception where, if the applicable law under paragraph 1 results in the establishment of parenthood with respect to only one parent, the law of the state of nationality of either parent or the law of the state of birth of the child may apply to establish parenthood for the second parent. This exception is triggered only when the applicable law results in the establishment of parenthood for only one parent. Parenthood established under any designated applicable law must be recognized across all Member States (Recital 52). This provision is a consequence of the Court of Justice ruling in the Pancharevo case. It may also apply in cases of surrogacy, where parenthood is established with respect to only one parent. It provides legal certainty and predictability for parents. To achieve this result, it is advisable that its application be *ex officio*, rather than at the discretion of the relevant authority or court.

4. *Including a provision that allows application of the exeptions if it is "more favorable for the child," extending beyond cases that simply enable parenthood for both parents*

National legal systems, such as the Bulgarian Private International Law (Article 83(1) CPIL), offer broader provisions, permitting the application of an exception to the main rule if it is "more favorable for the child". Bulgarian case law ultimately accepts that "more favorable" refers to the establishment of parenthood for both parents (Decision No. 513 of 17.02.2020 by the Sofia Court of Appeal). However, real-life situations

may arise in which another law could prove "more favourable" for determining parenthood in different circumstances, i.e. not only when it leads to the possibility to establish parenthood from the second parent. Therefore, the exception in Article 17(2) may be extended to allow for the application of a more favorable law not only in a limited situation where parenthood is established for both parents. This approach is also reflected in Belgium's PIL, which includes an escape clause allowing the application of another law if it is more closely connected to the case. Similarly, Croatian Private International Law (Article 41) permits the application of a law other than that of the habitual residence of the child if it serves the best interests of the child. Italian law (Article 33 of Law 218/1995) similarly allows the application of a more favorable law if it benefits the child.

5. *Clarification and expansion of the scope of the applicable law, including reference to the conditions for establishing parenthood rather than procedural aspects, as well as covering substantive parenthood matters alongside adoption-related issues.*

Article 18 of the draft Regulation specifies that the scope of the applicable law encompasses in a non-exhaustive way (a) the procedures for the establishment or contestation of parenthood; (b) the binding legal consequences and/or evidentiary effects of authentic instruments; (c) the procedural standing of individuals in proceedings related to the establishment or contestation of parenthood; and (d) time limits for the establishment or contestation of parenthood.

Evidently, certain aspects mentioned in Article 18 are procedural under national laws, while others are substantive. It is necessary to clarify whether the determination of the applicable law extends to procedural matters such as the burden of proof. For instance, Article 20(2) of the draft Regulation mentions that an act intended to have legal effect on the establishment of parenthood may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in paragraph 1 under which that act is formally valid, provided that such mode of proof can be administered by the forum, but it is not clear whether the mode of proof is included under the "procedures" under Article 18, letter "a" of the Proposal. Additionally, the assessment of evidence in establishing parenthood is mentioned in Article 20(2) but lacks sufficient clarification. National laws, such as Belgium's PIL (Article 63), include

these procedural aspects explicitly within the scope of the applicable law, ensuring consistency.

Finally, the Regulation does not clearly address whether within the scope of the applicable law fall the consequences of establishing parenthood, i.e. the filiation between the child and the parents. For example, Italian law (Article 33 of Law 218/1995) covers both the requirements and effects of establishing parenthood, while the draft Regulation remains ambiguous on this point.

Naturally, these specified issues could be further clarified (such as by referring to conditions for establishing parenthood rather than procedure) and expanded upon (for instance, concerning adoption matters).

6. *Inclusion of overriding mandatory provisions.*

The draft Regulation does not contain a rule on overriding mandatory provisions, which are common in national legal systems, particularly in cases where national laws seek to protect children from abusive or fraudulent practices, such as fraudulent acknowledgments of parenthood. The Belgium PIL includes specific provision regarding "sham acknowledgement", but the proposal may address this as an overriding mandatory provision.

7. *Addressing fundamental rights considerations under the Charter in a recital modelled by Regulation No 650/2012.*

The second rule in Article 22(2), is novel for applicable law instruments. It specifies that the public policy exception shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular Article 21 thereof on the right to non-discrimination. It is considered that this rule limits the application of public policy, with suggestions to expand its scope to encompass all fundamental rights under the Charter, particularly to accommodate Article 24 (Rights of the Child).The aim of the rule is clear: to restrict the possibility of invoking public policy against the application of foreign law that is discriminatory (for example, on grounds of sexual orientation, birth, etc.). This clarification should remain, but it would appear more appropriate to be included as a recital, as was done in Regulation (EU) No 650/2012 (Recital

58). In this way, the content of public policy would be determined without such limitation, but the recital would clearly emphasize the need to take into account the specific provisions of the Charter.

8. *Governing the regulations with existing Legal Aid Treaties*

The draft Regulation explicitly states in Article 66(1) that it "shall not affect" international conventions to which one or more Member States are party, and which lay down provisions on matters governed by the Regulation. However, these treaties, which predate the free movement of persons within the EU, primarily focused on cases where nationals of one state resided in another. This raises practical challenges in determining how the Regulation interacts with such treaties, particularly when multiple jurisdictions are involved.

To ensure legal certainty, the Regulation could include a list of international conventions that continue to apply alongside the Regulation. A recital should be included to guide national courts in resolving conflicts between international treaties and EU law, particularly drawing from the recent CJEU judgment in Case C-395/23 (Anikovi). This would provide clarity on the relationship between the Regulation and international legal aid treaties.

