

Background Note
Note d'information

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**BACKGROUND NOTE FOR THE MEETING OF THE EXPERTS' GROUP
ON THE PARENTAGE / SURROGACY PROJECT**

drawn up by the Permanent Bureau

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**NOTE D'INFORMATION POUR LA RÉUNION DU GROUPE D'EXPERTS RELATIF AU
PROJET FILIATION / MATERNITÉ DE SUBSTITUTION**

établie par le Bureau Permanent

*Document for the attention of the Experts' Group
(meeting of 15-18 February 2016)*

*Document à l'attention du Groupe d'experts
(réunion du 15 au 18 février 2016)*

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INTRODUCTION

1. The purpose of this background note is to assist the meeting of the Experts' Group¹ on the Parentage / Surrogacy Project ("Project") that will take place from 15 to 18 February 2016.

2. The mandate of the Group, as established by the Council on General Affairs and Policy ("Council") of the Hague Conference on Private International Law ("Hague Conference") of March 2015, is to consider the "**feasibility of advancing work**" on the "**[p]rivate international law issues surrounding the status of children, including issues arising from international surrogacy arrangements**".² Therefore, it is important to recall at the outset that the mandate focuses on issues of parentage and the civil status of children generally, of which international surrogacy arrangements ("ISAs") are a subset.³

3. In considering the feasibility of advancing work on the private international law issues surrounding the legal parentage and the civil status of children, the Experts' Group may wish to:

- identify the problem areas in practice and where there is a need for common solutions; and
- provide preliminary views as to the type and scope of a possible instrument in the field of parentage, binding or otherwise, including whether specific scenarios (e.g., parentage in the context of donor conceived children or ISAs) warrant a particular focus or differentiated approach.

4. Although at this meeting the Experts' Group might identify and discuss potential challenges to achieving a future instrument, it is understood that the Group may require further time to consider and arrive at conclusions on all aspects of feasibility.

5. This background note is structured as follows:

- Part I provides a summary of the context of this Project;
- Part II presents a brief survey of recent international, regional and national developments and international news relating to the topic since February 2015 when the last update by the Permanent Bureau of the Hague Conference was published;⁴
- Part III summarises the private international law and co-operation rules concerning the establishment, recognition and contestation of legal parentage, and addresses the particular challenges concerning ISAs;
- Part IV reflects on the possible topics of consideration by the Experts' Group and elaborates on options for future work with a primary focus on the type of a possible instrument; and
- Part V reflects on the expected outcomes of the Experts' Group meeting.

6. This note includes several annexes, some of which are drawn from prior work carried out by the Permanent Bureau (see para. 11):

- Annex 1 – Examples Illustrating Cross-Border Problems in Legal Parentage;
- Annex 2 – Table on Private International Law and Co-operation Rules Concerning Legal Parentage Case;
- Annex 3 – A "Mind Map" on the Feasibility of Future Project Work; and

¹ See Conclusions and Recommendations of the Council on General Affairs and Policy ("Council") of the Hague Conference of March 2015, para. 5(a) to (c): the Council decided that: "the Expert Group should meet in early 2016 and report to the 2016 Council; the Experts' Group should be geographically representative and be composed in consultation with Members; and Members are invited to keep the Permanent Bureau updated regarding significant developments in their States in relation to legal parentage and surrogacy".

² *Ibid.*, para. 5.

³ See 2014 Report, *infra*, note 11, paras 68-70.

⁴ See para. 11 of this note.

- Annex 4 – Comparison of Key Provisions in Selected Hague Conventions.

7. To assist the discussion of the different draft agenda items, experts will be invited to discuss the case examples in Annex 1 of this note from their national legal perspective and practical experience.

PART I – OVERVIEW OF THE PARENTAGE/SURROGACY PROJECT

8. The establishment or contestation of a parent-child relationship is not dealt with by the Hague Children's Conventions (except, as an incidental point, in the 2007 Hague Child Support Convention⁵ where the question of parentage arising in the context of maintenance proceedings is covered). Nonetheless, questions relating to the civil status of children and the determination of legal parentage at birth are of international interest and have been on the agenda of the Hague Conference since 2010.⁶

9. States' approaches to the establishment and contestation of legal parentage, particularly in the context of children born by means of assisted reproductive technology ("ART") and ISAs, vary significantly.⁷ Where children are connected with more than one State or move cross-border, the application of different rules on jurisdiction, applicable law and the international circulation of foreign public documents (*i.e.*, birth certificates, civil status documents)⁸ and judicial decisions (*i.e.*, rules on recognition) has led to situations of uncertain and "limping" legal parentage.

10. Disparities between legal parentage may arise in a wide range of situations, including: children conceived during a marriage and born after the end of the marriage; children conceived during a first marriage of the mother and born during a second marriage of the mother; children conceived before the marriage and born after the dissolution or annulment of the marriage; the legal attribution of paternity to a man or maternity to a woman with no genetic link to the child; assisted donor conception by a gamete donor; and surrogacy. The case examples set out at **Annex 1**⁹ present the types of problems that can arise in such cross-border situations. There are undoubtedly other cases, which the Permanent Bureau hopes will be reported by the experts.

Research and background material for the Experts' Group

11. The research of the Permanent Bureau to date has considered a range of issues in relation to who is considered to be a legal parent of a child. Between 2010 and 2015, the Permanent Bureau carried out research on the topic of legal parentage, and circulated questionnaires to States,¹⁰ legal practitioners, health professionals, and surrogacy agencies.¹¹ On the basis of that research and the responses to those questionnaires (from 2013), the Permanent Bureau prepared several documents:

⁵ The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, Arts 6(2)(h) and 10(1)(c). See the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, Art. 1, as well as the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, Art. 2, and the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Art. 3.

⁶ Conclusions and Recommendations of the Council of April 2010, p. 3.

⁷ As concluded by the research undertaken by the Permanent Bureau. See also M. Wells-Greco, *The status of children arising from inter-country surrogacy arrangements*, Eleven Publishing, 2015; P. Beaumont and K. Trimmings, "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?", Working Paper No 2015/2; K. Saarloos, "European private international law on parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage", Maastricht University, doctoral thesis, 2010.

⁸ A legalisation or similar formality (Apostille) may be required to establish the authenticity of the public document.

⁹ The case examples present the types of problems that can arise in cross-border situations relating to: paternity, use of ART, and ISAs. Following each case example, there is a brief summary of the cause of the problem, the consequences of that problem, the likely outcome, and a cross-reference to the table at **Annex 2**.

¹⁰"Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (Questionnaire No 1)", Prel. Doc. No 3 A of April 2013 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference. As at December 2015, there are 51 State responses this questionnaire, from 45 Members and 6 non-Member States, representing 6 different regions.

¹¹ A chronology of the Project, including all documents published, is available on the "Parentage/Surrogacy" section of the Hague Conference website < www.hcch.net >.

- The Parentage / Surrogacy Project: An updating note ([Prel. Doc. No 3A of February 2015](#)) ("2015 Update");
- The desirability and feasibility of further work on the Parentage /Surrogacy Project ([Prel. Doc. No 3B of March 2014](#)) ("2014 Report");
- A study of legal parentage and the issues arising from international surrogacy arrangements ([Prel. Doc. No 3C of March 2014](#)) ("2014 Study");
- A preliminary report on the issues arising from international surrogacy arrangements ([Prel. Doc. No 10 of March 2012](#)); and
- Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements ([Prel. Doc. No 11 of March 2011](#)).

12. Experts are respectfully requested to bear these documents in mind for the meeting of the Experts' Group. The conclusions and recommendations set out in those documents will not be repeated here.

13. Please note that the Permanent Bureau has used the same terminology in this note as that which was used in the **Glossary** at Annex A to the 2014 Report.

PART II – DEVELOPMENTS SINCE THE 2015 UPDATE

14. Part II of this note seeks to provide the Experts' Group with an overview of some key¹² developments relevant to the Project which have taken place since the publication of the 2015 Update Note in February 2015. Notwithstanding the focus of the Experts' Group on legal parentage *generally*, most of the recent developments described in this part relate to the establishment of legal parentage in the context of ISAs since these are growing and dynamic phenomena.

A. Important developments in relation to the establishment / recognition of legal parentage

15. The following legislative changes have been reported by States in the field of parentage: In Ireland, the Children and Family Relationships Act 2015¹³ provides new rules on parentage in cases of assisted reproduction and the establishment of a national donor-conceived person register.¹⁴ In Poland, legislation regulating the use of IVF and other assisted reproduction techniques, under which married and cohabiting heterosexual couples are granted access to ART procedures after 12 months of trying to conceive, came into effect on 1 November 2015.¹⁵ In Spain, a new law on the child and adolescent protection system has modified some of the provisions of the Civil Code relating to the applicable law rules to parentage (habitual residence is established as the principal connecting factor; failing which the nationality of the child; failing which, internal law), as well as the regulation of the claims and contestation of legal parentage.¹⁶

¹² The brief analysis offered in the first part of this note is deliberately broad and general in nature; it is essentially meant to assist the Experts' Group in its discussion of the subject and does not purport to be complete.

¹³ Available at < www.irishstatutebook.ie/eli/2015/act/9/enacted/en/pdf >.

¹⁴ The following provisions are of note. The Act confirms that the birth mother is the mother of the child, regardless of whether she is also genetically related to the child (Section 5 of the Children and Family Relationships Act 2015 ("CFRA")). What the Act does change is the situation of the intending second parent of a donor-conceived child. Subject to conditions, a mother's spouse, civil partner or cohabiting partner will be able to become the second parent of a child born to both of them. Detailed provisions have been included on the consent required of the birth mother, second parent and donor (see sections 6-18 of the CFRA 2015).

¹⁵ See < www.thenews.pl/1/9/Artykul/227134,Controversial-IVF-legislation-comes-into-force-in-Poland >.

¹⁶ Law 26/2015, of 28 July, that modifies the child and adolescent protection system (*Ley 26/2015, de 28 de julio, de modificación del sistema de protección de la infancia y adolescencia*), Art. 2. The law is available at < www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8470 >.

16. National commissions and draft legislative proposals¹⁷ in the field of parentage have also been identified. The Government of the Netherlands has established a committee to re-evaluate Dutch laws relating to parenthood. This national committee is examining issues associated with legal parenthood, multiple parenthood, and surrogate motherhood. The committee is expected to publish its findings in March 2016.¹⁸ In Canada (Quebec), a Consultative Committee on family law has also published a study reviewing family law in Quebec, which has made recommendations relating to the establishment and contestation of parenthood, including cases of ART and ISAs.¹⁹

B. Important developments in relation to the establishment / recognition of legal parentage following ISAs

1. International developments

17. Issues relating to ISAs have been discussed at the UN Committee on the Rights of the Child in further State Reports. In the context of the UN Optional Protocol on the Sale of Children, the Committee noted its concern that in Israel "there is no appropriate screening procedure for prospective parent/s of children born by surrogate mothers abroad, aimed at preventing hidden sale of children and / or possible sexual abuse".²⁰ In the context of the *UN Convention on the Rights of the Child* (UNCRC), while noting "that [Swiss] law prohibits surrogate motherhood and is aimed at discouraging surrogate motherhood arrangements made abroad", the Committee said that it was "nevertheless concerned about the uncertainty of the legal status of the child [in Switzerland] during the one-year period of assessment for possible adoption".²¹ These comments follow debates regarding surrogacy, including ISAs, which took place at the UN Committee in 2013 and 2014.

2. Regional developments

18. The cases of *Labassée v. France* and *Mennesson v. France*²² considered the issue of legal parent-child relationships in respect of children born in some states of the USA from surrogacy arrangements.²³ Three further cases are currently pending before the European Court of Human Rights ("ECtHR"): *Laborie v. France*²⁴ concerns the non-recognition of Ukrainian birth certificates in France with respect to two children born to a surrogate. The cases of *Foulon v. France*²⁵ and *Bouvet v. France*²⁶ concern the non-recognition in France of the acknowledgment of paternity of intending fathers of children born to surrogates in India.

