

**QUESTIONS DE DROIT INTERNATIONAL PRIVÉ CONCERNANT LE STATUT
DES ENFANTS, NOTAMMENT CELLES RÉSULTANT DES ACCORDS DE MATERNITÉ
DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

note établie par le Bureau Permanent

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**PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING
THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM
INTERNATIONAL SURROGACY ARRANGEMENTS**

document drawn up by the Permanent Bureau

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du Conseil d'avril 2011 sur les affaires générales et la politique de la Conférence*

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I. INTRODUCTION²

1. In 2001, as a result of informal consultations regarding the future work programme of the Hague Conference,³ private international law issues surrounding the status of children and, in particular, the recognition of parent-child relationships (*filiation*), was suggested as a possible future topic of work for the Conference. In April 2010, the Council on General Affairs and the Policy of the Hague Conference, "invited the Permanent Bureau to provide a brief preliminary note to the Council of 2011 on the private international law issues surrounding the status of children (excluding adoption) and, in particular, on the issue of recognition of parent-child relationships (*filiation*)".⁴

2. The 2010 Council meeting also discussed the growing problem of international surrogacy arrangements.⁵ The Council, in its Conclusions, "acknowledged the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements".⁶ It noted that the impact of international surrogacy cases on the practical operation of the 1993 Hague Intercountry Adoption Convention would be placed on the draft agenda for the Special Commission meeting in June 2010. The Council also agreed that the private international law questions relating to international surrogacy arrangements should be kept under review by the Permanent Bureau. In June 2010, at the Special Commission meeting, the interplay between international surrogacy cases and the 1993 Convention was discussed. The Conclusions of the Special Commission were as follows:

"25. The Special Commission noted that the number of international surrogacy arrangements is increasing rapidly. It expressed concern over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements. It viewed as inappropriate the use of the Convention in cases of international surrogacy.

26. The Special Commission recommended that the Hague Conference should carry out further study of the legal, especially private international law, issues surrounding international surrogacy."⁷

¹ In this paper, an "international surrogacy arrangement" is taken to mean any surrogacy arrangement involving more than one State, either as a result of the differing residences (and usually, nationalities) of the intending / commissioning parents and surrogate mother, or otherwise.

² N.B. this document is an introductory briefing note. It is by no means a complete review of this area of the law. It results from a desk review of some of the available literature and national legislation / case law. If further work is to be carried out on this topic, it will be important to ensure that less readily accessible legal sources are taken into account (*e.g.*, from States not currently mentioned in this document).

³ "Observations concerning the Strategy of the Hague Conference – Observations made by other international organisations and observations made in a personal capacity in response to the Secretary General's letter of 30/31 July 2001", Prel. Doc. No 20 for the attention of the Nineteenth Session.

⁴ Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (7-9 April 2010), p. 3.

⁵ This issue was raised by Israel in Work. Doc. No 3 for the attention of the Council on General Affairs and Policy of the Conference (7-9 April 2010). The Permanent Bureau also circulated a letter received from New Zealand (dated 15 December 2009) raising concerns about international surrogacy arrangements and asking a series of questions regarding the interplay between these arrangements and the 1993 Hague Intercountry Adoption Convention. The response of the Permanent Bureau to this request (by W. Duncan, Deputy Secretary General, and dated 9 February 2010) was also circulated.

⁶ *Ibid.* note 4.

⁷ The Special Commission of June 2010 on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption* (17-25 June 2010).

3. International surrogacy cases often involve problems concerning the establishment and / or recognition of the child's legal parentage and the legal consequences which flow from such a determination (*e.g.*, the child's nationality, immigration status, who has parental responsibility for the child, who is under a duty to maintain the child, etc.) Whilst international surrogacy cases undoubtedly present their own unique challenges (see section VI below), it has been considered artificial to address in this Note the challenges of private international law regarding the status of children generally, separately from those which face the international community in relation to international surrogacy cases. This preliminary Note therefore deals with international surrogacy in this wider context.

II. THE SCOPE OF THE SUBJECT

4. References to the "*status of a child*" in legal literature have, in many legal systems in the past, been references to a child's status as a legitimate or illegitimate child. However, in recent decades, in many legal systems, the distinction between legitimate and illegitimate children has been abolished.⁸ This has, for these States, altered the focus of attention with regard to parent / child obligations. As one commentator has put it, "If parental obligation to children is independent of the adult relationship, then definition of that obligation must start with the recognition of parenthood"⁹ (emphasis added). Indeed, it is the concept of legal parenthood which is now, arguably, the gateway through which many of the rights of children, and obligations to children, flow.¹⁰ It is therefore perhaps unsurprising that this evolution in *domestic* family law has shifted the concern of private *international* (family) law from a concentration on the recognition of the status (or legitimacy / illegitimacy) of a child in cross-border cases, to a focus instead on the establishment and contestation of the parent-child relationship in cross-border cases. This Note follows this general shift in approach and takes the "status of children" to refer to the legal parentage of children.