ADOPTION

Forms of adoption

Adoption law distinguishes between intercountry and domestic adoptions. Intercountry adoptions imply that the child changed countries as a result of the adoption. This form of adoption became prevalent between the 1980s and early 2000s, but started to decline after 2004. Now far fewer children are adopted internationally, and some countries have even suspended this form of adoption. All countries included in the UniPar project are parties to the Hague Adoption Convention of 1993, which provides safeguards for adopted children and establishes a system of cooperation between Contracting States to ensure these safeguards are respected. The Convention also aims to secure the recognition of adoptions carried out in accordance with its provisions.

Even if they contain a foreign element, domestic adoptions are regulated by domestic law and by domestic private international law. Domestic private international law would for instance determine which connecting factors to use if one of the adopting parents has a foreign nationality or lives in another country. This form of adoption would only be available with respect to children that are in the country where the adoption is about to take place – there is in other words no transfer of the habitual residence of the child due to or as a consequence of the adoption.

Another distinction that is made in adoption law is the distinction between the adoption of a known child and adoption of an unknown child. Adoption of a known child is typically an intra-family or step-parent adoption. Adoption of an unknown child entails providing a solution for a child that was abandoned at birth or whose parents cannot take care of them.

Intercountry adoption

As intercountry adoption decreased, international surrogacy and medically assisted reproduction increased. In some situations, in order to establish the legal filiation after surrogacy, the intending parents use adoption. Sometimes the filiation link is established in another way for one of the parents, but adoption is the only way for the other intending parent to become a legal parent. These cases are most often domestic adoptions, as the child is already in the country where they will be living after the adoption, even if the child was born in another country as the result of an international surrogacy. Where surrogacy is permitted, this adoption might be in line with the law, but where surrogacy is not regulated, adoption is often used as the only option to find a solution.

In countries where surrogacy is not regulated, the use of international surrogacy agreements to conceive a child may be seen as a circumvention of the rules on intercountry adoption: intending parents go and 'get' a child in another country. It is a circumvention because the procedure of intercountry adoption under the Hague Convention, in force in more than 100 States, contains many safeguards to guarantee the best interests of the child, but is not applied. At the same time, and in a paradoxical way, not recognising the rights of children born after international surrogacy (and not allowing adoption in order to establish filiation) can be contrary to the European Convention of Human Rights (as the European

Court of Human Rights found in Menneson v. France (App. No. 65192/11, judgment of 26 June 2014) and subsequent cases).

It is important to acknowledge this inextricable link between surrogacy and adoption. Adoption has been around for much longer, and many malpractices have emerged. These malpractices include creating a market for children, mistakes or fraud, and inadequate registration of information on origin. Societies are now in the process of addressing these mistakes of intercountry adoption. At the same time they should avoid repeating those mistakes in the context of surrogacy.

Domestic Adoption after surrogacy

In surrogacy cases, the adoption would be one for a known child. This adoption can take place in the country of the surrogacy, or the country where the intending parents live. Both can be problematic, as explained above.

The success of such adoption procedure depends on various aspects, among others the availability of adoption to same-sex couples. The remaining part of this section will give an overview of the countries investigated in the UniPar project.

In Poland adoption by same-sex couples is not permitted. Adoption by a married couple is possible if the biological parents consent before a court. This could be the situation where one of the couple is a biological parent (usually the male father) and that parent agrees to the adoption, while the surrogate mother relinquished the child beforehand or consents to the adoption. If the intending parents are not married adoption is not possible.

The situation is the same in Croatia, although a step-parent adoption is an available option for spouses as well as co-habiting partners. This is exclusively open to different-sex spouses or partners; same-sex cohabiting partners can only get parental responsibility over children, but filiation cannot be established for them.

In Bulgaria step-parent adoption is also possible only by two spouses of different sex, after consent by the biological parent(s).

In Italy, step-parent adoption is possible after an international surrogacy. Such adoption is possible by the intending (male) parent who is not the registered (biological) parent. The pursuant adoption is not a full adoption. The Italian Constitutional Court found that this amounts to

discrimination, and also found that adoption after surrogacy is not an adequate solution as it requires consent by the biological parent(s).

Spanish law also permits adoption after surrogacy, for same-sex and different-sex parents. Consent is also necessary, as well as acceptance by the public entity. The Spanish Supreme Court accepted that adoption is a solution that takes account of the best interests of the child.

In Belgium domestic adoption is not often used after surrogacy. Step-parent adoption is a possibility, and this process is open to same-sex and different-sex couples. Consent is necessary as well.

Recommendations

1. When undertaking adoption after surrogacy, authorities (both in the country of the surrogacy and in the country where the intending parents live) must take care that this does not amount to a circumvention of intercountry adoption rules.

2. The European Commission and national legislators should carefully consider elements that could undermine the 1993 Hague Adoption Convention.

3. When legislating on assisted reproduction or surrogacy, legislators should take care not to repeat the mistakes made in intercountry adoption. Therefore they should:

- ensure that children's rights, particularly the right to birth registration and the right to identity, are respected and prioritised, and avoid a market-driven approach based on the demands of intended parents, donated gametes and surrogate mothers;
- set procedures in place for adequate registration and preservation of personal information, so that the children can at a later stage find their origins.
- create a system of access to information, with assistance where the child needs assistance.

RECOGNITION OF DECISIONS AND OF BIRTH CERTIFICATES

A. *Recognition of judgments*

Parenthood is usually established by operation of the law. Judicial decisions are rather exceptional. They mainly result from disputes over paternity or when parenthood is constituted by a competent authority like in the case of adoption or pre-birth judgments in connection to ART.