19. None of the judgments of the ECtHR to date has considered the establishment or recognition of parentage in the context of (1) a married surrogate,²⁷ (2) a traditional surrogacy arrangement or (3) a surrogate seeking to establish or maintain a parental status.²⁸

¹⁷ E.g., the Government of Manitoba (Canada) has proposed legislation to provide new rules on parentage in the context of ART and surrogacy. The legislative bill entitled "The Family Law Reform Act (Putting Children First)" is available at < <https://web2.gov.mb.ca/bills/40-4/b033e.php#A14> >.

¹⁸ See press release at < www.government.nl/news/2014/02/21/government-sets-up-national-commission-to-review-parenthood.html >.

¹⁹ "Rapport du Comité consultatif sur le droit de la famille : Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales", recommendations with respect to parentage at paras 3.1 to 3.33.5 (pp. 395-404), and in the context of surrogacy at paras 3.21.1-3.21.10 available at < www.justice.gouv.qc.ca/francais/publications/rapports/pdf/droit_fam7juin2015.pdf >.

²⁰ See the "Concluding observations on the report submitted by Israel under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography" (CRC/C/OPSC/ISR/CO/1), 8 June 2015, para. 28.

²¹ See the "Concluding observations on the combined second to fourth periodic reports of Switzerland" (CRC/C/CHE/CO/2-4), 26 February 2015 at para. 46.

²² *Mennesson v. France*, App. No 65192/11; *Labassée v. France*, App. No 65941/11.

²³ *Paradiso and Campanelli v. Italy*, Appl. No 25358/12, concerned the placement in social service care of a nine-month old child who had been born in Russia following a gestational surrogacy contract entered into by a married Italian couple; it subsequently transpired that they had no genetic relationship with the child. The decision is not yet final and has been referred to the Grand Chamber. On 9 December 2015, the Grand Chamber heard the appeal and judgment is anticipated in early 2016.

²⁴ Application No 44024/13.

²⁵ Application No 9063/14.

²⁶ Application No 10410/14.

²⁷ 2015 Update at paras 5-12.

²⁸ P. Beaumont and K. Trimmings, "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?", Working Paper No 2015/2; M. Wells-Greco, "Inter-Country surrogacy and public policy: Lessons from the European Court of Human Rights",

20. In its resolution of 17 December 2015 on the European Union's (EU) Annual Report on Human Rights and Democracy in the World 2014 and the EU's policy on the matter, the European Parliament: "condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments".²⁹

3. Legislative reform

21. Several States have considered or passed domestic legislative reform concerning surrogacy over the course of the past year. The following legislative changes are noteworthy.

22. An interesting trend is that several States, including States of origin of surrogate mothers, have restricted access to ISAs. Thailand has prohibited surrogacy arrangements for profit as well as the use of surrogacy by foreign and same-sex couples. Under the new provisions, surrogacy arrangements will only be permitted in the case of heterosexual couples who have been married for a minimum of three years, and where at least one spouse is a Thai national. The new rules also stipulate that women acting as surrogates must be over the age of 25 and related to one of the spouses.³⁰ On 29 October 2015, the Government of Nepal informed Diplomatic Missions in Kathmandu that exit permits will no longer be granted to children born to surrogates after 25 August 2015.³¹ On 14 December 2015, the Mexican State of Tabasco has restricted surrogate arrangements to Mexican nationals and to cases where the intending mother (aged 25 to 40) is medically unable to bear a child.³² There are also some States that are proposing to restrict access to ISAs. For example, in November 2015, the Indian Ministry of Health took the policy decision, in consultation with other Ministries, not to support commercial surrogacy. The Ministry has published instructions with that aim, pending discussion in Parliament (which is supposed to take place soon) of the Assisted Reproductive Technology (Regulation) Bill 2014, which would prohibit foreign nationals and single persons from using the services of a surrogate in the State.³³

23. In contrast, China reversed the planned ban on surrogacy when the family planning law was amended in December 2015. The new law, which entered into force on 1 January 2016, moved away from the policy of prohibiting surrogacy, which had been in force since 2001. Other States are planning to regulate surrogacy with consequential amendments to the law of parentage. Serbia's draft new Civil Code, for example, includes a provision for surrogacy agreements in cases of infertility or when, due to severe health issues, it is not advisable to conceive naturally or through other forms of assisted fertility because of the risk of transmitting hereditary diseases to the child. The law would allow surrogacy for married or cohabiting couples and, in some circumstances, single persons; however it would not be possible to enter into a surrogacy arrangement with a relative.³⁴ Following a Supreme Court decision,³⁵ the Irish Government has already given a commitment to include surrogacy in the planned legislation dealing with the regulation of ART.³⁶

¹⁶ Yearbook on Private International Law 2014/2015: Council of Europe and the EU Agency for Fundamental Rights, "Handbook on European law relating to the rights of the child", 2015, p. 67, available at < www.coe.int/ >.

²⁹ See < www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0470 >, General Consideration No 115. It should be noted that there is no reference to surrogacy or surrogacy arrangements in the European Union's Annual Report on Human Rights and Democracy in the World 2014 (see < www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-human-rights-report/ >).

See as well, No Maternity Traffic, Petition to the Council of Europe,

< www.nomaternitytraffic.eu.wordpress/?lang=en >.

³⁰ See < www.bionews.org.uk/page_498893.asp > and < www.bangkokpost.com/news/general/638264/law-banning-commercial-surrogacy-takeseffect >.

³¹ See < <http://nepal.usembassy.gov/service/surrogacy-in-nepal.html> >.

³² See < www.congresotabasco.gob.mx/comunicacion/ver-boletin/id/904 >.

³³ See < www.dhr.gov.in/latest%20Govt.%20Instructions%20on%20ART%20Surrogacy%20Bill.pdf >. See also < www.thehindu.com/news/cities/Delhi/art-bill-may-close-surrogacy-doors-for-foreigners-unmarried-people/article7793884.ece >.

³⁴ See < www.crin.org/en/home/what-we-do/crinmail/children-court-crinmail-44-surrogacy-and-childrens-rights >.

³⁵ See M.R. and D.R. (suing by their father and next friend O.R.) & ors v. An t-Ard-Chláraitheoir & ors [2014] IESC 60 (7 November 2014). See also Annex I to 2015 Update.

³⁶ See < www.merrionstreet.ie/en/News-Room/Speeches/Speech_by_Ms_Frances_Fitzgerald >.

24. On 3 December 2015, the Attorney-General of Australia announced a national inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements. The Committee has been asked to report by 30 June 2016.³⁷

4. Developing national case law

25. There have been a number of reported cases at the national level involving ISAs.³⁸ As an update to the cases reported in the 2015 Update, three reported decisions of national courts at the highest levels merit particular consideration.

26. On 21 May 2015, the Swiss Federal Court³⁹ refused the registration in the civil register of births of a male couple who are in a civil partnership and are living in Saint-Gallen, Switzerland, as the legal fathers of a child born following an ISA. The child was born in the United States state of California to a gestational surrogate, and one of the intending fathers provided the sperm, which was used to fertilise an egg from an anonymous donor. With the consent of the surrogate, and following a pre-birth judgment of a Californian court, the intending fathers were named as the legal parents and their names were recorded on the child's US birth certificate. The Swiss Federal Court held that the parentage of the second intending parent established in California could not be recognised in Switzerland – only the intended genetic father and the surrogate would be registered as the child's parents in the Swiss civil register.⁴⁰

27. On 14 September 2015, the Swiss Federal Court held that a Swiss national married couple living in Aargau, Switzerland, may not be recognised as the parents of twins who were born in 2012 to a gestational surrogate in the USA.⁴¹ The couple presented a California birth certificate to the civil register that named them as the twins' mother and father, but both the Aargau authorities and the Federal Court refused to recognise the parental status as neither parent had a genetic link to the twins. The non-recognition was supported by the fact that the intending parents had been living uninterrupted in Switzerland, and had no official link to the US.⁴²

28. Following the decisions of *Mennesson* and *Labassée*, the French Court of Cassation held that foreign birth certificates of children, born under surrogacy arrangements in Russia in two separate cases of intending (genetic) fathers, could be transcribed in the civil register.⁴³

C. Public policy and identified human rights considerations

29. The use of the public policy exception, while rare in private international law generally, appears more frequently in the field of ISAs (and, to some degree, parentage in the context of ART).

30. With respect to the reported case law⁴⁴, it is interesting to note the references to public policy and the international human rights instruments dealing with children's rights (e.g., Art. 3

³⁷ See <www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/3-December-2015-Inquiry-into-surrogacy.aspx>.

³⁸ E.g., a challenge to South Africa's surrogacy laws was brought in the Pretoria High Court in the *Case of AB and Surrogacy Advisory Group v. Minister of Social Development and Centre for Child Law* (as *Amicus Curiae*) No 40658/13. The applicant submitted that the requirement of a genetic link between the child and at least one of the intending parents in the Children's Act 2005 is unconstitutional, violating the right to equality, privacy and dignity of those who cannot contribute their own gametes. A decision is pending before the South African Constitutional Court. A court of second instance in Germany has recognised a judgment from a US court according to which two men were regarded as the parents of a child born by a surrogate mother in the US (*Oberlandesgericht Düsseldorf*, case ref. II-1 UF 258/13, 7 April 2015).

³⁹ ATF 21.5.2015, 5A_748/2014, c. 6.

⁴⁰ There were a number of reasons for this conclusion. Surrogacy and the use of medically assisted reproduction in the context of surrogacy are prohibited in Switzerland and second-parent adoption is currently restricted to (heterosexual) married couples.

⁴¹ ATF 17.9.2015, A_443/2014 (d).

⁴² An important observation is that the Swiss Federal Court appears to leave open the possibility for recognition and, as such, it cannot be assumed that legal parentage established abroad following a surrogacy arrangement violates Swiss public policy. If correct, this would mean that Swiss courts and authorities may – albeit in undefined circumstances – recognise a foreign decision on parentage or a birth certificate.

⁴³ *Arrêt No 620 du 3 juillet 2015 (15-50.002), Cour de cassation, Assemblée plénière*. It appears from the case report that the decision applies only to cases where the surrogate is registered as the child's mother. It remains uncertain what would happen if the two intending parents were named on the foreign birth certificate.

⁴⁴ At paras 24 to 27; see also the 2014 Study, paras 164 to 170 and the 2015 Update, Annex I.

UNCRC or Art. 8 ECHR).⁴⁵ National and international human rights undertakings make it clear that within the context of the public policy exception, reference should in particular be to the best interests of the child. The case law and the research material also illustrate that there are other public policy interests to be taken into account, including identity rights and the dignity and health of, for example, the surrogate mothers.⁴⁶

31. At a glance, these national and regional developments appear to be directed towards securing continuity in the civil status of children. As has been recognised by the UN Committee on the Rights of the Child, by the ECtHR, by national courts⁴⁷ and by other fora⁴⁸, there is an important human rights dimension to the status of children. The unity, stability, and continuity of an individual's personal status is of a social interest. A certain civil status is a constituent element of a child's personal identity.

32. In the field of nationality, the overall impression is that the international community has begun to consider newly identified sources of statelessness,⁴⁹ of which surrogacy is one such source. The EU⁵⁰ and an experts' group appointed by the UN High Commissioner for Refugees⁵¹ have considered emerging nationality issues for children.

33. These developments might therefore be considered to add further weight to the conclusion of the 2014 Report⁵² that there is now a human, including children's, rights imperative to the cross-border continuity of the civil status of children.