5. It should also be noted that this paper concerns cross-border issues relating to the establishment and contestation of legal parenthood in circumstances related to the *birth* of a child: the establishment / contestation of legal parentage by *adoption* is therefore excluded.¹¹ This Note also does not deal with private international law issues related to the acquisition and exercise of *parental responsibility*.¹² It should be noted that previous work of the Hague Conference on maintenance¹³ and succession¹⁴ has indirectly, or

⁸ This global trend is in line with Art. 2 of the UNCRC which seeks to protect children from discrimination on the grounds, amongst others, of their or their parents' "birth or other status". It is also in line with other international instruments in the field of international child protection (*e.g.*, the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999, (in particular, Art. 2); the American Convention on Human Rights of 22 November 1969 (in particular, Art. 1); the European Convention on Human Rights (in particular, Arts 8 and 14); the European Convention on the Legal Status of Children born out of Wedlock, 15 October 1975) and international jurisprudence (*e.g.*, European Court of Human Rights: *Marckx v. Belgium*, 13 June 1979; *Johnston and others v. Ireland*, 18 December 1986, *Mazurek v. France*, 1 February 2000).

⁹ "The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity", Carbone J. (2005) *Lo. LA. Rev.* 1295 at 1297.

¹⁰ It should be noted that the adult relationships surrounding a child do remain important in many States for the establishment and contestation of legal parentage: for example, methods to establish paternity vary significantly in many jurisdictions based upon whether a child is born in or out of wedlock.

¹¹ See the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

¹² As to which, see the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, which excludes from its scope the establishment or contestation of a parent-child relationship (Art. 4 a)).

¹³ See, *e.g.*, the recent *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter the 2007 Convention) and its *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, which establish a comprehensive system of co-operation in the field of maintenance obligations in respect of children. The 2007 Convention deals to a certain extent with the issue of parentage in the context of child support (see the scope of the Convention in Art. 1(1)

incidentally, touched upon the issue of the legal parentage of children but has not established any rules of private international law in this field which have general effect.

III. THE BACKGROUND: DEVELOPMENTS IN DEMOGRAPHICS, MEDICAL SCIENCE AND NATIONAL LAWS

6. Historically, the issue of whom the law should identify as the child's legal parent(s) was relatively settled. However, the definition of legal parentage has been the subject of much domestic legislation in recent years.¹⁵ The uncertainty in recent decades springs from a combination of changing family patterns and advances in medical science (in particular, DNA testing and human reproductive technology).

7. In many States there are now more varied forms of family households than ever before. Global statistics show that a growing number of children are born out of wedlock,¹⁶ whether to unmarried cohabiting parents, or to single-parent families. The rise in the global divorce rate has added to these single-parent families and seen a growth in the number of children living in step-families. Moreover, in some States (albeit still a minority), alternatives to marriage (*e.g.*, registered partnerships) have been introduced.¹⁷ At the same time, marriage or its alternatives have, in a few legal systems, been made available to same-sex couples. These changing family patterns have forced States to consider, amongst other issues, how far so-called "social parenting" should play a role in determining *legal* parentage.

8. Conversely, the advent of DNA testing, which can now ascertain to a near-certain degree biological parentage, has left States grappling with the relative importance of

and Arts 6(2) *h*) and 10(1) *c*). However, these instruments do not establish any rules of private international law concerning the establishment of parentage (*e.g.*, Art. 19(2) of the 2007 Convention). See also P. Lortie, "Parentage and International Child Support Responses to the 2002 Questionnaire and an Analysis of the Issues", Prel. Doc. No 4 of April 2003 drawn up for the attention of Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance, available on the Hague Conference website at < www.hcch.net > under "Conventions" then "38" and "Preliminary Documents".

¹⁴ *E.g.*, the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*.

¹⁵ *E.g.*, the following States have amended their legislation / rules on parentage / assisted reproduction in recent years: Australia (2009, reform on assisted reproductive technologies and surrogacy), Canada (2004, reform on assisted human reproduction, 2010 Uniform Child Status Act adopted by the Uniform Law Conference of Canada), United Arab Emirates (2005, codification of family law), Qatar (2006, codification of family law), Bahrain (2009, codification of family law), France (2005, reform on parentage), Belgium (2006, reform on parentage), Germany (2008, reform on paternity acknowledgment), Puerto Rico (2009, reform on parentage), Sweden (2006, reform on access to medically assisted reproduction treatment), New Zealand (2004 and 2007, reform on human assisted reproduction), United Kingdom (2008, reform on human assisted reproduction).