The recognition of foreign judgments is a classic field of Private International Law. Recognition entails that the procedural effects of the judgment are accepted. Since parenthood is a civil status establishing the position of a person in respect to a family enforcement is not an issue. Parenthood gives rise to several rights and duties between the child and their parents or family and is also the source of rights under public law in areas such as Social Security or Nationality law. These derived rights and obligations may require enforcement whenever they are not voluntarily complied with but the enforcement of the rights and duties stemming from parenthood is not a matter to be dealt with within parenthood.

The recognition of parenthood judgments arises usually in connection to the entry or the update of an entry in a Public Register or incidentally within judicial proceedings related to the effects of parenthood. For all other purposes, e.g. in connection with social security benefits or health insurance, parenthood is proven by means of birth certificates which are issued following the registration of the judgment.

Recognition under Current National Rules

National reports show that there are no specific rules for the recognition of parenthood judgments. General recognition provisions apply. There are hardly Treaty obligations in this area of the law except for some bilateral Conventions, e.g. between Poland and Bulgaria.

National rules for the recognition and enforcement of judgments vary quite significantly. In some of the investigated Member States like Belgium and Italy the automatic recognition principle applies, meaning that special judicial proceedings for the recognition of judgments are not required. The situation in Spain comes very close. While the recognition of foreign judgments is subject to exequatur the entry or modification of an entry in the Civil Registry or the recognition of the foreign judgments in

the framework of other judicial proceedings can take place directly. Bulgaria, Croatia and Poland on the contrary require the intervention of a court, if there are objections to recognition.

The refusal grounds most frequently mentioned in the national UNIPAR reports are indirect jurisdiction and public policy. Indirect jurisdiction requires checking whether the jurisdiction of the court of the State issuing the judgment is based on a reasonable connection. It is generally presumed that jurisdiction of the court of origin is reasonable if the ground of jurisdiction is identical or similar to that used in the rules of direct jurisdiction of the requested State. In this regard national rules show a varying degree of flexibility. Controlling indirect jurisdiction is, however, always time consuming since it requires ascertaining which is the ground of jurisdiction used by the court of origin and evaluating whether this ground is reasonable.

Public policy does not seem to play a role in connection with traditional paternity judgments- i.e, when the judgment establishes or terminates paternity. By contrast it is a major issue in judgments on parenthood related to ART, particularly surrogacy.

Recognition under the Parenthood Proposal

The recognition rules proposed by the Commission are closely inspired by those contained in Regulation Brussels II ter. In general, no fundamental objections against the proposed rules have been raised, except as regards certain provisions that blindly copy from Regulation 2019/1111 and fail to consider the specificities of parenthood, a concept distinct from parental responsibility. As regards the ground of refusal based on the irreconcilability with a court decision from a Member State or third State, Art. 31(1)(e) PP has taken over art. 39 of the Parental Responsibility Regulation without realizing that it is exceptional to give priority to the later decision. This is only justified by the special nature of parental responsibility decisions which are never truly final and need to be adjustable to changing circumstances. Parenthood, however, is about status, about the position of a child in a family and in society. There is no reason to depart from the *res iudicata* rule that gives priority to the earlier decision. As noted by the Marburg group court decisions on parenthood are primarily based on unchangeable circumstances at the time of birth. If parenthood is successfully contested at a later stage in one Member State

and recognition of this decision is sought, there would be no irreconcilability with a prior decision since different people would be regarded as parents.

Another contentious matter is the role that must be given to the hearing of the child. If parenthood decisions deal with the biological descent of the child, the hearing of the child is most often not required and should therefore not justify the refusal of recognition.

Since parenthood decisions are either declaratory or constitutive they do not require enforcement. This entails that in this area the advantages of the Brussels system are quite limited, especially in those Member States that do not require a special exequatur procedure or where the exequatur procedure does not need to be pursued for the update of a Civil Register or when the recognition of a foreign court decision is raised as an incidental question in judicial proceedings.

It would thus seem that the simplification of the recognition regime will have a varying impact depending on the current national rules on the recognition of judgments.

The main factor of simplification as regards the recognition of foreign decision is that the jurisdiction of the court of origin of the foreign decision is no longer reviewed under the proposed rules. As is the case with other EU Regulations this is brought about because of the unification of the jurisdiction rules.

Whether the public policy exception will be curtailed as suggested by several Recitals in the Proposal is questionable. Public policy concerns arise frequently in connection with ART and Surrogacy and are not necessarily connected exclusively with discrimination on grounds of sexual orientation but rather with different positions in relation to bioethical matters. The best interests of the child principle which applies in all Member States is subject to divergent interpretations and does not necessarily lead to the recognition of a status acquired abroad if basic rghts of the child and other persons have been breached.

B. *Recognition of Birth Certificates*

Judicial decisions on filiation are rather exceptional. Most often filiation results from the operation of the law with a birth certificate being issued as evidence of filiation. Even where filiation results from a legal act, for example of acknowledgment, or a judgment, States are under the

obligation of providing for updated birth certificates. Birth certificates do not disclose how filiation was established.

A birth certificate is a vital record that documents a person's birth, including their name, date and place of birth. It also records the identity of the woman who gave birth to the child. That this woman is the legal mother of the child does however not result from the birth certificate but from the law applicable to filiation which may or may not be the law of the State issuing the certificate. It is also this law that establishes the status *vis-a-vis* the spouse of the woman giving birth.