34. It can be observed that ISAs form an important part of the work due to the growth in numbers, serious problems, including human rights issues, and hence acute need for action. The developing research literature,⁵³ international symposia⁵⁴ and the continuing, steady stream of reported decisions concerning legal parentage following ISAs at the national level in

⁴⁵ See as well other international human rights instruments such as the African Charter on the Rights and Welfare of the Child, Art. 4, the American Convention on Human Rights, Art. 19, and the EU Charter of Fundamental Rights, Art. 24(2).

⁴⁶ Some extremely serious rights issues which have continued to arise in 2015 are detailed in Annex II to the 2015 Update and include: cases of child abandonment (causing a media furore); cases in which the suitability of intending parents has been called into question and in which trafficking concerns have arisen; cases in which courts have lamented the child's likely future inability to trace his / her genetic and birth origins; cases in which concerns have yet again arisen in relation to the free and informed consent, the dignity and health concerns of surrogate mothers; and cases demonstrating clear concerns in relation to unscrupulous intermediaries. However, it should be noted that, as stated in the 2014 Study, these concerns arise with varying frequency and severity across different States of birth.

⁴⁷ The English case of *Re A and B (No 2 Parental Order)* [2015] EWHC 2080 demonstrates that point. It is reported that there were a number of complicated factors involved – the deadline to apply for a parental order was missed by some 2.5 years, the parents had separated in the meantime and there were concerns about the ability of the applicants to meet the on-going emotional needs of the children. The court found that the making of parental orders remained essential in order to serve the children's lifelong welfare needs. A child's safeguarding needs require a determination of parentage in favour of the intending parents.

⁴⁸ See discussion in 2015 Update, pp. 3-7, and Annex II.

⁴⁹ Statelessness is regarded to be an undesirable situation. This is recognised by Art. 15 of the *Universal Declaration of Human Rights*. It has been envisaged and elaborated in several human rights treaties including the UNCRC and the 2006 *Convention on the Rights of Persons with Disabilities*. Two UN treaties deal specifically with the issue of statelessness: the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*.

⁵⁰ In 2015, a study was commissioned by the EU's Policy Department for Citizen's Rights and Constitutional Affairs at the request of the LIBE Committee: "Practices and Approaches in EU Member States to Prevent and End Statelessness" available at

< [www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2015\)536476](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)536476) >.

⁵¹ According to Art. 5(1) of the 1961 *Convention on the Reduction of Statelessness*, no change in the personal status of a person may cause statelessness. In addition to the situations explicitly listed in the article, it has been considered therefore that this rule would apply in case of a successful denial of paternity but also – if a legal system provides for such possibilities – to a denial of maternity as well as to annulment or revocation of parentage in the context of surrogacy. Indeed the range of situations which fall under Art. 5(1) is likely to grow as a result of developments in the area of reproductive technology. See the Summary Conclusions of the UNHCR Expert Meeting, "Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality", Tunis, Tunisia, 31 October-1 November 2013.

⁵² See, in particular, 2014 Report, *supra*, note 11, paras 18 and 19.

⁵³ The *Family Law News, Newsletter of the International Bar Association Legal Practice Division on ISAs*, Newsletter, Vol. 8(1), October 2015.

⁵⁴ See, for example, the conference on family law of the American Bar Association at Carlsbad, California from 6-9 May 2015; the surrogacy symposium organised by the International Academy of Matrimonial Lawyers in London from 17-19 May 2015.

2015 has only added weight to the conclusion⁵⁵ that the number of ISAs has grown and that the problems arising as a result are continuing to grow.

PART III – SUMMARY OVERVIEW OF THE PRIVATE INTERNATIONAL LAW ISSUES

35. The brief analysis offered in this part is essentially meant to assist the Experts' Group in its consideration of the discussion points presented in the preliminary agenda, and does not purport to be complete. For a more comprehensive and detailed review, experts are respectfully requested to consider the 2014 Study and 2014 Report.

36. The diversity of the national approaches to private international law and rules on parentage is summarised at **Annex 2**. That summary table demonstrates that these national (private international law) approaches are surprisingly disparate with numerous subtle nuances. Moreover, the examples in **Annex 1** may help illustrate the legal and practical challenges that arise from such diverse approaches.

A. Existing legal framework on the establishment and contestation of parentage

37. Parentage may be established by (1) operation of law (including by presumptions provided by law), (2) voluntary acknowledgement of parentage, more usually in cases of paternity, or, if it is not otherwise possible to establish parentage, by (3) a decision of a competent, usually judicial, authority.⁵⁶ The judicial determination of parentage is usually based on a presumption, oral or documentary evidence, or medical evidence, including blood and genetic (DNA) testing.⁵⁷ Recourse to the courts is available in order to contest parentage established by presumption or by acknowledgement.

38. In light of the considerable diversity, the existing legal framework is highly fragmented, creating confusion and legal uncertainty.

39. States' private international law rules concerning the establishment and contestation of legal parentage vary significantly in important respects, whether one is considering questions of jurisdiction, applicable law or the recognition of legal parentage already established abroad.⁵⁸ The 2014 Study concludes that whilst significant variation exists in the approaches of States to many issues (e.g., such as when State authorities will assume jurisdiction to register – and therefore determine the legal parentage – of a child born outside the State territory, when jurisdiction will be assumed to accept a voluntary acknowledgement of legal paternity, and the applicable law rules relating to the establishment of legal parentage arising by operation of law), significant congruity in approaches exists in other areas (e.g., concerning the assumption of jurisdiction when a child is born on the territory of the State) and in further areas common themes can be deduced (e.g., in relation to the interpretation and application of the public policy exception in this field).⁵⁹

Box A: Diversity of national approaches on the establishment and contestation of parentage and the continued need for common solutions

Experts may wish to consider the following discussion points:

- a. Other than cases involving ISAs and the case examples at Annex 1, are there any other cases of which you are aware where difficulties have arisen in your State in relation to (1) establishing, (2) contesting, or (3) recognising a child's legal parentage as a result of the cross-border movement of the child and / or his / her putative parents?
- b. What are the problem areas that you consider ought to be addressed?

⁵⁵ See, in particular, 2014 Report, *supra*, note 11, para. 35.

⁵⁶ In some States, an administrative authority may be competent to establish parentage.

⁵⁷ See, in particular, 2014 Study, *supra*, note 11, para. 86.

⁵⁸ See 2014 Report, *supra*, note 11, Part B, Section 3.

⁵⁹ See 2014 Study, *supra*, note 11, para. 26.

- c. Are there any emerging national or regional trends or common approaches with respect to the private international law rules on the establishment or contestation of parentage? If so, in what particular areas?

B. General issues relating to jurisdiction

40. The registration of the child in the State of birth is mandatory under national law and international law, while the registration of the birth with the authorities of the child's nationality may be optional. The authorities of the State of birth and State of (presumed) nationality determine the child's parentage according to their jurisdiction to record births, and this can be a source of different legal status in the different birth registers.

41. Jurisdiction as to the establishment or contestation of parentage is based upon: (i) the (common) habitual residence⁶⁰ of the putative parents; (ii) the presence of the child, where the child's habitual residence is uncertain; (iii) domicile / nationality of the putative parent(s); or (iv) the nationality which a child would acquire if parentage is established.

42. Issues of jurisdiction have not been at the forefront of the areas of uncertainty reported in the examples made available to the Permanent Bureau and the responses to Questionnaire No 1.⁶¹ It appears that the connecting factors to establish jurisdiction are more usually based on the habitual residence (or domicile) or the nationality of the child or the persons involved.

Box B: Jurisdiction rules

Experts may wish to consider the following discussion points:

- a. What are the key problems currently created by the absence of uniform rules on jurisdiction relating to the establishment and contestation of parentage?
- b. Is it feasible to establish uniform rules on the jurisdiction of national authorities to make decisions as to the establishment and contestation of legal parentage? If so, are there any grounds of jurisdiction that you feel should be included or excluded?
- c. Is it feasible to establish rules of indirect jurisdiction?
- d. Are there examples of the transfer of jurisdiction in cases relating to the establishment and contestation of parentage?
- e. Can any inspiration be drawn from any of the Hague Conventions?⁶²

C. General issues relating to applicable law

43. It can be seen that there are two main themes in the position of States regarding applicable law rules: (1) there is a division between those States which will consider applying foreign law where a situation has foreign elements and those which will always apply the *lex fori* when called upon to determine a child's legal parentage arising by operation of law, and (2) in those States in which foreign law may be applied, nationality remains a primary connecting factor in many States (often the nationality of the child and also that of the putative parents) but this is not uniformly the case; many States also have multiple possible connecting factors and the choice of applicable law will often be premised on serving the best interests of the child.⁶³ The law designated by the applicable law rules is, in most States, subject to a public policy clause or other exceptions.

⁶⁰ This is the primary connecting factor in the Hague Children's Conventions. See **Annex 4 – Comparison of Key Provisions in Selected Hague Conventions**.

⁶¹ See 2014 Study, *supra*, note 11, paras 67 to 73.

⁶² See **Annex 4 – Comparison of Key Provisions in Selected Hague Conventions**.

⁶³ 2014 Study, *supra*, note 11, para. 80.

44. If legal parenthood is not established by operation of law, the law governing legal parentage (*lex causae*) usually determines whether it can be established by acknowledgment of maternity or paternity (or by the second parent). The acknowledgment involves questions of substance that are governed by the law applicable to parentage. It decides whether or not the acknowledger is entitled to acknowledge his or her parenthood, whether or not special rules apply in cases of acknowledgement of adulterous or incestuous children and whether the consent of, for example, the child or the mother is required and whether it can be replaced by the consent of a court.

45. If legal parenthood does not exist *ex lege* and if it has not been established by acknowledgment of parenthood, the *lex causae* determines whether it can be established by a judicial decision. The *lex causae* on legal parentage also determines whether or not the legal parenthood can be contested.

46. Certain tentative conclusions can be made. First, it appears that despite diversity in applicable law rules, all systems aim at applying the policy of the national law on parentage to international cases. Secondly, the lack of consensus on the appropriate connecting factor(s) is only one part of the problem. Even if the applicable law rules appoint the same legal system or different legal systems with the same rules, it is still possible that the foreign law is not applied if the result of its application is considered unacceptable because the foreign law violates the public policy of the State involved.⁶⁴ Thirdly, in the context of children born by ART, in analysing the connecting factors under the relevant applicable law rules it is sometimes not practical to use the terms "mother" or "father" as connecting persons for the purposes of the applicable law rules because it may not be clear who those persons are.

Box C: Applicable law rules

Experts may wish to consider the following discussion points:

- a. What are the key problems currently created by the absence of uniform applicable law rules?
- b. Does a review of the "best interests of the child" assist with the determination of the applicable law? If so, in which cases?
- c. Is it desirable and feasible to establish uniform applicable law rules as to the establishment and contestation of legal parentage?
- d. Other than in cases of ISAs, are there examples of the application of the public policy exception with respect to the determination of the law applicable to parentage?
- e. Can any inspiration be drawn from any of the Hague Conventions (e.g., the 1996 Hague Child Protection Convention)?⁶⁵

D. General issues relating to the recognition of legal parentage established in another State

47. In relation to the approaches of States to legal parentage established abroad, there is an important contrast depending upon whether a foreign public document (e.g., birth certificate, a voluntary acknowledgment) or a foreign judicial decision is being considered. In relation to foreign public documents, States have adopted a variety of private international law approaches from recognition⁶⁶ (subject to varying conditions), to methods which simply determine legal

⁶⁴ See Example 1.2 at **Annex 1**.

⁶⁵ See **Annex 4** – Comparison of Key Provisions in Selected Hague Conventions.