¹⁶ See OECD Family database, SF2.4 Share of births outside marriage and teenage births, on < www.oecd.org/els/social/family/database >; United States National Center for Health Statistics, Data Brief No 18, Changing Patterns of Non-marital Childbearing in the United States, 8 pp. (PHS) 2009-1209. May 2009, in particular Figure No 6; United Nations Statistics Division, Demographic and Social statistics, Natality, Table No 13. Live births by legitimacy status, and percent illegitimate: 1990–1998.

¹⁷ For a discussion of the developments in national and private international law in this field, see C. Harnois and J. Hirsch, "Note on developments in internal law and private international law concerning cohabitation outside marriage, including registered partnerships" Prel. Doc. No 11 of March 2008 for the attention of the Council on General Affairs and Policy, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" and "General Affairs".

biological truth, family stability and child welfare. The last 30 years¹⁸ have also seen the creation, and the subsequent ready availability in some States, of human reproductive technology.¹⁹ This has brought with it not only fraught ethical dilemmas but also thorny legal questions. Should a sperm donor be a legal parent? How does the law regard a mother who gives birth to a child who is genetically unrelated to her?

9. As stated, this evolution in family forms and in science has given rise to a number of legal developments across States, including the law on parentage.²⁰ However, difficulties have arisen because these developments have not been globally uniform. States' approaches to issues such as paternity disestablishment (in light of DNA testing), human reproductive technology, surrogacy arrangements and same-sex families and parenting have varied greatly, depending on the State's cultural, political and social environment.²¹ As a result, there is, as yet, no international consensus on how to establish and contest legal parentage in these new circumstances.

IV. CASE EXAMPLES

10. Preliminary research has suggested²² that by far the highest number of cases reported²³ involving cross-border difficulties related to legal parentage (and its legal consequences, *e.g.*, nationality) are those involving international surrogacy arrangements. Examples of such cases are therefore dealt with first.

(a) International surrogacy

Introduction to examples

11. A brief Internet search of "international surrogacy" and, in today's world, one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilisation techniques ("IVF") and surrogacy: for a price. It is now a simple fact that surrogacy is a booming, global business. Figures are hard to verify but, as an example, some estimate that approximately 400 million US dollars²⁴ a year of

¹⁸ The first birth of a child conceived by IVF and embryo transfer occurred on 25 July 1978 in the United Kingdom. The first reported gestational surrogacy in the world occurred in 1984 (see WH Utian *et al.*, "Successful Pregnancy After an In-vitro Fertilization-embryo Transfer from an Infertile Woman to a Surrogate", 313 *New Eng. J. Med.* 1351 (1985)).

¹⁹ See, in particular, the World Collaborative Report on In Vitro Fertilization 2002, International Committee Monitoring Assisted Reproductive Technologies (ICMART), and the current work of the Committee in establishing a world registrar for In Vitro Fertilization treatments.

²⁰ *Ibid.* note 15.

²¹ As an example, in relation to surrogacy, some States decided to regulate surrogacy (*e.g.*, Israel and the United Kingdom), some to prohibit it (*e.g.*, France and Germany) and some to ignore it (*e.g.*, Belgium and Finland).

²² It must be stressed that this research is preliminary in nature and further work would be required to confirm this, see Section 0 below.

²³ The research includes those cases reported through the (online) media and academic articles, as well as through official case reports. Time has not permitted detailed verification of online and academic reports and further work would be needed to ensure access to original case reports and to request such verification from the relevant States, where necessary.

²⁴ See Cheaper Overseas: Surrogate Mothers, In-Vitro Fertilization is \$6,000 in India and \$60,000 in the US, ABC News, Sept. 28, 2007, < <http://abcnews.go.com/GMA/story?id=3664065&page=1> > (last consulted 22 March 2011) (600 IVF clinics in India bring more than \$400 million a year into the local economy); see also Sudha Ramachandran, India's New Outsourcing Business – Wombs, Asia Times Online, 16 June 2006, < http://www.atimes.com/atimes/south_asia/hf16df03.html > (last consulted 22 March 2011) (reproductive tourism valued at more than \$450 million in India); Randeep Ramesh, British Couples Desperate for Children Travel to India in Search of Surrogates: Ethics under Scrutiny as Would-be parents are Enticed by Lower Costs and Relaxed Laws, Guardian, 20 March 2006, at 26, available at < <http://www.guardian.co.uk/world/2006/mar/20/health.topstories3> > (last consulted 22 March 2011) (noting that fertility market is worth about 250 million pounds per year).

India's medical tourism industry (estimated to be worth, as a whole, approximately 2.3 billion US dollars²⁵ a year by 2012), is attributable to the reproductive segment of the market.