Birth certificates produce evidentiary effects. In line with the ELI-Enhancing Child Protection project it is useful to distinguish between general or formal evidentiary effects and substantial or extended evidentiary effects.

In Romano-Germanic legal systems, authentic acts issued by notaries or civil status registrars have general or formal evidentiary effects. This means that the elements directly ascertained by the issuing authority are presumed to be correct and accurate. For birth certificates, these effects pertain to the date the birth was declared, the identity of the declarant, and the fact that a declaration was made. In certain systems, these evidentiary effects have been extended by law to include the birth itself, even if the Registrar did not witness it personally. However, filiation is not covered by these general or formal evidentiary effects, which primarily address factual matters.

In addition to general or formal evidentiary effects, authentic acts can also have more substantial or extended evidentiary effects concerning the legal content of the act. For instance, with filiation, which results from legal reasoning rather than being purely factual, the individual named as mother or father on the birth certificate may assert that status. This presumption serves as an evidentiary mechanism: it does not establish filiation but facilitates the assertion of this status and may only be contested through judicial proceedings.

In cross-border cases, parents and children may seek to rely on a foreign birth certificate as evidence of the existence of filiation. Acceptance of the parenthood presumption deriving from the birth certificate suffices in most scenarios, for claiming social security benefits or medical insurance or requesting residence permits, for example.

Birth certificates qualify as public documents since they are issued by a public authority. As is the case with public documents generally two issues are at stake. First, the authenticity and the evidential value of the

document itself (*instrumentum*) and second the authority of the legal situation evidenced in the document, i.e. its content (*negotium*).

Reognition of the document as such usually requires providing for a translation into the official language of the requested State and the legalisation or obtention of an apostille to prove its authenticity. These matters are covered by Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union. This Regulation provides, in relation to certain public documents which are issued by the authorities of a Member State, and which have to be presented to the authorities of another Member State, for a system of exemption from legalisation or similar formality. A translation is generally not required if the document is accompanied, by a multilingual standard form

Recognition under Current National Rules

The national systems analysed all seem to provide rather straightforward systems for the recognition of foreign birth certificates. Leaving aside formalities such as translation and legalization which have been considerably simplifed when birth certificates originate from another Member State by virtue of Regulation 2016/1191, the jurisdictions reviewed are mostly ready to accept the general or formal evidentiary effect that was alluded before i.e. that the fact of the birth occurred and the place and date of birth as recorded in the birth certificate.

When it comes to recognizing the extended evidentiary effects, the situation differs between Member States that subject the recognition of the bond of filiation to a choice-of-law test and those that do not. In the latter case the national report of Croatia mentions that this practice is not in accordance with the rule establishing that choice- of-law rules bind all authorities in Croatia. The Italian report also suggests some inconsistencies as regards the limited role of civil registrars.

This is an area of the law, where the law in the books and the law in action seem likely to differ quite significantly. In the absence of empirical evidence, one cannot know with certainty whether choice-of-law tests are undertaken or not, but it is suggested that there are deficiencies. Authorities in civil registries are probably not well equipped to deal with foreign law in many countries and content themselves to transcribing the foreign

birth certificate as it is presented unless essential information is missing or the content is manifestly contrary to public policy.

Recognition under the Parenthood Proposal

The rules as regards authentic instruments are among the most controversial of the proposed Regulation.The Proposal distinguishes between birth certificates with binding legal effect and birth certificates with non- binding legal effect. The categorization is unclear. If what the Commission means are birth certificates that establish parenthood with constitutive effect the category might be unnecessary since in accordance with the CJEU finding in the Senatsverwaltung case such authentic instruments might qualify as court decisions and thus be subjected to the legal rules on the recognition of decisions. In any case it seems that there is a very limited number of such certificates which might therefore not require a new special regime.

In a cross-border scenario what parents and children need is the acceptance of the extended or substantive evidentiary effects of the foreign birth certificate, namely that the persons named in the certificate are presumed to be the legal parents of the child.

In connection with authentic instruments the Commission proposes that, in line with Art. 59 Succession Regulation, Art. 58 of the Matrimonial Property Regulation and Art. 58 of the Partnership Regulation, an authentic instrument which has evidentiary effects in the Member State of origin should have the same evidentiary effects in another Member State as it has in the Member State of origin. To ensure that the extended evidentiary effects – namely the presumption that the persons named in the certificate are the egal parents of the child- are also accepted, Member states should as well be required to accept the evidentiary effects provided by the law governing filiation. In this respect it is of course beneficial to have uniform applicable law provisions, which is where the real value of the proposed Regulation lies.

Recommendations

1. In practice, it seems that the main difficulties in connection with the recognition of judgments in matters of parenthood arise from the need to review the jurisdiction of the State of origin. To do so, authorities in the requested State must first investigate the grounds on which the

issuing court asserted its jurisdiction and then assess whether such ground is reasonable and justified by virtue of proximity. The fact that the PP is a complete instrument with uniform jurisdiction rules justifiifies that checks of indirect jurisdiction are dispensed with, thus simplifying the recognition process and contributing to legal certainty.

2. The recognition rules proposed are in principle adequate but would require some adjustments. Parenthood is a matter of civil status and in the case of irreconcilable decisions the *res iudicata* principle should be fully respected by giving priority to the prior decision.

3. The weight of the child's opinion varies greatly in judicial proceedings depending on whether parenthood is merely ascertained because it is a matter of fact based on biological descent or parenthood is constituted by an act of authority like in adoption. In the first case the opinion of the child (or of any other person) is largely irrelevant while it would be a major issue in the second case. The hearing of the child should thus not be a general ground for refusal of recognition applying to all parenthood judgments.