⁶⁶ The authenticity of a foreign birth certificate may need to be established; this is commonly done through legalisation or an Apostille. The meaning of "recognition" may vary: in some cases a birth certificate may only be relied upon as evidence of the findings of fact of the foreign authority, while in other cases there may be full recognition of the legal relationship set forth in the certificate. Where recognition of a birth certificate is possible, in many States this may take place by operation of law, while in other States a court order is required.

parentage *de novo* based on applicable law rules (which may involve a consistent application of the *lex fori*). In relation to foreign judicial decisions, however, there is far more congruity in States' approaches with many more States adopting a recognition approach, often subject to indirect rules of jurisdiction and certain procedural safeguards (expressed usually as grounds for non-recognition).

48. Problems seemingly arise whether a "conflicts approach" (*i.e.*, an approach using applicable law rules, including if this is always an application of the *lex fori*) or, but perhaps to a lesser extent, whether a "recognition approach" is used in the State's private international law rules. In the case of the recognition method the forum does not determine whether or not the legal relationship exists, but it determines whether or not the relationship can be recognised. The problem with the recognition method is how to determine the existence of a legal relationship. Most legal systems apply the recognition method to judicial decisions on the establishment or contestation / annulment of legal parentage.

49. Issues of recognition – particularly of foreign birth certificates and foreign judicial decisions – appear to be at the forefront of the areas of uncertainty. As such, this would appear to be an area requiring particular focus. The case examples in **Annex 1** illustrate the application of recognition policies in the context of paternity and the use of ART for opposite and same-sex couples.⁶⁷

1. Foreign birth certificates

50. States have diverse approaches to the recognition of foreign birth certificates. In some States, a foreign birth certificate (or the legal relationship recorded therein) may be recognised if certain conditions are satisfied, *e.g.*, that the ground upon which the jurisdiction of the foreign authority was based is a ground established in the recognising State's private international law rules. In other States, a foreign birth certificate may be recognised (sometimes by operation of law) only if it is valid according to the applicable law designated by the recognising State's private international law rules. In many other States, the applicable law is applied *de novo* to determine parentage without regard to the foreign birth certificate (although the birth certificate may be relied upon as evidence of the facts recorded therein). In other States, a birth certificate is considered a "public document"; if it fulfils the legal requirements of the State of origin, it can be relied upon in the State of receipt.

2. Foreign voluntary acknowledgements of legal parentage

51. Many States generally apply, with regard to foreign voluntary acknowledgements, the same basic approach that they take with regard to foreign birth certificates, as discussed above, subject to some variations. In some States, however, significantly different rules apply to foreign voluntary acknowledgements. As with foreign birth certificates, in many States where recognition is possible this may occur by operation of law, whereas in other States it is necessary to obtain an order from a court or other authority. It is noteworthy that few States have a procedure of acknowledgement in the context of maternity.

3. Foreign judicial decisions

52. In contrast to the recognition of foreign birth certificates or voluntary acknowledgements, there is greater similarity in States' approaches to the recognition of foreign judicial decisions. In the absence of a bilateral or other agreement, in most States a judicial recognition procedure is necessary, although in some States recognition may be achieved by operation of law if the conditions of national legislation are satisfied.

53. Generally, if the jurisdiction of the foreign court was assumed in a manner contrary to the requirements of the recognising State, this may lead to non-recognition. Also, recognition may be refused if the recognising State determines that it had exclusive jurisdiction over the matter. In addition, States typically apply a number of other conditions when considering whether to recognise a foreign court decision. Common grounds for non-recognition include:

⁶⁷ Examples 1.1-1.2 and 2.1-2.3.

- the foreign decision was rendered in contravention of fundamental due process principles;
- the foreign decision is not final / conclusive;
- the foreign decision contradicts an earlier final decision of the recognising State;
- the foreign decision contradicts an earlier final decision of a third State that has been, or may be, recognised by the recognising State;
- the same action between the same parties is pending in the recognising State, and was commenced prior to the foreign proceeding (*lis pendens*);
- the foreign decision is manifestly contrary to the public policy of the recognising State; and / or
- evasion of national law (*fraude à la loi*).

54. It might also be noted that, in some States, even where a foreign judicial decision exists, legal parentage (or in some States only legal maternity) is determined *de novo* under the *lex fori*.

Box D: Recognition rules

Experts may wish to consider the following discussion points:

- a. Is the process and legal ground for recognition of a birth certificate or voluntary acknowledgment (if applicable) different from that applicable to judicial decisions (domestic or foreign)?
- b. Is a review of the "best interests of the child" undertaken as part of the recognition process? If so, in which cases?
- c. When will a parental status established in one State be recognised in another State? Please also consider your answer in the context of a domestic case becoming international (e.g., as a result of the cross-border movement of the child and / or his / her parents some years later).
- d. Does the recognition extend to the recognition of the effects of the legal status under foreign law?
- e. When can recognition of a parental status established in one State be refused in another? What are the most common grounds for refusal in practice (e.g., public policy, *fraude à la loi*)?
- f. Can any inspiration be drawn from other Hague Conventions (e.g., the 1993 Hague Intercountry Adoption Convention)?⁶⁸

E. Legal status of children in the context of ISAs

1. Establishment of legal parentage

55. The approach to legal parentage is particularly complex in the context of ISAs. The 2014 Study suggests that the majority of States do not have specific (private international law) rules on parentage in the context of surrogacy. Instead, domestic rules of parentage apply, which has proven to be problematic. For many States, if the situation has foreign elements, the usual applicable law rules will apply to determine which law determines the child's legal parentage (or, in some cases, legal paternity only).

⁶⁸ Art. 24 of the 1993 Hague Intercountry Adoption Convention provides that recognition may be refused only if the adoption is manifestly contrary to public policy, taking into account the best interests of the child. See **Annex 4** – Comparison of Key Provisions in Selected Hague Conventions.

56. In most States, national law does not recognise a parental status established through surrogacy in other jurisdictions, whether in the context of a foreign public document (such as a birth certificate), a foreign voluntary acknowledgment or a foreign judicial decision (pre-birth or post-birth).⁶⁹ This is usually because surrogacy is prohibited. Where there is a permissive surrogacy framework, surrogacy arrangements for profit are usually excluded from specifically enacted domestic surrogacy laws that enable transfer of legal parentage in certain circumstances. Despite such positions, national authorities and courts have had to grapple with the claims of intending parents trying to return with a foreign-born child with whom one of the intending parents usually has a genetic link and both intending parents have a primary caregiving role, but no legal relationship.⁷⁰

57. Recognition has occurred through *ad hoc* liberalisation of interpretations of "parent" and "child" in particular pieces of legislation as well as an assessment of the best interests of the surrogate-born child. Where recognition has been refused, this has resulted in "limping" legal parentage, and often an asymmetry in the parental statuses between, on the one hand, an intending (genetic) father and, on the other, an intending mother (whether or not genetically related) or second parent.

58. The comparative review demonstrates that, in practice, the *ad hoc* solutions adopted by national judicial and administrative authorities in a number of States attempt to establish parenthood for the intending (genetic) father and for the second parent (usually by means of step-parent adoption, if eligible to do so) but, as a whole, these solutions are usually far from adequate.⁷¹ There are at least two reasons for this. First, in many jurisdictions, the procedures used to find solutions were originally not designed for surrogacy situations and are therefore not necessarily suitable for application to surrogacy cases. As a result, the procedures are often very complex and lengthy, often with the consequence that the intending parents and the surrogate-born children have little option except to remain in the State of birth for an extended period of time while the situation is "regularised". Secondly, in addition to their *ad hoc* nature, these remedies usually only offer partial solutions, whereby the position of the intending genetic father is established as from the moment of birth. The position of the intending mother (or the other intending parent) remains uncertain in most of the jurisdictions researched, often with no or limited options of establishing legal parenthood. In practice the majority of the legal systems considered by the Permanent Bureau allow the intending parents to care for the child on a day-to-day basis.

2. Safeguards / minimum standards

59. In addition to the discussion above regarding the private international law rules relating to legal parentage, in the specific context of ISAs it may also be beneficial to explore the identification of minimum safeguards that would help protect the actors involved.⁷² Such safeguards might be presented in guidelines, principles, or other form of guidance, or could appear in a binding instrument. Some areas for consideration include:

- due diligence obligations of States;
- free and informed consent of surrogate mothers;
- appropriate information and education for all parties with regard to the legal, medical and psychological issues;
- suitability of the intending surrogate mother;
- suitability of the intending parents;
- a child's ability to know his or her origins (including the collection and preservation of information);
- standards for intermediaries, e.g., clinics;

⁶⁹ See Examples 3.1-3.3 at **Annex 1**.

⁷⁰ And no parental responsibility / authority for the child in the State of recognition.

⁷¹ See M. Wells-Greco, *The status of children arising from inter-country surrogacy arrangements*, Eleven Publishing, 2015.

⁷² See also International Social Service (ISS), "Call for Action 2016: Urgent need for regulation of International surrogacy and artificial reproductive technologies, January 2016, available at <www.iss-ssi.org/images/Surrogacy/Call_for_Action_2016.pdf>".

- medical safeguards – standards for ART procedures;
- provisions in case of breakdown of the ISA, and child abandonment;
- the financial aspects of the arrangements, including ensuring that financial terms do not constitute sale of a child;
- preventing child trafficking in the guise of ISAs;
- ensuring that intending surrogate mothers are not trafficked for purposes of ISA;
- whether a pre-conception agreement on the arrangements should be required; and
- securing the child's legal status prior to or post conception.

Box E: Parentage in the context of ISAs

Experts may wish to consider the following discussion points:

- a. Should parentage in the context of ISAs warrant a particular focus or differentiated approach?
- b. What international legislative response(s) to ISAs would you recommend?
- c. If it is decided that further work is done in the context of applicable law and / or recognition rules, what minimum standards / safeguards are necessary?

F. Continued need for common solutions

60. No matter whether the establishment or recognition of a parental status is sought by way of a legal act, fact, or judicial decision, a strict application of national law may (particularly in the context of ART and an ISA) lead to the non-establishment or non-recognition of the legal parentage of the intending parent(s) (in particular, legal maternity) established under foreign law because of the application of the State's public policy exception. Assessing these public policy issues may be complex and time consuming for the individual parties and the State.

61. The 2014 Study and the responses to the consultation process underscore the interest of States involved in exploring the feasibility of common solutions in this area. The diversity of approaches in national laws need not prevent work at the international level, but the overall picture emphasises the importance of focusing on building bridges between legal systems, based on internationally established common principles, rather than work which might attempt any harmonisation of substantive laws concerning legal parentage.

PART IV – OPTIONS GOING FORWARD

62. **Annex 3** sets out a Mind Map which shows the interface between the various issues for consideration, and to assist the Experts' Group with the identification of possible outcomes. For ease of reference, **Annex 4** provides a comparison of key provisions in selected Hague Conventions related to this subject matter.

63. The primary means by which the Hague Conference achieves its purpose is through the conclusion of international conventions. These conventions, once accepted by a State, create binding obligations on that State under public international law. It would seem that in light of the Hague Conference's tradition and the importance of the subject-matter, this option could be considered first.

64. An instrument with binding obligations might:

- address private international law issues (or a selection thereof): jurisdiction, applicable law and / or recognition;
- establish channels of communication between authorities and co-operation between States; and / or

- draw some inspiration from other Hague Conventions.

65. If the options for a new convention have been exhausted, then the preparation of a non-binding instrument could be considered. A non-binding instrument may facilitate the adoption and more widespread diffusion of common solutions. However, its consequences in State law and practice may be much more limited.

66. Under such a soft law approach:

- good practices might be catalogued in a guide;
- non-binding principles, e.g., principles relating to the establishment of legal parentage; principles relating to legal contestation of parentage; and possible legal consequences (in particular parental responsibilities and maintenance) where parentage has not been established, might be considered;
- establishment of informal channels of communication between authorities and co-operation between States; and / or
- a model law or legislative guidance might be prepared on the private international law aspects of parentage.