12. This growth in "reproductive tourism" and, in particular the growth in the international surrogacy market, can be attributed to a number of interrelated factors. First, in what appears to be many States worldwide, commercial surrogacy (and in some States, human reproductive technology as a whole) is either banned or sharply regulated.²⁶ In contrast, in a minority of States, commercial surrogacy is permitted, often with little or no internal regulation. The result of these differing laws, combined with modern means of communication and travel, has meant that individuals have had little difficulty in seeking and organising surrogacy overseas. In some of these more permissive States there is the added attraction for intending parents of lower costs²⁷ and less risk.²⁸

13. As the rapidly burgeoning case law from multiple jurisdictions indicates, the legal problems in this area are acute (and misinformation on legal matters for hopeful infertile couples, rife). As the sample of cases below shows, depending on the States involved and the exact factual matrix, problems may arise: (a) when intending parents wish to take the child "home" to their State of residence, (b) once the child is in the State of the intending parents' residence and either registration of the foreign birth certificate is sought or a judicial / administrative action is brought to recognise a foreign judgment relating to the child's legal parentage; and (c) even later in time when the issue of parentage might be raised as an incidental question to a custody or maintenance dispute.

Key for case examples

IP(s): Intending parent(s) (sometimes known as commissioning parent(s))
 S: Surrogate (birth) mother
 State A: State where the surrogacy agreement is entered into, where S is resident (and usually the State of her nationality) and where the child is born
 State B: State where the IP(s) are resident (and often the State of their nationality) and the State to which the IP(s) wish to return with the child following the birth of the child in State A

²⁵ See < http://india.gov.in/overseas/visit_india/medical_india.php > (last consulted 22 March 2011) (the National Portal of India – information on website stated to be produced by Indian Government Ministries and Departments).

²⁶ *E.g.*, Italy, Germany, France, Switzerland, Greece, Spain, Norway, New Zealand and several Australian states.

²⁷ *Ibid.* note 25 where it is stated, "The cost of Infertility treatments in India is almost 1/4th of that in developed nations. The availability of modern assisted reproductive techniques, such as IVF, and a full range of Assisted Reproductive Technology (ART) services have made India the first choice for infertility treatments."

²⁸ Where the surrogate mother is from a socio-economic background which ensures that she is in need of the financial compensation resulting from the surrogacy agreement and / or cannot afford to parent another child, it might be said that there is less likelihood of her reneging upon the agreement.

Examples

(1) Inability of IP(s) and child to leave State A to travel to State B due to fact IP(s) are unable to secure passport or travel documentation for the child²⁹

- A couple (the IPs), resident in and nationals of State B, use the Internet to find a surrogacy agency in State A, 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 A. The surrogacy agreement is entered into subject to the law of State A. 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).³⁰
- The child is born in State A and transferred into the care of the IPs. Depending upon the requirements of State A, the IPs may be able to place their names immediately on the birth certificate in State A or (more common) they will seek an order from a court in State A confirming that they are the legal parents of the child and that the birth certificate may be amended to reflect this fact.³¹
- The law of State A 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 A.
- The IPs apply to the local consulate of State B for a passport to enable them to travel "home" with their new child.
- The consulate of State B rejects the application for the passport on the basis that the law in State B considers S and her husband to be the legal parents of the child. The child is therefore not entitled to citizenship of State B.

²⁹ Cases the Permanent Bureau is aware of which are *similar* (but not identical) to this factual scenario include *Baby Manji Yamada v. Union of India & Anr.* (2008) INSC 1656 (29 September 2008) (Japan / India); *Re G (Surrogacy: Foreign Domicile)* [2008] 1 FLR 1047 (Turkey / UK); the *Jan Balaz* Case (Germany / India) – this case is reported at first instance in the Gujarat High Court in India as *Balaz v. Anand Municipality* (11 November 2009). The Indian government appealed the decision to the Supreme Court. However, the case was eventually compromised on the basis that the children were permitted to return to Germany having gone through the inter-country adoption channel, see < http://articles.timesofindia.indiatimes.com/2010-05-27/india/28279835_1_stateless-citizens-balaz-surrogate-mother > (last consulted 22 March 2011). In *X & Y (Foreign Surrogacy)* [2009] 1 FLR 733, twin children were, in the words of Hedley J, left "*marooned, stateless and parentless*" in the Ukraine following a surrogacy agreement which had been entered into by British parents (the IPs) with a surrogate mother (S) and her husband in the Ukraine. Following a long delay due to DNA testing, eventually the children were granted discretionary leave to enter the United Kingdom "outside the rules" which made it possible for the IPs to apply in the English Court for an order giving them legal parentage of the children ('parental orders' under what was then the Human Fertilisation and Embryology Act 1990). *Re K (Minors) (Foreign Surrogacy)* [2010] EWHC 1180 also involved travel difficulties for the children – see note 36 below.

³⁰ This varies from case to case and depends upon whether the law in State A permits *commercial* as opposed to *altruistic* surrogacy agreements. In many recent cases studied, the agreement has been commercial in nature.

³¹ In some States which permit surrogacy agreements (*e.g.*, California), a *pre-birth* order confirming the IPs legal parentage can be sought from the court.