4. The requirements for the recognition of birth certificates are twofold. As regards the recognition of the authentic instrument as such, the EU has already made a major contribution. *Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union* provides, in relation to certain public documents which are issued by the authorities of a Member State, and which have to be presented to the authorities of another Member State, for a system of exemption from legalisation or similar formality. A translation is generally not required if the document is accompanied, by a multilingual standard form. Further action in this respect is not required.

5. The focus should be the portability of the content of the authentic instrument. Most documents do not establish parenthood; in other words they do not have constitutive effect. Birth certificates create a presumption that the individuals named in the birth certificate are the child's parents. Challenging this presumption would require initiating judicial proceedings. To make birth cerificates portable Member States should

be required not only to accept the evidentiary effect of the document itself according to the law of the State of origin (namely that the facts of the birth are as stated in the document) as proposed in the PP but also the evidentiary effects about the content of the document created by the law governing parenthood. In this respect the PP greatly facilitates the process since it contains choice-of-law rules. If such rules were simplified mutual trust would justify that in the requested Member State, birth certficates issued in another Member State were merely transcribed.

COOPERATION

A. *The point of departure – Parenthood Proposal as it is*

The Impact Assessment accompanying the Proposal (SWD(2022) 391 final) emphasized that the protection of children in matters of parenthood should not depend exclusively on the traditional mechanisms of jurisdiction, applicable law, and recognition and enforcement, but should also be supported by "non-legislative measures." In illustrating this concept, the Parenthood Proposal expressly refers to the enhancement of cooperation among public authorities competent in parenthood-related matters.

The vast majority of stakeholders and public authorities consulted during the Impact Assessment concurred that fostering cooperation among national authorities would be instrumental in improving mutual understanding of the issues at stake and in identifying common solutions aimed at avoiding instances of "limping parenthood." Nonetheless, the measures proposed were confined to non-legislative initiatives, such as strengthening cooperation and exchanges between authorities, organizing judicial training sessions or thematic meetings within the framework of the EJN-Civil, issuing interpretative guidance to Member States on the recognition of parenthood, and raising public awareness regarding the existing challenges in this domain.

Administrative and judicial cooperation constitutes a standard ancillary component of the EU's private international law instruments affecting children. The proposed Regulation on Parenthood, however, departs from this established approach. It contains no specific provisions on ad-

ministrative cooperation, neither it envisages the establishment of a network of central authorities nor delineates general or specific tasks to be undertaken within such a framework.

Conversely, the Parenthood Proposal approaches judicial cooperation in a more conventional manner. From the outset of the drafting process, particular importance was accorded to the European Judicial Network in Civil and Commercial Matters (EJN-Civil), which would be entrusted with facilitating the practical application of the Regulation—mirroring its role under other EU instruments in the field of civil law with cross-border implications.

From the very outset, cooperation under the Parenthood Proposal has been conceived in close alignment with the broader EU framework on digitalised cooperation (Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters). The establishment of a decentralised IT system and a European electronic access point—intended to facilitate the effective digitalisation of procedures across various areas of cross-border judicial cooperation in civil and family matters—relies on the development of an IT infrastructure that can be readily extended to encompass the Parenthood Regulation as well (see the UniPAR Impact Report on Parentage in the EU acquis, p. 77). For the communication of competent authorities with interested parties, a European electronic access point has been established on the European e-Justice Portal. The European electronic access point may be used for electronic communication between natural or legal persons or their representatives and competent authorities. Consistency of Parenthood proposal with the Digitalisation Regulation is ensured by Article 58 of the Proposal, establishing a base for electronical communication of Member State courts or other competent authorities in proceedings for a decision that there are no grounds for the refusal of recognition of a court decision or an authentic instrument on parenthood, or proceedings for the refusal of recognition of a court decision or an authentic instrument on parenthood, as well as communication of Member State courts or other competent authorities should communicate with citizens through the European electronic access point only where the citizen has given prior express consent to the use of this means of communication (see Recital 82 and Article 58). The European electronic access point should allow natural persons or their legal representatives to launch a request for a European Certificate of Parenthood and to receive and send that Certificate electronically.

B. *Possible amendments of the Proposal*

Empowering Central authority established under other regulations to cooperate under the parenthood scope as well

The benefits traditionally associated with establishing a network of central authorities for administrative cooperation have been outweighed by the system's inherent complexity and inadequate resources, which lead to delays in communication and loosened expected cooperation effects. Legislator calculated to rule out the entire central authority system out of the Parenthood Proposal, focusing solely on available means of electronic communication established by general civil justice framework. It is also a fact that cooperation among authorities would be multi-tracked, as authorities may use the channels of cooperation in taking evidence and service established under relevant EU rules (see the UniPAR Impact Report on Parentage in the EU acquis, p. 65-72). Nonetheless, the continued relevance of central authority system is implicitly acknowledged in the recitals of the Parenthood Proposal.

At the Union level, several legislative instruments address the rights of children in cross-border situations, most notably Council Regulation (EC) No 4/2009 and Council Regulation (EU) 2019/1111. However, neither of these instruments contains provisions concerning the establishment or recognition of parenthood. Likewise, Regulation (EU) 2016/1191 of the European Parliament and of the Council encompasses public documents relating to birth, parenthood, and adoption within its material scope. Yet, this Regulation is confined to matters of authenticity and translation of such documents and does not extend to the recognition of their substantive content or legal effects in another Member State.