67. Irrespective of the type of instrument, improved mechanisms for communication and co-operation between States may include the maintenance by the Permanent Bureau of Country Profiles on approaches to parentage and ISAs both as to substantive law and private international law rules on the establishment and contestation of parentage; and / or organising and facilitating other meetings and exchanges.

Box F: Feasibility of an international instrument providing for private international law rules

Experts may wish to consider the following discussion points:

- a. Is it feasible to develop an international instrument?
- b. What further research or information might be necessary, if any, to clarify the feasibility of an international instrument?
- c. Are there examples of the functioning of co-operation between authorities in this field?

Type of instrument

- d. What type of instrument would you consider desirable and feasible: a binding convention or non-binding instrument? What are the benefits and challenges of either approach?
- e. What might be the objectives of such an instrument?

Binding

- f. What might be the substantive scope of a convention?
 - An instrument dealing with rules on (i) jurisdiction, (ii) applicable law, (iii) recognition, and (iv) mechanisms for communication and co-operation between States?
 - A single-issue instrument on ISAs?
 - A multi-issue private international law instrument with ISAs as one (specific) aspect of a greater issue (e.g., including the particular needs of children born via ART)?

- An instrument dealing only with the recognition and enforcement of foreign public documents and / or decisions regarding legal parentage and international co-operation?
- The establishment of safeguards (minimum standards) that would promote respect for the fundamental rights and welfare of all parties involved, in particular the child(ren) concerned?
- A framework for international co-operation? If so, in what areas, e.g., designation of a Central Authority, improved mechanisms for communication and co-operation between States?

Non-binding

- g. What type of non-binding instrument is desirable?
- h. What might be the substantive scope of such an instrument?
 - The establishment of safeguards (minimum standards) that would promote respect for the fundamental rights and welfare of all parties involved, in particular the child(ren) concerned?
 - Principles or a good practice guide in the field of parentage? If so, should the principles or guide expressly address children conceived as a result of ART and / or parentage in the context of ART and / or ISAs?
 - A framework for international co-operation? If so, in what areas?
 - Is it feasible to consider a model law or legislative guidance on the private international law aspects of parentage?

PART V – EXPECTED OUTCOMES AND RESOURCE IMPLICATIONS

68. It is hoped that the conclusions of the Experts' Group and its recommendations on next steps will be consolidated in a report that will be submitted to the Council for its consideration at the 2016 meeting.

69. It is also hoped that the Experts' Group will arrive at a position concerning the merits of continuing further work in the area of parentage / surrogacy. If the Experts' Group is of the opinion that there are merits in engaging in further work in this area, the Council would benefit from any specific recommendations that the Experts' Group could make on the feasibility of further work, including: identifying the problem areas in practice and where there is a need for common solutions; providing preliminary views as to the type and scope of a possible instrument in the field of parentage, binding or otherwise; and indicating whether specific scenarios (e.g., parentage in the context of donor conceived children or ISAs) warrant a particular focus or differentiated approach.

70. In terms of resources, the team in charge of this project is also in charge of the work on the 1993 Hague Intercountry Adoption Convention: one Principal Legal Officer (0.9 FTE) and one Senior Legal Officer (1 FTE), both falling under the Hague Conference's regular budget. In addition, this team has benefited from the assistance of a lawyer on secondment from the government of a Member State. If the Experts' Group recommends to Council to continue work in this area, then it will be important that at least the same resources are allocated to this project in order to ensure its success.

71. Finally, the Permanent Bureau would also be grateful if the Group would consider recommending to Council that Members keep the Permanent Bureau closely updated regarding significant developments in their States in relation to legal parentage and surrogacy (e.g., new

case law, legislation and policy approaches) wherever possible. This would save the Permanent Bureau resources that it would otherwise need to invest in tracking these developments.

A N N E X E S

ANNEX 1

CASE EXAMPLES ILLUSTRATING CROSS-BORDER PROBLEMS IN LEGAL PARENTAGE

The case examples that follow present the types of problems that can arise in cross-border situations relating to:

1. paternity in the "traditional" context,
2. use of assisted reproductive technology, and
3. international surrogacy arrangements.

After each case example, there is a brief summary of the cause of the problem, the consequences of that problem, the likely outcome, and a cross-reference to the tables at Annex 2 on Private International Law Rules Concerning Legal Parentage.

With a view to assist the discussion of the different items on the draft agenda, experts will be invited to discuss these case examples from their different legal perspective and practical experience.

PATERNITY

1. Establishing paternity in another State of a child born shortly after a divorce

A bi-national couple, the mother (M) being a national of State A and the husband (H) being a national of State B, are habitually resident in State B. One month before a child is born to the mother, the couple divorce. The child acquires the nationality of State A upon birth from the mother. **The child is registered in State B upon birth** and its applicable law rules state that the law of State B, as the State of the child's habitual residence, will apply to determine legal parentage. **The law of State B permits the mother to attend the birth registry with the man she says is the father (X) and register him as the child's legal father**, with H's consent.

Subsequently, M seeks to register the child with the authorities in her State of origin, State A. This is possible following the child's birth abroad due to the fact that the child is a national of State A. **When M produces the birth certificate of State B, however, State A says that this has no "constitutive effect" in the State and it must apply its applicable law rules to determine the child's legal parentage.** Its rules state that the national law of the child at birth will apply, which is the law of State A.

State A's law provides that if a child is born within 300 days of the divorce of a woman, the ex-husband will be presumed to be the legal father of the child unless and until this legal paternity is challenged before a court in State A. Therefore, despite the foreign determination of legal parentage and the foreign birth certificate, M, H and X have to initiate proceedings in State A for a declaration that H is not the father of the child and that X is the legal father, with all the concomitant emotional and financial costs and delay this entails.

Only once the court has determined the question (and provided a favourable outcome is achieved) will the competent authorities in State A be able to register the legal parents, already established as such in State B.

- Cause of the problem: State A will not recognise the birth certificate from State B or the acknowledgement of paternity made by X in State B. Under State A's law, H is presumed to be the father.
- Consequences: Although there is no dispute over paternity, a proceeding must be brought in State A to establish X as the legal father instead of H.
- Outcome: There does not appear to be an alternative to proceeding in court in State A.
- See Annex 2 – Table on PIL :
 - o Sec. A Establishment of legal parentage by operation of law
 - o Sec. B Recognition of foreign birth certificates
Recognition of acknowledgement of legal parentage undertaken abroad

2. Contesting paternity in another State of a child born prior to a divorce

A married couple reside in State D, a State which has enacted legislation such that a father can only bring an action seeking to disprove his paternity within the first two years of a child's life.

During the course of the marriage, the wife (W) gives birth to a child (C) that is not the husband's (H's) genetic child. H is aware that there is a possibility that C is not genetically his.

When C is 3 years old, the couple divorce. In the divorce action, evidence is introduced suggesting that H might not be the child's genetic father. Based on this information, H seeks DNA testing to disprove his paternity and to avoid child support obligations. State D rejects H's request based upon its legislation prohibiting challenges to paternity after a child's second birthday. **The court in State D declares H to be C's legal father**, grants primary custody to W and requires H to pay child support.

Two years later, W and C relocate to State E, a State in which there is no time bar on challenging paternity. H files a new action in the court in State E asking the court to order DNA testing and, if the testing reveals he is not the genetic father, to issue an order declaring that he is not a legal parent of C and has no child support obligations. H argues that **it would be contrary to the public policy of State E to recognise the decision of the court of State D regarding parentage** due to the fact that he has not been able to present scientific evidence to contest paternity.

- Cause of the problem: Conflicting State laws with regard to the process for contesting paternity. The time bar in State D does not apply in State E.
- Consequences: H is able to bring a legal challenge to paternity in State E that he could not bring in State D.
- Outcome: W will presumably argue that State E should recognise H's paternity and the child support order made in State D. It is not clear if the question of when paternity can be contested rises to the level of a fundamental principle and value of State E that would support use of the public policy exception to deny recognition.
- See Annex 2 – Table on PIL :
 - o Sec. B Recognition of foreign judicial decisions
 - o Sec. C Contestation of legal parentage

USE OF ASSISTED REPRODUCTIVE TECHNOLOGY (ART)

3. Establishing maternity in another State where egg was donated

A married bi-national couple, living in State F, have a child through ART in State F at a licensed ART clinic and following the correct procedures under the law of that State. The husband (national of State F) provides his sperm and an egg donor is used due to the wife's (national of State G) medical condition. The wife carries the child and gives birth to the child in State F. **According to the law of this State, she is considered the legal mother of the child and her husband is the legal father and, upon registration in State F, the child acquires a birth certificate in these terms.**

The wife wishes for the child to acquire the nationality of her State of origin, State G (in particular because their plan is to return to State G to live in a couple of years' time). However, due to the fact that a donor egg was used, she learns that, **under the law and policy of State G, she is not able to pass her nationality, by descent, to a non-genetically related child born abroad.** It is also not clear that she will be able to be recognised as a legal parent under the law of that State.

The wife therefore decides that she has no option but to lie to the authorities of State G and not reveal that the child was born following an egg donation. She feels uncomfortable about this as she wanted to be open with the child about the circumstances concerning his conception. She also now fears that if the authorities of State G ever discover the truth, the child's legal parentage and / or nationality could be revoked.

- Cause of the problem: State G's laws on acquisition of nationality by descent (and perhaps parentage) do not apply where the parent is not genetically related to a child born abroad.
- Consequences: The child is not able to acquire the nationality of State G (and the mother may not be recognised as the child's legal parent).
- Outcome: The child may be a national of State F by virtue of the nationality of the father. The mother might explore alternative means of passing her State G nationality to the child. It might be necessary for her to adopt the child under the laws of State G. Proceeding illegally as indicated above carries obvious risks to the parents and the child.
- See Annex 2 – Table on PIL:
 - o Sec. A Establishment of legal parentage by operation of law
 - o Sec. B Recognition of foreign birth certificates

4. Same-sex couple – establishing parentage in another State

A female same-sex couple live in State J but are nationals of State K. They have undertaken a civil partnership in State J. They use a licensed ART clinic in State J to conceive a child with the assistance of sperm donation and following the correct procedures under the law of State J. They ensure that, as required by State J, the non-birth mother formally consents to the ART procedure and to becoming a legal parent of any child born.

Under the law of State J, upon birth, the child therefore has two legal mothers by operation of law, the birth mother and her female civil partner. This will be registered on the child's birth certificate and there is no option not to register both women if the legal criteria establishing their legal maternity have been fulfilled.

Following conception, upon receiving legal advice in their State of origin, State K, the women learn that having a birth certificate with two mothers registered could cause significant problems in State K. They are advised that, whilst State K has recognition rules for foreign birth certificates, it is highly likely that recognition of a birth certificate with two women on it will be considered contrary to public policy. As a result, the child's legal parentage will not be recognised and the child may not be able to acquire the nationality of State K. The child cannot acquire the nationality of State J as this State does not have an *ius soli* rule and neither of the women has this nationality.

As a result, the women feel they have no choice but to misrepresent the situation to the authorities in State J and **initially register the birth in State J (incorrectly) as a birth to a single mother. They therefore receive a birth certificate with only her name on it.** This is actually a criminal offence in State J. They then seek transcription of this birth certificate in State K and seek the nationality of State K on this basis. Once this process is finalised in State K, they write to the registration authorities in State J and state that there has been a mistake and they seek rectification of the child's registration in State J to include the two women as legal parents. Again, however, they fear the situation for the child in future if the authorities in State K ever discover the truth about the child's conception and / or legal parentage in State J.