Result: the IPs and the child are left “stranded” in State A and cannot remain there indefinitely (due to immigration controls). **The child is stateless and with uncertain parentage.**

What has happened to the child(ren)? Cases such as the above have often received high profile media coverage. In some cases diplomatic solutions have been negotiated between States, including either intercountry adoption solutions³² or the issuing, by *State A*, of a one-time, “outside the rules” transit visa to enable the child to travel to State B.³³ However, this has often taken some considerable time to negotiate (in one particular case the children and their father were stranded in India for more than two years³⁴) and in some cases the child’s status in State B has been unclear upon return.³⁵ In other cases, *State B* has adjusted its immigration procedures to enable a child to enter State B “outside the rules” but only once certain conditions were satisfied, including the immigration officer being satisfied that it is likely that the IPs will be able to obtain a court order in State B confirming their legal parentage on return to the jurisdiction. However, this has caused difficulties in terms of seeking the court in State B’s *prior* confirmation that the child will likely be granted an order recognising the IPs as the legal parents of the child.³⁶ In other cases, legal proceedings have been brought in *State B* (whilst the IPs and child remain in State A) to contest the refusal to grant the passport to the child.³⁷

(2) State B will not recognise State A’s judgment granting the IP(s) legal parentage on public policy grounds

- In this second set of cases,³⁸ the factual scenario remains the same as above, except that, following the child’s birth, the child *is* able to travel to State B with the IPs.³⁹

³² This appears to be the solution which was adopted in the *Jan Balaz* Case. However, see Section I above and note 7 stating the view of the Special Commission meeting on the practical operation of the 1993 Convention that use of the 1993 Convention in these cases is inappropriate.

³³ For example, in the case of *Baby Manji*, *ibid.* note 29.

³⁴ The *Jan Balaz* Case, *ibid.* note 29.

³⁵ See the *Baby Manji* Case, *ibid.* note 29.

³⁶ This was the situation in *Re K (Minors) (Foreign Surrogacy)* [2010] EWHC 1180. In this case the English IPs entered into a surrogacy agreement with a married couple in India and twins were subsequently born in India. Under English law the Indian couple were considered to be the legal parents of the twins. The IPs could not therefore obtain British passports for the children to return to the UK. Under UK immigration rules, they therefore needed to obtain “Entry Clearance” for the children to enter the UK. (In the UK entry clearance is an executive decision, not a judicial decision). Guidance produced by the UK Border Agency known as “Inter-Country Surrogacy and the Immigration Rules” states that in international surrogacy cases the Border Agency has to be satisfied that, upon the children’s return to the UK, evidence suggests that an order granting the IPs legal parentage will be “likely to be granted” by the court. However, in these cases, no application for legal parentage can be made by IPs to the English Court *prior* to the children’s return to England due to the English jurisdiction rules in such matters. The court would not give what it considered an advance “advisory opinion” on the case but made some *obiter* comments on the facts. It stated that whether the Entry Clearance Office found them helpful was a matter for it. It is unknown whether the children have subsequently been granted Entry Clearance to leave India and return to the United Kingdom.

³⁷ See, *e.g.*, the recent Dutch case, LJN: BP0426, *Voorzieningenrechter Rechtbank Haarlem*, AWB 10/6420 (10 January 2011) – available (in Dutch) at: < http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BP0426&u_ljn=BP0426 > (last consulted 22 March 2011).

³⁸ Cases the Permanent Bureau is aware of which are *similar* to this scenario include 2006 (Kyo) No 47, decision of 23 March 2007 (Japan / Nevada) where the Japanese Court of Appeal refused to recognise the decision of the Nevada Court recognising the IPs as the legal parents of twins born as a result of an altruistic surrogacy agreement entered into in Nevada. In a slight variation of these facts, the decision of the Paris Court of Appeal (26 February 2009) (France / USA) involved French IPs who travelled to Minnesota to enter into a surrogacy arrangement. Following the birth of the child, the Minnesota court recognised the IPs as the legal parents of the child (in this case, it seems through an adoption order). This order was subsequently entered into the civil status register in France. However, the “*Ministère public*” in France subsequently sought the annulment of the transcription on the grounds that it was contrary to public policy (the French Civil Code provides that surrogacy is forbidden – see Art. 16-7 of the Civil Code). This argument succeeded before the Court of Appeal.

³⁹ This appears to be most usual in cases where the surrogacy agreement is entered into in the USA (obviously in a state in the USA which permits surrogacy agreements). It seems that US citizenship rules are such that by dint of birth in the USA, the child acquires US citizenship and he / she can therefore travel back to State B on a US passport.

- However, it is in State B that the difficulties commence for the child. The IPs seek to confirm the child's status in State B and therefore bring legal proceedings for the recognition of the foreign judgment from State A according them legal parentage.
- The court in State B refuses to recognise the foreign judgment on grounds of public policy.

Result = The child is residing in a State which does not recognise his principal carers as his legal parents, with all the legal disadvantages which flow from this.