It has also been confirmed by *UNIPAR* Impact Report on Parentage in the EU acquis (p. 6) that the establishment of parentage constitutes an essential precondition for the effective functioning of other EU private international law instruments relating to children. A closer examination of the cooperation mechanisms established under other EU family law regulations leads to Article 80 of Regulation (EU) 2019/1111, which provides that *"the Central Authorities shall provide any information relevant to proceedings concerning parental responsibility in the requesting Member State, in particular regarding the situation of a parent, relative or another person who may be suitable to care for the child"*. Such information may

encompass the existence of proceedings concerning parenthood. This provision must be read in conjunction with Article 79(b) of the same Regulation, which assigns to the Central Authorities the specific task of "collecting and exchanging information relevant to proceedings in matters of parental responsibility". Article 80 further specifies the scope of this information, stipulating that the Central Authority shall, where available, provide or draw up and provide a report on: (ii) any ongoing proceedings in matters of parental responsibility concerning the child; or (iii) decisions taken in such matters.

Both of these provisions are closely connected to parenthood, insofar as it is entirely possible that an ongoing proceeding concerning the acquisition of parental responsibility raises, as a preliminary issue, the determination of parentage between the child and the individual seeking parental authority. Similarly, the existence of a prior determination of parentage may serve as the basis for the subsequent granting of parental responsibility to that parent. In addition, the Central Authority is obliged to provide any other information relevant to proceedings in matters of parental responsibility in the requesting Member State, particularly regarding the situation of a parent, relative, or other suitable person, where the circumstances of the child so require.

In addition to the examples already mentioned, other types of information may also be relevant to proceedings concerning parental responsibility—most notably, the initiation of proceedings to contest or establish parenthood. The outcome of such proceedings may have a direct and significant impact not only on the allocation of parental responsibility but also on the legal determination of parentage itself.

In light of the foregoing, the Proposal should duly reflect these considerations and explicitly empower the Central Authorities to exchange information and cooperate in matters of parenthood within the framework of other relevant EU regulations.

Introducing a European Parenthood Register

The ELI Project (Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695 final. ELI 2025., draft version, p. 170) recommends the establishment of a centralised register to complement the practical functioning of the European Certificate of Parenthood (ECF) and to enable

all national authorities to retrieve certificates from a single, unified database. The proposed amendments envisage a confidential yet accessible system, in which sensitive medical records are safeguarded through strict secrecy provisions and stored in an encrypted database linked to the EU centralised register via an ECF electronic identification number.

The ECF electronic numbering system would serve as the technical backbone of this framework, obliging adoption centres, hospitals, and fertility clinics to submit complete documentation, while requiring authorised registrars to verify the integrity of all files prior to their upload. Furthermore, it is proposed to introduce a new Article 58a (or *58bis*) to regulate the operation of the database containing anonymised information concerning the child's origins.

This collaborative mechanism would not only enhance the efficiency and transparency of cross-border parenthood recognition but also foster European integration and strengthen mutual trust among Member States.

Recommendations

1. The Parenthood Proposal should explicitly empower the Central Authorities to exchange information and cooperate in matters of parenthood within the framework of other relevant EU regulations.

2. A collaborative mechanism, in the form of a centralised registry to complement the practical functioning of the European Certificate of Parenthood (ECF), should be introduced not only to enhance the efficiency and transparency of cross-border parenthood recognition but also to foster European integration and strengthen mutual trust among Member States.

ADVANTAGES OF COMMON RULES

The need for common private international law rules

Parenthood is the typical field where efforts toward the adoption of a common legal framework of reference is needed: the relationship between parents and children is the backbone of every society, States tend to regulate such a relationship by following their own traditions and needs, with the consequence that there might be relevant differences from one national law to another.

Parenthood is also a very difficult topic to regulate, since the needs of the society are rapidly changing. People are facing problems in having children and science has tried to solve this problems by providing artificial reproductive techniques (ARTs), which may challenge the foundation of parenthood (such as the principle *mater semper certa est*) and which may be differently appreciated/accepted by the States. Such different appreciation may give rise to a real polarization of positions in some cases: with reference to surrogacy, the divide between States allowing it and States opposing it is growing.

A market of laws in the field of parenthood exists and those wanting to become parents frequently move in search of the legal order envisaging the best solution for them.

This is clearly a field where private international law rules are needed, given the cross-border elements inherent to the described situations and the high risk of limping situations.

But private international law rules are needed also in a more modern perspective: private international rules could (and probably should) be shaped, interpreted and applied with a view to promote the protection of human rights.

Ongoing efforts to develop a common legal framework

Cross-border parenthood issues necessarily involves the interaction between human rights law and private international law and efforts to promote the adoption of common rules and principles exist in both field.

With reference to the field of human rights, the focus is mainly on parenthood following international surrogacy agreements (ISA), where soft law instruments have been adopted.

At global level, on the one side, 3 reports have been adopted under the aegis of the United Nations: (i) the 2018 Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective; (ii) the 2019 Report of the Special Rapporteur on sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; (iii) the 2025 Report of the Special Rapporteur on violence against women and girls, its causes and consequences.

On the other side, the ISS has developed common soft law principles (so-called Verona principles) for the protection of children's rights.