- Cause of the problem: State K's laws on parentage do not permit recognition of a birth certificate with two legal mothers and no father.
- Consequences: They are unable to demonstrate parentage in State K and thus the child cannot obtain the nationality of State K.
- Outcome: As the child would otherwise be stateless, the parents might discuss the case with authorities in State K to see if there are alternative means of the child acquiring State K nationality. They might also explore adoption in State K, although it seems likely that adoption by two women would not be possible given the State's position with regard to a birth certificate listing two mothers. Proceeding illegally as indicated above carries obvious risks to the parents and the child.
- See Annex 2 – Table on PIL :
 - o Sec. A Establishment of legal parentage by operation of law
 - o Sec. B Recognition of foreign birth certificates

5. Contesting paternity where sperm was donated in another State

An unmarried couple are nationals of State L, but reside in State N. As a result of fertility problems, the couple have undergone two rounds of failed IVF treatment in State N. The couple are informed by relatives in State L of a prestigious doctor in State L who performs successful IVF treatment in difficult cases. The couple therefore travel to State L to undergo treatment.

In State L the male partner formally consents to the IVF treatment proceeding and consents to the use of donor sperm. Under the law of State L his consent to treatment is sufficient to establish his legal paternity.

The IVF treatment is successful and the couple return home to State N for the birth. The child is born in State N and **the couple place the male partner's name on the birth certificate**. Two years later, the relationship breaks down. The female partner sues the male partner for child support.

The male partner brings an action before the court in State N to contest paternity, seeking a declaration that he is not liable for child support since he is not the genetic or legal father of the child according to the law in State N. He states that, despite the birth certificate, he is not the legal father under the law of State N since the requirements of State N for accessing ART treatment were not met. This is because the clinic where the IVF treatment took place in State L was not a "licensed clinic" within the meaning of the relevant legislation in State N.

The court in State N declares that, under the law in State N the male partner cannot be considered to be the legal father of the child for this reason.

- Cause of the problem: Conflicting State laws regarding the licensing of ART clinics. The clinic in State L does not meet the standards required in State N.
- Consequences: The male partner is not considered the legal father in State N, and thus is not liable for child support.
- Outcome: The mother could seek a child support order in State L, but it seems unlikely that it could be enforced in State N.
- See Annex 2 – Table on PIL:
 - o Sec. B Recognition of foreign birth certificates
 - o Sec. C Contestation of legal parentage

6. Same-sex couple – contesting parentage of the non-biological mother in another State

A female same-sex couple, T and W, enter into a civil union in State O. They subsequently agree to have a child together through artificial insemination (donor sperm). State O permits same-sex couples to undergo such treatment and has rules which ensure that W, the non-biological and non-gestational mother, will be automatically treated as the second legal parent of any child born (and registered on the birth certificate as such).

The child is born and **the birth certificate in State O contains the name of both T and W.** According to the law of State O, the child has two legal mothers and no legal father.

As a result of a job offer, the family relocate to State P, a State which does not recognise same-sex civil unions or co-mothers as legal parents of children. The relationship breaks down. T and W both wish for the child to live with them. T initiates court proceedings in State P seeking a declaration that she is the sole legal parent of the child and that W has no standing to seek custody of the child because she is not a legal parent. W argues that the court in State P should recognise the birth certificate of State O.

State P determines that the birth certificate of State O cannot be recognised on public policy grounds and that W therefore has no standing to claim custody in respect of the child.

- Cause of the problem: State P's laws on parentage do not permit recognition of a birth certificate with two legal mothers and no father.
- Consequences: W is unable to demonstrate parentage in State P and thus cannot obtain custody rights.
- Outcome: W could challenge State P's decision in court, but the public policy argument may be convincing.
- See Annex 2 – Table on PIL:
 - o Sec. B Recognition of foreign birth certificates
 - o Sec. C Contestation of legal parentage

USE OF INTERNATIONAL SURROGACY ARRANGEMENTS (ISAs)

7. Denial of parentage and thus nationality by home state of intending parents

A couple (the IPs), resident in and nationals of State Q, use the Internet to find a surrogacy agency in State R, a State which recognises and enforces surrogacy agreements. Via e-mail, they enter into a surrogacy agreement with a married woman (S) and her husband, who are resident in and nationals of State R. The surrogacy agreement is entered into subject to the law of State R. The agreement states that the IPs will provide their own egg and sperm (gametes) *i.e.*, it is a *gestational* surrogacy agreement. The agreement states that the IPs will be the legal parents of the child born as a result of the agreement and S and her husband will relinquish all rights / responsibilities as regards the child.

The agreement is a *commercial* surrogacy agreement (*i.e.*, for financial compensation beyond covering the reasonable expenses of S). The child is born in State R and transferred into the care of the IPs. Depending upon the requirements of State R, **the IPs may be able to place their names immediately on the birth certificate in State R or (more common) they will seek an order from a court in State R confirming that they are the legal parents of the child and that the birth certificate may be amended to reflect this fact.**

The law of State R now considers the child to be the child of the IPs and its citizenship rules are such that the child will not acquire the nationality of State R. The IPs apply to the local consulate of State Q for a passport to enable them to travel "home" with their new child.

The consulate of State Q rejects the application for the passport on the basis that the law in State Q considers S and her husband to be the legal parents of the child. The child is therefore not entitled to citizenship of State Q.

- Cause of the problem: State Q does not recognise ISAs or parentage arising from them.
- Consequences: State Q does not consider the intending parents to be the legal parents of the child and thus the child is not considered a national of State Q and cannot obtain that State's passport.
- Outcome: Unless State R follows the principle of *ius soli*, the child will be effectively stateless. The intending parents might discuss with the State Q authorities issuance of some type of document to allow the child to travel to State Q for the purpose of adoption there by the intending parents.
- See Annex 2 – Table on PIL :
 - o Sec. A Establishment of legal parentage by operation of law
 - o Sec. B Recognition of foreign birth certificates or foreign judicial decisions

8. Refusal to recognise foreign judgment establishing parentage

The factual scenario remains the same as in example 7, except that, following the child's birth, the child *is* able to travel to State Q with the IPs. However, it is in State Q that the difficulties commence for the child. The IPs seek to confirm the child's status in State Q and therefore bring legal proceedings for the recognition of the foreign judgment from State R according them legal parentage.

The court in State Q refuses to recognise the foreign judgment on grounds of public policy.

- Cause of the problem: State Q does not recognise ISAs or parentage arising from them.
- Consequences: State Q does not consider the intending parents to be the legal parents of the child and thus the child is not considered a national of State Q and cannot obtain that State's passport.
- Outcome: The child needs appropriate documentation to remain in State Q. The intending parents might explore with the authorities adoption of the child.
- See Annex 2 – Table on PIL :
 - o Sec. A Establishment of legal parentage by operation of law
 - o Sec. B Recognition of foreign judicial decisions

A variation on the above scenario could be when State Q is a State where *altruistic* surrogacy *is* permitted but where *commercial* surrogacy is unlawful and contrary to public policy. In this situation, the IPs may only be able to obtain an order in State Q recognising them as legal parents *if* they can show that they have not paid more than reasonable expenses to S in State R. If this cannot be proved, the court of State Q may refuse to grant the IPs legal parentage. This refusal results in a similar precarious situation for the child.

9. Refusal to recognise foreign birth certificate

The facts are identical to those in example 8, save that this time the IPs, when back in State Q, seek recognition of the *birth certificate* granted in State R (rather than any *judgment* upon which the birth certificate is based). These cases have faced similar difficulties and **a number of States have refused to recognise the foreign birth certificate on public policy grounds** with the same result for the child as set out above.

- Cause of the problem: State Q does not recognise ISAs or parentage arising from them.
- Consequences: State Q does not consider the intending parents to be the legal parents of the child and thus the child is not considered a national of State Q and cannot obtain that State's passport.
- Outcome: It seems likely that State Q will refuse to recognise the birth certificate from State R. The child needs appropriate documentation to remain in State Q. The intending parents might explore with the authorities adoption of the child.
- See Annex 2 – Table on PIL:
 - o Sec. A Establishment of legal parentage by operation of law
 - o Sec. B Recognition of foreign birth certificates

ANNEX 2

TABLE ON PRIVATE INTERNATIONAL LAW RULES CONCERNING LEGAL PARENTAGE

PRIVATE INTERNATIONAL LAW RULES CONCERNING LEGAL PARENTAGE

Table based principally on Section B of the "Study on Legal Parentage and the Issues arising from International Surrogacy arrangements"
 (2014 Prel. Doc. No 3 C)

| A. ESTABLISHMENT OF LEGAL PARENTAGE | | |
|--|--|------------------------------|
| 1. Jurisdiction of registration | | |
| Legal parentage is established by operation of law | State of birth of the child | Registration is mandatory |
| | Other States | Registration is NOT possible |
| | <small>*¹ If one putative parent is a national of the registering State or if the child is considered a national of the registering State</small> | |
| | <small>* Only possible in limited situations, e.g., if the parents reside or intend to reside in the registering State, if it was not possible to register the child in the State of birth</small> | |
| | <small>For some States, registration may be made at the Consulate or Embassy of the registering State in the State of birth</small> | |

¹ * = alternative approaches

| A. ESTABLISHMENT OF LEGAL PARENTAGE 1. Jurisdiction of registration (cont.) | | | |
|--|---------------------------|--|---|
| Voluntary acknowledgement of legal parentage | Timing of acknowledgement | At the time of the initial registration | Rules may be specific to acknowledgement or may be the general rules for parentage / filiation Jurisdiction to accept may be connected to whether authorities have jurisdiction to register the child at all |
| | | Afterwards | <ul style="list-style-type: none"> * Acknowledgement is possible only if the child is already registered in the birth register |
| | | | <p>* If the child is not registered in that State, jurisdiction to accept acknowledgement depends upon presence of connecting factors</p> <p>Common connecting factors include:</p> <ul style="list-style-type: none"> - child's HR, nationality, domicile and / or place of birth - author of the acknowledgement's HR, nationality and / or domicile <p>Other factors:</p> <ul style="list-style-type: none"> - mother was HR in the State - one of the child's parents is domiciled in the State |
| | | | <p>Time when factors must be fulfilled – different approaches:</p> <ul style="list-style-type: none"> * at time of acknowledgement * pre-birth * at time of / following birth |
| | | For some States, acknowledgement may be made at the Consulate or Embassy in the State of birth | |
| Judicial establishment of legal parentage | Timing | <ul style="list-style-type: none"> * pre-birth * following birth | <p>Common connecting factors include:</p> <ul style="list-style-type: none"> - nationality of child - nationality of the mother or of person seeking to establish parentage - common nationality of putative parents - common HR of putative parents |

| A. ESTABLISHMENT OF LEGAL PARENTAGE | | | |
|---|--|--|---|
| 2. Applicable law rules | | | |
| <p>Legal parentage is established by operation of law (incl. legal presumptions)</p> | <p>*Apply only internal law (<i>lex fori</i>), regardless of foreign elements</p> <p>*Apply applicable law rules, which may result in application of foreign law</p> | | |
| | | <p>Connecting factors</p> | <p>Common connecting factors include:</p> <ul style="list-style-type: none"> - child's nationality - nationality of the mother or of person seeking to establish parentage - common nationality of putative parents - common HR of putative parents |
| | | | <p>Other factors:</p> <ul style="list-style-type: none"> - child's HR - place of domicile of child - place of domicile of parents - HR of parents |
| | | <p>Where several connecting factors are relevant, consideration may be given to which law is more beneficial to the child</p> | |
| | | <p>Formulation of the applicable law rule for parentage (e.g., use of terms such as father and mother) may be problematic, particularly in the context of ART and same-sex parentage</p> | |
| | | <p>Differing State practice as to whether <i>renvoi</i> is accepted or excluded</p> | |
| | | <p>Application of applicable law rules may be subject to a public policy exception leading to a different applicable law rule, generally the <i>lex fori</i></p> | |