What has happened to the child(ren)? In some cases the court has permitted a "special adoption" of the child by the IPs.⁴⁰ In other cases it has not been clear how the court intends the situation for the child to be rectified.

A variation on the above scenario could be when State B 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 B recognising them as legal parents *if* they can show that they have not paid more than reasonable expenses to S in State A. If this cannot be proved, the court of State B may refuse to grant the IPs legal parentage. This refusal results in a similar precarious situation for the child.⁴¹

⁴⁰ 2006 (Kyo) No 47, decision of 23 March 2007 (Japan / Nevada) – see note 38.

⁴¹ *E.g.*, in the UK, surrogacy arrangements are lawful but it is an offence for third parties to broker a surrogacy arrangement on a commercial basis, as well as to advertise in connection with the making of a surrogacy arrangement (Surrogacy Arrangements Act 1985). Furthermore, whilst it is possible, following the birth of a child to a surrogate, for the IPs to obtain a "parental order" essentially reassigning legal parentage to them and extinguishing the legal parentage of the surrogate (and her husband, where relevant), various conditions must be met before the court can grant such an order. One condition is that "The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants [the intending parents]...unless authorised by the court" (see s. 54 of what is now the Human Fertilisation and Embryology Act 2008). Regarding the principles the court will apply in determining whether to authorise any payments made, see, *e.g.*, *Re X & Y (Foreign Surrogacy)* [2009] 1 *FLR* 733 and *Re S (Parental Order)* [2010] 1 *FLR* 1156. In all the cases which have so far come before the English Court, the payments made to surrogate mothers have been authorised. As Hedley J stated in *Re X & Y*, it is almost impossible to imagine a set of circumstances in which, by the time the case comes to court, the welfare of any child would not be gravely compromised by a refusal to make an order granting the intending parents legal parentage. If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing of such an application; the point of admission into the country is, in some ways, the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.

(3) State B will not recognise the *birth certificate* granted in State A recognising the IPs as legal parents on public policy grounds

- In these cases, the facts are identical to those in example (2) above, save that this time the IPs, when back in State B, seek recognition of the *birth certificate* granted in State A (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.⁴²

14. Non-recognition of the parent-child relationship may have a number of serious consequences for the rights and welfare of the child, in particular regarding the child's right to acquire a nationality,⁴³ the child's right to an identity,⁴⁴ and States' obligations to ensure that children do not end up stateless.⁴⁵ In a number of States *ad hoc, ex post facto* remedies have been found with a view to reducing the harmful impact of this legal limbo for children.⁴⁶ These remedies are ways of trying to cope with situations which are, in effect, a *fait accompli*: the child is already born and usually the surrogate mother does not wish to care for the child and the intending parents do.

⁴² Cases the Permanent Bureau is aware of which are *similar* to this scenario include *Dirección General de los Registros y el Notariado* (DGRN) 2575/2008, 18 February 2009 (Spain / California). In this case a homosexual Spanish couple (IPs) moved to the USA for the purposes of entering into a surrogacy arrangement with a US surrogate mother (S). Twins were born and birth certificates were issued in the US recognising the two male IPs as the legal parents. The Spanish authorities refused to register the birth certificates in Spain. This refusal was challenged by the couple and they succeeded before the DGRN. However, on 17 September 2010, the Tribunal de Primera Instancia No 15 of Valencia overturned this decision at the request of the Public Prosecutor and declared the entries null. It is reported that the couple have decided to appeal the decision to the Audiencia Provincial. Further, the DGRN has now issued an "Instruction" regarding affiliation registration in cases of international surrogacy – see < <http://www.boe.es/boe/dias/2010/10/07/> >. In two Dutch cases of 2009 (Netherlands / France and Netherlands / California), the Dutch Court held that a foreign birth certificate that does not name the birthmother of the child, while it is known who gave birth to the child, violates Dutch public policy and cannot be recognised (see J.S. Kees, "European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage". Dissertation: 2010 at p. 272. Available at < <http://arno.unimaas.nl/show.cgi?fid=19540> > (last consulted 22 March 2011)). In a recent Belgian case (Belgium / California), a Belgian same-sex married couple were named as the legal fathers of twin boys on the birth certificates of the boys in California. When the couple returned to Belgium with the children, the local authorities refused to give any effect to the birth certificates. The parents challenged this refusal before the Court of First Instance which was denied (March 2010). However, on 6 September 2010, the Court of Appeal of Liège, 1st Chamber, docket No 2010/RQ/20 reversed in part the decision of the lower court. It recognised and gave effect to the birth certificates issued in California but only in so far as they formed the basis for the legal link between the twins and their *biological* father. See further < <http://conflictoflaws.net/2010/belgian-court-recognizes-californian-surrogacy/> >.

⁴³ Art. 7(1), UNCRC.

⁴⁴ Art. 8, UNCRC.

⁴⁵ Art. 7(2), UNCRC.