At regional level, the Council of Europe has tried to harmonize the substantive law of the Member States concerning the status of children, but it never attempted to harmonize rules in relation to surrogacy: reference should be made to the 1975 European Convention on the Legal Status of Children Born Out of Wedlock (ETS No 85), which considered the protection of children against discrimination based on their parents' status. Relevant is also the Draft recommendation on the rights and legal status of children and parental responsibilities (May 2010) of the Committee of Experts in Family law of the Council of Europe, which – whilst recommending the adoption of rules related to legal parentage in the context of medically assisted reproduction – does not attempt to harmonise practices on surrogacy. As regard surrogacy, an *ad hoc* committee of experts on progress in the biomedical science (CAHBI) in a 1989 report on human artificial procreation stated some principles on human artificial procreation, among which there is principle 15 stating as follows: "*1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother. 2. Any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable. 3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited. 4. However, states may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that: a. the surrogate mother obtains no material benefit from the operation; b. the surrogate mother has the choice at birth of keeping the child*".

The necessary interaction between human rights law and private international law rules is highlighted by the Resolution on human rights and private international law adopted in 2021 by the Institute of International Law, which envisages specific rules on parenthood.

With reference the private international law perspective, two main projects are ognoing: the first is the one of the Hague Conference of Private International Law, at global level, and the second is the proposal from the European Commission.

The main differences between the two, beside the fact that the first is global in nature, whilst the second being of a (potentially) regional dimension, are that (i) the Hague Conference's project envisages a specific and separate regime for parenthood arising from surrogacy whilst the EU does not introduce such a distinction; (ii) the EU's project also introduces the parenthood certificate, which facilitate the circulation of such a status.

Advantages of common principles and rules in the field of human rights

A *de minimis* common framework of reference in the field of human rights when parenthood is at stake is necessary, in particular when ARTs are concerned.

The most significant efforts, in the present moment, have been made with reference to parenthood following international surrogacy agreements.

But continuous reflection/speculation is needed: further scientific developments are expected and there is a need to think not only in the short-middle term, but also in the long term, by considering future generations, the future society.

The *de minimis* common framework deriving from such a reflection shall be the source of inspiration in shaping the private international law rules (from the key notion of public policy, to the possibility to envisage overriding mandatory provisions, but also to conflict-of-laws rules), which therefore can be instrument of promotion of interests and value.

The European Court of Human Rights' advisory opinion of 10 April 2019 (request n. P16-2018-001) has in fact set a standard of protection of the right to family life in the field of parenthood following an international surrogacy agreement, by giving relevance to the biological link between the intended parent and the child and by envisaging the path that the non-biological intending parent shall follow to become parent.

Advantages of common rules in the field of private international law

There are traditional and inherent advantages in having common rules in the field of private international law, which are certainty, foreseeability and avoiding limping situation.

With specific reference to parenthood, the need to grant continuity of status is particularly urgent, given that children enjoy important rights deriving from it.

On the other hand, the continuity of status for children already born tends to be already granted by virtue of human rights law instruments, such as the ECHR (as mentioned), and with specific reference to the EU context, by virtue of the exercise of the freedom of movement of EU citizens.

In this respect, therefore, private international law rules adopted at EU level would increase certainty and overcome the case-by-case approach.

The most significant advantages for the national legal orders would be:

- To have common rules on jurisdiction and on conflict-of-laws rules which depart from the element of connection of nationality (which is frequently used in national private international law rules), which might not be significant in term of proximity with the situation;
- To reduce the scope of application of the public policy exception;
- To eliminate any exequatur procedure for the recognition of decisions and, therefore, to increase continuity of status across EU borders and, possibly, to increase mutual trust;
- To have a common certificate on parenthood.

However, the proposal as it is now is not likely to be adopted, given the lack of unanimity (Italy and France have already declared that they are not going to vote in favour).

It might be adopted by virtue of enhanced cooperation (if 9 Member States will ask for it and the Council will accept), but this would not increase very much the possibility to reach the goals for which the proposal was adopted and it would also limit the advantages mentioned to the countries adhering to the proposal.

It shall be also considered that, in light of the previous experiences of acts in the field of civil judicial cooperation adopted by virtue of enhanced cooperation, it is not likely that future adhesions by the Member States which do not promote the enhance cooperation will occur.

Further possible advantages in light of the present situation

What common private international law rules could do is to promote further goals, such as the protection of the fundamental rights of the persons involved and, among them, of the children in particular.

This revolution is still ongoing.

Whilst the HCCH's project tries to stay neutral in this respect, the EU's proposal clearly declares that its main goal is the protection of fundamental rights.

The focus of the ongoing proposal seems to be on the principle of non-discrimination, which shall apply in respect of the adults involved as well as of the children.

Whilst the need to avoid any discrimination was a goal at the time the proposal was made, perhaps the situation now is different.

Significant changes in the geopolitical situation have occurred and further information on parenthood and in particular in parenthood following ISAs (which, traditionally, is a topic where official information and data are lacking) have been collected.

The 2025 UN report reports an alarming situation of exploitation of surrogacy and also of risks for the children born following the surrogacy agreement.

Meanwhile the EU has adopted the directive 2024/1712/EU amending the directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. Exploitation of surrogacy is now included among the offences provided by Article 2, para. 3 of the directive 2011/36/EU. According to recital 6 of the directive 2024/1712/EU, "[...] *in view of the gravity of those practices, and in order to tackle the steady increase in the number and relevance of offences concerning trafficking in human beings committed for purposes other than sexual or labour exploitation, the exploitation of surrogacy, of forced marriage or of illegal adoption should be included as forms of exploitation in that Directive, in so far as they fulfil the constitutive elements of trafficking in human beings, including the means criterion. More specifically, as regards trafficking for the exploitation of surrogacy, this Directive targets those who*

coerce or deceive women into acting as surrogate mothers".