| A. ESTABLISHMENT OF LEGAL PARENTAGE | | |
|--|---|---|
| 2. Applicable law rules (cont.) | | |
| Voluntary acknowledgement of legal parentage | *Apply only internal law (<i>lex fori</i>), regardless of foreign elements | |
| | <p>*Apply applicable law rules, which may result in application of foreign law</p> <p>Substantive validity: look to connecting factors</p> | Applicable law rules may be specific to acknowledgement or of general application |
| | | Form: look to applicable law or law of the State where acknowledgement is made |
| | | <p>Connecting factors include:</p> <ul style="list-style-type: none"> - child's nationality or HR - nationality of the person requesting the acknowledgement - HR of the person requesting the acknowledgement |
| | | <p>Time when factors must be fulfilled – different approaches:</p> <ul style="list-style-type: none"> * at time of acknowledgement * pre birth * at time of / following birth |
| | | Differing State practice as to whether <i>renvoi</i> is applied or excluded |
| | | Applicable law rules may be subject to a public policy exception leading to a different applicable law rule, generally <i>lex fori</i> |
| | | Consent of mother or child may be required and subject to different applicable law rules with different connecting factors |
| | | Procedural limitations in the child's best interests may apply |

| A. ESTABLISHMENT OF LEGAL PARENTAGE 2. Applicable law rules (cont.) | | |
|--|---|--|
| Judicial establishment of legal parentage | *Apply only internal law (<i>lex fori</i>) , regardless of foreign elements | |
| | *Apply applicable law rules , which may result in application of foreign law | <p>Connecting factors</p> <p>Common connecting factors include:</p> <ul style="list-style-type: none"> - child's nationality - nationality of mother - nationality of person seeking to establish parentage - common nationality or common HR of putative parents <p>Other factors:</p> <ul style="list-style-type: none"> - child's domicile or HR - place of domicile or HR of parents <p>Where several connecting factors are relevant, consideration may be given to which law is more beneficial to the child</p> |
| | | Formulation of the applicable law rule for parentage (e.g., use of terms such as father and mother) may be problematic, particularly in the context of ART and same-sex parentage |
| | | Differing State practice as to whether <i>renvoi</i> is applied or excluded |
| | | Applicable law rules may be subject to a public policy exception leading to a different applicable law rule, generally <i>lex fori</i> |

| B. RECOGNITION OF LEGAL PARENTAGE ALREADY ESTABLISHED ABROAD | | |
|--|--|--|
| Foreign public documents, such as birth certificates | Authenticity of the document | May need to be established by legalisation or an Apostille |
| | Meaning of recognition | May vary (e.g., in some States birth certificates are only relied upon as evidence, as opposed to full recognition of the legal relationship established) |
| | How recognition occurs | * In some States by operation of law |
| | | * In other States an order by a court or other authority is needed |
| | * Different approaches to recognition | * Considered a public document and can be relied upon |
| | | * May be recognised if certain conditions are met (e.g., not fraudulent, and subject to procedural or jurisdictional requirements) |
| | | * May be recognised only if the public document is valid according to the applicable law rule designated by the private international law rules of the State of recognition |
| | | * Applicable law is applied and determination of legal parentage is made <i>de novo</i> , irrespective of birth certificate |
| | * In some States, legal parentage must be determined <i>de novo</i> under the <i>lex fori</i> | |
| Acknowledgement of legal parentage undertaken abroad | Different approaches to recognition | * Many States apply the same basic approach that is used for recognition of foreign birth certificates (see immediately above), with some variations |
| | | * Some States have different rules that are special to recognition of foreign voluntary acknowledgements |

| B. RECOGNITION OF LEGAL PARENTAGE ALREADY ESTABLISHED ABROAD (cont.) | | | |
|--|---|--|--|
| Foreign judicial decisions | Authenticity of the judicial decision | May need to be established by legalisation or an Apostille | |
| | * Recognition exists in most States | Procedure for recognition | * In most States, a recognition procedure must be undertaken in the absence of a bilateral or other agreement |
| | | | * In some other States, recognition may be by operation of law if certain conditions in national legislation are satisfied |
| | | Ground for refusal to recognise (incl. public policy) | Most States may decline to recognise a foreign judicial decision if they object to the grounds on which the foreign court based its jurisdiction |
| | | | Common grounds for refusal include, e.g.,: <ul style="list-style-type: none"> - the foreign decision was rendered in contravention of fundamental due process principles - the foreign decision is not final / conclusive - the foreign decision contradicts an earlier decision of the State of recognition or a decision of a third State which has already or may be recognised - the same action between the same parties, commenced prior to the foreign proceedings, is pending in the State of recognition (<i>litis pendens</i>) - the foreign decision is contrary to the public policy / order of the State of recognition - <i>fraude à la loi</i> |
| | | In some States, there is also a requirement of reciprocity | |
| | * In some States, legal parentage must be determined <i>de novo</i> under the <i>lex fori</i> notwithstanding the foreign decision | | |

| B. RECOGNITION OF LEGAL PARENTAGE ALREADY ESTABLISHED ABROAD (cont.) | |
|--|---|
| Public policy exception | <p>Common themes in applying the exception</p> <p>Application may depend on how a State interprets its "fundamental principles and values"</p> <p>Application may depend also on the intensity of the connection with the State's legal system and the gravity of the effect of recognition or application of the foreign law</p> <p>Examples of situations in which the exception arises:</p> <ul style="list-style-type: none"> - deeming a woman other than the birth mother to be the legal mother at birth - involuntary acknowledgement of legal paternity - untruthful acknowledgement of legal maternity or paternity - legal paternity established in absentia - legal paternity established without due process - same-sex parents <p>Human rights concerns may need to be taken into account in applying the exception (e.g., UNCRC 1989, regional human rights treaties, and regional courts (<i>i.e.</i>, European Court of Human Rights decisions in 2015: <i>Mennesson</i> and <i>Labassée</i>))</p> |

| C. PRIVATE INTERNATIONAL LAW RULES CONCERNING THE CONTESTATION OF LEGAL PARENTAGE | | |
|---|--|--|
| Jurisdiction | Contestation is generally before a court | General jurisdiction rules in civil matters may apply or there may be rules specific to contesting legal parentage or civil status more broadly |
| | | In either case, look to connecting factors |
| | | Connecting factors may not coincide with connecting factor on establishment and may include: <ul style="list-style-type: none">- child's HR and / or nationality- putative parents' common HR and / or nationality (or a putative parent's HR / nationality)- child's or parent's domicile- child's State of birth- paternity or co-motherhood having been established in that State- a "real and substantial connection" with that State |
| Applicable law | In most States, it will depend upon the nature of the dispute, e.g.,: <ul style="list-style-type: none">- if it involves a determination of legal parentage arising by operation of law- if it involves the recognition of legal parentage established in another State | |
| | However, some States have specific applicable law rules for contestation of parentage (connecting factors may differ to those with respect to the establishment of parentage) | |
| | Differing State practice as to whether <i>renvoi</i> is applied or excluded | |

| C. PRIVATE INTERNATIONAL LAW RULES CONCERNING THE CONTESTATION OF LEGAL PARENTAGE (cont.) | |
|---|---|
| Recognition | See B above. Procedural limitations (e.g., statutes of limitations) in the child's best interests may apply |
| Public policy exception | See B above Examples of situations in which the exception arises: <ul style="list-style-type: none"> - the establishment of the legal paternity of the genetic father in cases where the mother is married - intensity of the connection of the case to the forum - foreign law is more permissive |

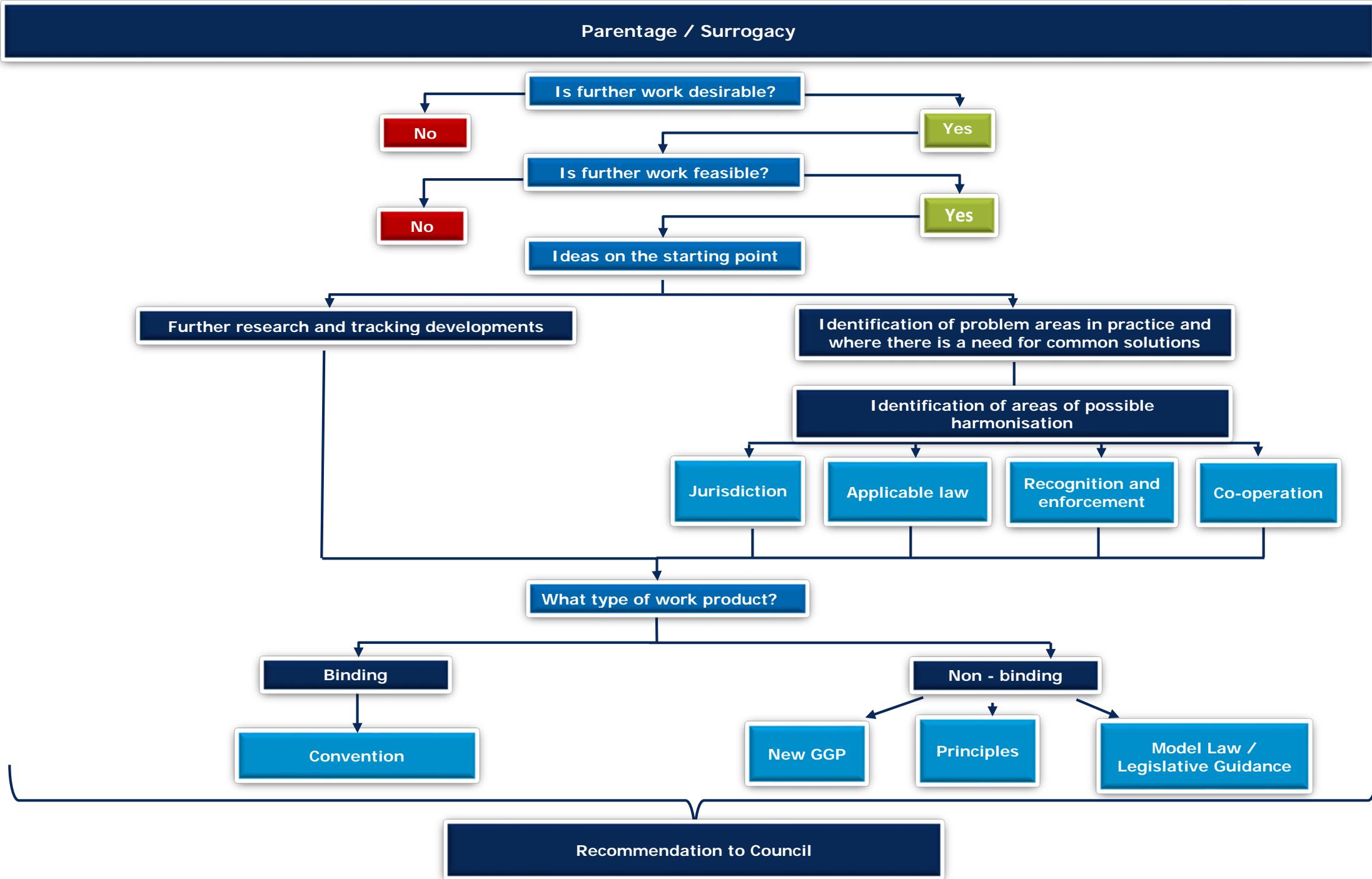
| D. LEGAL EFFECTS OF RECOGNITION | | |
|---------------------------------|---|--|
| Applicable law | Which law governs the effects or consequences of the recognition of a foreign birth certificate / foreign public document, voluntary acknowledgement, or judicial decision? | Often governed by <i>lex fori</i> |
| | | But may be subject to applicable law rules, either general or specific to the effects of recognition |

| E. LEGAL STATUS OF CHILDREN AND INTENDING PARENTS IN INTERNATIONAL SURROGACY ARRANGEMENTS (ISAs) CASES | | |
|--|---|--|
| States of birth | In the most popular States of birth, there are generally procedures for according legal parentage to the intending parents | These procedures may be pre-birth or post-birth |
| | In most cases, the child cannot acquire the nationality of the State of birth solely by dint of birth there | Exceptions: States with the (default) <i>ius soli</i> principle, <i>ex lege</i> acquisition of nationality if the child would otherwise be stateless |

| E. LEGAL STATUS OF CHILDREN AND INTENDING PARENTS IN INTERNATIONAL SURROGACY ARRANGEMENTS (ISAs) CASES (cont.) | | |
|---|--|--|
| Receiving States | Many variables affect the procedure and the determination of legal status | <p><i>E.g.:</i></p> <ul style="list-style-type: none"> - whether the surrogate mother is married - the intending parents' nationality - whether the child is genetically related to the intending parents - the State in which the child was born and its procedure for establishing legal parentage |
| | Where the child automatically acquires the nationality of the State of birth and obtains that passport | The child may still need a visa or permit (or <i>laissez passer</i>) from the receiving State to enter it (this may be on a "discretionary" basis) |
| | Where the child must acquire nationality through the parents | The child may need a passport or appropriate visa / permit (or <i>laissez passer</i>) from the receiving State (this may be on a "discretionary" basis) |
| | In some federal States (principally of common law tradition) | <ul style="list-style-type: none"> - immigration and nationality are determined at the federal level, - whereas legal parentage is determined at the State / provincial level |
| | In some common law States (without federal systems) | <ul style="list-style-type: none"> - the <i>lex fori</i> of the State of nationality of the intending parent(s) determines who the legal parents are and whether the child can acquire nationality by descent |
| | Many civil law States apply their private international law rules to determine whether the child has a legal parent who is a national of that State | Some States focus on whether the intending father is genetically related to the child and is a national of the State |
| | | In some cases, the intending mother or second intending father may need to adopt, if adoption is available |
| | | In any case, the outcome will be highly fact dependent |