⁴⁶ For a good overview of the difficulties in this area and some of the *ad hoc* remedies which have been used by States, see also the report of the French Senate on Surrogacy: *Rapport d'information de Mme Michèle ANDRÉ, MM. Alain MILON et Henri de RICHEMONT, fait au nom de la commission des lois et de la commission des affaires sociales*, Sénat, No 421 (2007-2008) – 25 June 2008.

(b) Other possible difficulties relating to legal parentage in cross-border situations

(1) Paternity disestablishment⁴⁷

- A married couple reside in State X, 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, 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 X rejects H's request based upon its legislation prohibiting challenges to paternity after a child's second birthday. The court in State X 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 Y, a State in which there is no time bar on challenging paternity. H files a new action in the court in State Y 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 Y to recognise the decision of the court of State X regarding parentage due to the fact that he has not been able to present scientific evidence to contest paternity.

(2) Medically assisted reproduction ("MAR") in non-surrogacy cases

*Example 1:*⁴⁸ *an unmarried couple travel overseas for IVF treatment (not surrogacy)*

- An unmarried couple are nationals of State X, but reside in State Y. As a result of fertility problems, the couple have undergone two rounds of failed IVF treatment in State Y. The couple are informed by relatives in State X of a prestigious doctor in State X who performs successful IVF treatment in difficult cases. The couple therefore travel to State X to undergo treatment.
- In State X the male partner formally consents to the IVF treatment proceeding and consents to the use of donor sperm. Under the law of State X his consent to treatment is sufficient to establish his legal paternity.

⁴⁷ This example is inspired by a hypothetical case given in the article "Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond", UC Davis Legal Studies Research Paper Series, No 178 (available at < <http://ssrn.com/abstract=1424535> > (last consulted 22 March 2011)). In the article, the hypothetical example was an intra-US case involving conflicting laws in different states of the USA. However, as this description shows, the same hypothetical example can be extrapolated to an international scenario.

⁴⁸ This example is inspired by the English case of *U. v. W. (Attorney-General Intervening)* [1998] Fam 29 but the facts are not identical.

- The IVF treatment is successful and the couple return home to State Y for the birth.
- The child is born in State Y 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 Y 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 Y. He states that, despite the birth certificate, he is not the legal father under the law of State Y since the requirements of State Y for accessing MAR treatment were not met. This is because the clinic where the IVF treatment took place in State X was not a "licensed clinic" within the meaning of the relevant legislation in State Y.
- The court in State Y declares that, under the law in State Y the male partner cannot be considered to be the legal father of the child for this reason.

Example 2:⁴⁹ A female same-sex couple decide that one of them will undergo artificial insemination in State X. Post relocation to State Y the relationship breaks down and the biological mother contests the legal maternity of the co-mother.

- T and W enter into a civil union in State X. They subsequently agree to have a child together through artificial insemination (donor sperm). State X 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 X contains the name of both T and W. According to the law of State X, the child has two legal mothers and no legal father.
- As a result of a job offer, the family relocate to State Y, 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 issues court proceedings in State Y 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 Y should recognise the birth certificate of State X.
- State Y determines that the birth certificate of State X cannot be recognised on public policy grounds and that W therefore has no standing to claim custody in respect of the child.

⁴⁹ This example is inspired by (but again not identical to) an intra-US case where a conflict occurred between state law in Vermont and Virginia – see *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007), and the related Virginia proceedings, *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006).

V. THE ESTABLISHMENT OR CONTESTATION OF LEGAL PARENTAGE FROM A PRIVATE INTERNATIONAL LAW PERSPECTIVE

(a) Birth certificates: registration and recognition

Registering a birth

15. States Parties to the UNCRC are bound by Article 7(1) of that Convention which states: "The child shall be registered immediately after birth...".⁵⁰ It is therefore perhaps unsurprising that States generally do not limit the jurisdiction of their State officials to register a child born in their State in any way: the fact of birth in the State is enough. However, a number of States do offer, in addition, the possibility for their nationals (and sometimes their residents) to register with them a child born overseas. This registration may be operated by diplomatic and consular agents⁵¹ and any registration effected must be transmitted to national competent authorities.

16. When registering a birth, to establish the legal parentage of the child concerned, States generally apply their own conflict of laws (applicable law) rules, which, at least in common law States, often lead to the application of the *lex fori*. If the birth of a child is registered in both the State of the parents' nationality or residence (if permitted) and the State where the child is born, the same child may have two birth certificates. Depending upon the applicable law rules of each State, this *could* result in the child having different legal parents in each State. However, our preliminary review has not brought to light actual cases where differences have resulted from this dual registration of births.