Such recent developments and concerns need to be addressed. A possible new scenario might be considered, where:

1. The notion "exploitation of surrogacy" under Directive 2024/1712 is further clarified, with a view to make it possible to distinguish it from acceptable forms of surrogacy;
2. The 2022 Commission's proposal is re-considered and *ad hoc* private international law rules are envisaged for parenthood arising from international surrogacy agreements;
3. An "*a priori*" identification of *de minimis* safeguards is provided with a view to develop an acceptable surrogacy agreement capable of producing effects across the EU Member States;
4. The *de minimis* safeguards are characterized as overriding mandatory provisions or, as an alternative, the national rules implementing the *de minimis* safeguards are characterized as such in the case where some margin of appreciation on them is left to the Member States (following the solution envisaged under art. 29 of the Directive 2024/1760 on corporate social responsibility).

1. I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (a cura di), *La tutela dei "soggetti deboli" tra diritto internazionale, dell'Unione europea e diritto interno*, 2012
2. I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (a cura di), *Le nuove famiglie tra globalizzazione e identità statuali*, 2014
3. F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea*, 2013
4. I. QUEIROLO, B. HEIDERHOFF (edited by), *Party Autonomy in European Private (and) International Law, Tome I*, 2015
5. M.E. DE MAESTRI, S. DOMINELLI (edited by), *Party Autonomy in European Private (and) International Law, Tome II*, 2015
6. C. CELLERINO, *Soggettività internazionale e azione esterna dell'Unione europea. Fondamento, limiti e funzioni*, 2015
7. I. QUEIROLO, *EU Law and Family Relationships. Principles, Rules and Cases*, 2015
8. B. HEIDERHOFF, I. QUEIROLO (edited by), *European and International Cross-Border Private and Economic Relationships and Individual Rights*, 2016
9. F. PESCE, D. RONE (edited by), *Mediation to Foster European Wide Settlement of Disputes*, 2016
10. S. DOMINELLI, *Party Autonomy and Insurance Contracts in Private International Law: A European Gordian Knot*, 2016
11. A.M. BENEDETTI, I. QUEIROLO (a cura di), *Il consumatore di servizi finanziari nella crisi globale*, 2016
12. I. QUEIROLO (edited by), *Private International Law within the EU. Current Issues and Regulatory Perspectives*, 2016
13. F. MUNARI, C. CELLERINO (a cura di), *L'impatto della nuova direttiva 104/2014 sul Private Antitrust Enforcement*, 2016
14. P. CELLE, *La tutela dei diritti fondamentali dell'Unione europea*, 2016

15. M. GRONDONA (a cura di), *Libertà, persona, impresa, territorio. Visioni interdisciplinari a confronto*, 2016
16. B. HEIDERHOFF, I. QUEIROLO (edited by), *Current Legal Challenges in European Private and Institutional Integration*, 2017
17. S.M. CARBONE (edited by), *Brussels Ia and Conventions on Particular Matters. The Case of Transports*, 2017
18. I. QUEIROLO, S. DOMINELLI (edited by), *European and National Perspectives on the Application of the European Insolvency Regulation*, 2017
19. L. SANDRINI, *L'interpretazione del diritto internazionale privato dell'Unione Europea. Il caso della responsabilità da prodotto*, 2018
20. S. DOMINELLI, *Current and Future Perspectives on Cross-Border Service of Documents*, 2018
21. B. HEIDERHOFF, I. QUEIROLO (edited by), *Persons on the Move. New Horizons of Family, Contract and Tort Law*, 2018
22. B. HEIDERHOFF, I. QUEIROLO (edited by), *Old and New Problems in Private Law*, 2020
23. L. CARPANETO, *Autonomia privata e relazioni familiari nel diritto dell'Unione europea*, 2020
24. B. HEIDERHOFF, I. QUEIROLO (edited by), *Private (International) Law in an Evolving Transboundary Society. Selected Issues*, 2020
25. I. QUEIROLO, R. ESPINOSA CALABUIG, G.C. GIORGINI, N. DOLLANI (directed by), C.E. TUO, L. CARPANETO, S. DOMINELLI (edited by), *Brussels I bis Regulation and Special Rules. Opportunities to Enhance Judicial Cooperation*, 2021

Per i tipi di Editoriale Scientifica

26. B. HEIDERHOFF, I. QUEIROLO (edited by), *New Approaches in Private (International) Law*, 2021
27. F. MAOLI, *Il certificato successorio europeo tra regolamento (UE) n. 650/2012 e diritto interno*, 2021
28. F. PESCE (a cura di), *La surrogazione di maternità nel prisma del diritto*, 2022

29. B. HEIDERHOFF, I. QUEIROLO (edited by), *EU and Private International Law: Trending Topics in Contracts, Successions, and Civil Liability*, 2023
30. B. HEIDERHOFF, I. QUEIROLO (edited by), *EU (and) Private International Law. Societal Changes and Legal Challenges*, 2024
31. S. DOMINELLI, *Regolamento Bruxelles I bis e US jurisdiction in personam: riflessioni e proposte su condivisioni valoriali, influenze e osmosi di metodi,* 2025
32. B. HEIDERHOFF, I. QUEIROLO (edited by), *EU (and) Private International Law. Open Questions in Family Law, Contracts and Torts*, 2025
33. L. CARPANETO, F. MAOLI, I. QUEIROLO, (edited by), *Towards Universal Parenthood in Europe*, 2025