ANNEX 3

A "MIND MAP" ON THE FEASIBILITY OF FUTURE PROJECT WORK



ANNEX 4

COMPARISON OF KEY PROVISIONS IN SELECTED HAGUE CONVENTIONS

| | 1965 HC Adoptions | 1971 HC Enforcement | 1996 HC Child Protection | 2007 HC Child Support |
|---------------------|---|---|--|--|
| Jurisdiction | Jurisdiction to grant an adoption is vested in the authorities of the State where the adopter(s) habitually resides (HR), or of which the adopter(s) is a national (Art. 3) | The courts of the State of origin shall have jurisdiction where: Defendant had HR or seat / place of incorporation / principal place of business in the State of origin; proceedings arose from the defendant's business activities in the State of origin; action concerned immovable property situated in the State of origin; damage was caused by person present in the State of origin; parties had agreed on the State of origin as the forum for dispute settlement; defendant argued the merits without challenging the court's jurisdiction; recognition and enforcement is sought against the plaintiff in the original proceedings in the court of origin (Arts. 10, 11) | The authorities of the State of HR of the child have jurisdiction to take measures to protect the child's person or property (Art. 5); for refugee children or children internationally displaced due to disturbances in their country, the authorities of the State in which the children are present have the jurisdiction specified above (Art. 6) | Where a decision is made in a Contracting State where the creditor is HR , proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State so long as the debtor remains HR in the first State (Art. 18) |
| | Jurisdiction to annul or revoke an adoption is vested in the authorities of the State in which the adoptee habitually resides ; the State in which the adopter(s) habitually resides ; or the State which granted the adoption (Art. 7) | Jurisdiction of the courts of the State of origin need not be recognised if: courts of the State addressed have exclusive jurisdiction; the courts of that State recognise a different exclusive jurisdiction; or the authority addressed is bound to recognise the exclusive jurisdiction conferred upon arbitrators (Art. 12) | In case of wrongful removal or retention of the child, the authorities of the State in which the child had HR immediately before the removal or retention retain their jurisdiction until the child has acquired HR in another State (Art. 7) | |

| | 1965 HC Adoptions | 1971 HC Enforcement | 1996 HC Child Protection | 2007 HC Child Support |
|-------------------------|-------------------|---------------------|--|-----------------------|
| Jurisdiction (cont.) | | | If an authority having jurisdiction under Art. 5 or 6 considers that an authority of another Contracting State would be better placed to assess the best interests of the child , it may request that the other authority assume jurisdiction or it may suspend the case and invite the parties to make such a request (Art. 8) | |

| | 1965 HC Adoptions | 1996 HC Child Protection | 2007 Prot. Law Appl. Maintenance |
|----------------|---|--|---|
| Applicable law | The authorities with jurisdiction under Art. 3 shall, subject to Art. 5, apply their internal law to the conditions governing an adoption; however, they shall respect any provision prohibiting adoption contained in the national law of the adopter(s) specified in a declaration (Art. 4) | In exercising their jurisdiction under Ch. II of the Convention, States shall apply their own law ; however, insofar as the protection of the person or property of the child requires, they may exceptionally apply the law of another State with a substantial connection with the situation; if the child's HR changes , the law of that other State governs (Art. 15) | Maintenance obligations shall be governed by the law of the State of HR of the creditor , except where the Protocol provides otherwise; in the case of a change in the creditor's HR , the law of the State of the new HR shall apply as from the moment when the change occurs (Art. 3) |
| | The authorities with jurisdiction under Art. 3 shall apply the national law of the child to consents and consultations, other than those with respect to an adopter, his family or his or her spouse (Art. 5) | The attribution or extinction of parental responsibility by operation of law is governed by the law of the State of the child's HR ; such attribution or extinction by an agreement or unilateral act is governed by the law of the State of the child's HR at the time when the agreement or act takes effect; parental responsibility existing under the law of State of the child's HR continues after a change in that HR to another State; if the child's HR changes , the attribution of parental responsibility by operation of law to a new person is governed by the law of the State of the new HR (Art. 16) | The maintenance creditor and debtor may designate , for the purpose of a particular proceeding in a given State, the law of that State as applicable to the maintenance obligation (Art. 7) |
| | | The exercise of parental responsibility is governed by the law of the State of the child's HR ; if the child's HR changes, it is governed by the law of the State of the new HR (Art. 17) | The maintenance creditor and debtor may designate as applicable to the maintenance obligation: the law of a State of which either party is a national ; the law of a State of the HR of either party; the law designated by the parties as applicable, or the law in fact applied, to their property regime; or the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation (Art. 8) |

| | 1965 HC Adoptions | 1971 HC Enforcement | 1993 HC Intercountry Adoption | 1996 HC Child Protection | 2007 HC Child Support |
|--------------------|---|---|--|---|---|
| Recognition | Decisions granting, annulling or revoking an adoption shall be recognised without further formality in all Contracting States (Art. 8) | A decision shall be entitled to recognition and enforcement in another Contracting State if: the deciding court had jurisdiction; the decision is not subject to ordinary review; and the decision is enforceable in the State of origin (Art. 4) | An adoption certified as having been made in accordance with the Convention shall be recognised by operation of law (Art. 23) | The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States (Art. 23) | A decision made in the State of origin shall be recognised and enforced in other Contracting States if: the respondent was HR in the State of origin; the respondent has submitted to the jurisdiction of the State of origin; the creditor was HR in the State of origin; the child was HR in the State of origin, provided that the respondent has lived with the child or resided in that State and provided support; the parties have agreed to the jurisdiction of the State of origin (except in disputes relating to maintenance obligations); or the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility (unless jurisdiction was based solely on the nationality of one of the parties) (Art. 20) |
| | | | Recognition of an adoption includes recognition of the legal parent-child relationship ; parental responsibility of the adoptive parents; and termination of the pre-existing legal relationship between the child and parents, if the adoption has this effect (Art. 26) | | |

| | 1965 HC Adoptions | 1971 HC Enforcement | 1993 HC Intercountry Adoption | 1996 HC Child Protection | 2007 HC Child Support |
|----------------------------------|-------------------|---|-------------------------------|--|--|
| Grounds for refusal to recognise | | <p>Recognition or enforcement may be refused if: manifest incompatibility with the public policy of the State addressed; proceedings were incompatible with due process; either party had no adequate opportunity to present its case; the decision was obtained by procedural fraud; similar proceedings between the same parties are pending in the State addressed, have already been decided in the State addressed, or have already been decided in another State and the decision is entitled to recognition and enforcement; or the decision was rendered by default (Arts 5 and 6)</p> | | <p>Recognition may be refused if: the measure was taken by an authority whose jurisdiction was not based on one of the specified grounds; the measure was taken without the child having been provided the opportunity to be heard; on the request of a person claiming infringement of parental responsibility without having been provided the opportunity to be heard; such recognition is manifestly contrary to the public policy of the requested State, taking into account the best interests of the child; the measure is incompatible with a later measure taken in a non-Contracting State of the child's HR and qualifies for recognition in the requested State; non-compliance with procedures relating to placement in a foster family or institution, or kafala care (Art. 23)</p> | <p>Recognition and enforcement may be refused if: it is manifestly incompatible with the public policy of the State addressed; the decision was obtained by procedural fraud; the same proceedings are pending before an authority of the State addressed and were instituted first; the decision is incompatible with a decision rendered between the same parties and with the same purpose, in the State addressed or another State, provided that the latter qualifies for recognition and enforcement in the State addressed; where the respondent has neither appeared nor was represented in the proceedings and did not have proper notice; or the decision violated Art. 18 (Art. 22)</p> |

| | 1965 HC Adoptions | 1971 HC Enforcement | 1993 HC Intercountry Adoption | 1996 HC Child Protection | 2007 HC Child Support |
|--------------------------------|---|----------------------------|---|---------------------------------|------------------------------|
| Public policy exception | Provisions of the Convention may be disregarded only when their observance would be manifestly contrary to public policy (Art. 15) | See immediately above | Recognition may be refused only if the adoption is manifestly contrary to public policy, taking into account the best interests of the child (Art. 24) | See immediately above | See immediately above |

| | 1965 HC Adoptions | 1971 HC Enforcement | 1993 HC Intercountry Adoption | 1996 HC Child Protection | 2007 HC Child Support |
|---------------------------------------|---|----------------------------|---|---|--|
| Designation of authorities | Each State shall designate the authorities having power to grant / annul / revoke an adoption; exchange communications; or receive information (Art. 16) | | Each State shall designate a Central Authority (CA) to discharge enumerated duties (Art. 6) | Each State shall designate a CA to discharge enumerated duties (Art. 29) | Each State shall designate a CA to discharge enumerated duties (Art. 4) |
| Communication and co-operation | The authorities shall promptly give all assistance requested for the purposes of an adoption; for this purpose they may communicate directly with each other (Art. 6) | | CA shall co-operate with each other and promote co-operation amongst the competent authorities in their States (Art. 7) | CA shall co-operate with each other and promote co-operation amongst the competent authorities in their States; they shall provide information as to the laws of and services available in their State relating to the protection of children (Art. 30) | CA shall co-operate with each other and promote co-operation amongst the competent authorities in their States (Art. 5) |
| | | | CA shall exchange information ; provide each other with general evaluation reports about experience with intercountry adoption; and reply to justified requests for information (Art. 9) | CA shall take appropriate steps to facilitate communications and offer assistance as provided in Art. 8 and 9; provide assistance upon request in discovering the whereabouts of a child (Art. 31) | A CA may make a request to another CA to take appropriate specific measures when no application is pending ; the requested CA shall take such measures as appropriate if satisfied that they are necessary (Art. 7) |
| | | | CA shall keep each other informed about the adoption process and the measures taken to complete it (Art. 20) | | |

| | 1965 HC Adoptions | 1971 HC Enforcement | 1993 HC Intercountry Adoption | 1996 HC Child Protection | 2007 HC Child Support |
|----------------------------------|--------------------------|---|--------------------------------------|---|---|
| Legalisation of documents | | No legalisation or other like formality may be required (Art. 13). | | All documents forwarded or delivered under the Convention shall be exempt from legalisation or any analogous formality (Art. 43) | No legalisation or similar formality may be required (Art. 41) |