The recognition of foreign birth certificates

17. As regards the recognition of foreign birth certificates, some States will treat a foreign birth certificate as a statement of fact (*i.e.*, as a matter of evidence, but not a conclusion of law).⁵² In this scenario a foreign birth certificate will not be subject to the rules regarding the recognition of foreign decisions / judgments. As a result, the competent authorities will simply take the fact of the foreign birth certificate into account when establishing legal parentage under their own law (and, where relevant, under their own applicable law rules). This approach creates a risk that the State considering the foreign birth certificate may reach a different conclusion on the question of the child's legal parentage to that reflected in the birth certificate. However, in some States the situation is more complex than this.⁵³ Further, at least one State⁵⁴ has set aside this

⁵⁰ Full text of Art. 7(1), UNCRC, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

⁵¹ In particular, Art. 5 f) of the Vienna Convention on Consular Relations of 24 April 1963 provides for such a consular function.

⁵² It should be noted that, in relation to a foreign birth certificate, in some States a preliminary issue may be the authenticity of the document. Legalisation is the process required to verify that the signature of the civil registrar who issued the document or extract is authentic. A number of bilateral or multilateral agreements dispense with legalisation, in particular the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*. However, it is worth remembering that an Apostille only certifies the signature, the capacity of the signer and the seal or stamp it bears. It does not certify the content of the document for which it was issued (see Art. 5 of the 1961 Convention and para. 85 of the Conclusions and Recommendations of the 2009 Special Commission on the practical operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions). Other multilateral treaties have also been adopted under the aegis of the International Commission on Civil Status with a view to facilitating the proof of civil documents for individual and families across borders. *E.g.*, the *Convention introducing an international family record book*, Paris, 12 September 1974; the *Convention on the exemption from legalisation of certain records and documents*, Athens, 15 September 1977, the *Convention on the recognition and updating of civil status booklet*, Madrid, 5 September 1990.

⁵³ *E.g.*, in Belgium, a distinction is made between the acceptance of a foreign birth certificate as a matter of fact (Art. 29, Code of Private International Law), the use of a foreign birth certificate for evidence purposes (Art. 28, Code of PIL) and full recognition (Art. 27, Code of PIL: the so-called "conflict of law" method).

⁵⁴ The Netherlands.

“conflict of law method” and adopted a “recognition method” as regards civil status documents. Using this approach, such a civil status document will be recognised if: (1) the document has been drawn up by a competent authority in the foreign State; (2) the legal facts or acts have been established abroad, (3) the legal fact or acts appear in the document; and (4) the legal facts or acts have established legal parentage (*filiation*) abroad.⁵⁵ However, recognition of such a document *must* be refused when: (a) proper verifications have not been taken when establishing legal parentage abroad; (b) the document contradicts a decision of the national courts; or (c) it contradicts national public policy.⁵⁶

(b) The law applicable to the establishment of legal parentage by operation of law or by agreement

National law rules

18. In many States, upon the birth of a child, legal parentage will arise by operation of law (*i.e.*, there will be no need for individuals to take action to establish their legal parentage) or by agreement between the putative parents.

19. For example, in many States legal parentage for a mother will arise by operation of law as a result of the fact of giving birth⁵⁷ (which, as seen above, can lead to difficulties in surrogacy cases). In relation to paternity, in many States certain legal “presumptions” operate. First, if a mother is married, there is often a rebuttable presumption that her husband is the legal father of the child. This presumption can be rebutted in many States by presentation of evidence to the contrary (*e.g.*, DNA testing). However, whilst a common approach seems to be taken among jurisdictions in relation to *married* couples, there does not appear to be the same international consensus in relation to children born out of wedlock. Depending upon the legal system concerned, a presumption of legal parentage may be extended to heterosexual registered partners, unmarried cohabiting couples and, in a minority of States, to same-sex couples. Where a legal presumption does not apply in relation to unmarried couples, in some States and in certain circumstances, the putative father may be able to agree with the mother to register himself as the legal father of the child (usually to put his name on the birth certificate). Additionally, or alternatively, the putative unmarried father may be able to voluntarily acknowledge paternity (see (c) below).

Applicable law rules

20. The applicable law rules in relation to legal parentage arising by operation of law or agreement are particularly diverse. While many common law jurisdictions apply the *lex*

⁵⁵ See Art. 10(1) of the Dutch *Wet Conflictenrecht Afstamming* (Conflict of Laws (Parentage) Act).

⁵⁶ Art. 10(1) of the Dutch *Wet Conflictenrecht Afstamming* (Conflict of Laws (Parentage) Act), in conjunction with Art. 9(1) under b and c WCA.

⁵⁷ It should be noted that, unlike in many other legal systems, in France the legal maternity of the birth mother is not established automatically. It is also possible for a mother to give birth anonymously (*accouchement sous X* or “birth by an unidentified person”). If this occurs, the birth mother’s legal maternity cannot be judicially established. In *Odievre v. France* App No 42326/98, the European Court of Human Rights ruled that this practice does not violate Art. 8 of the European Convention on Human Rights. This ability to give birth anonymously has featured in at least one international surrogacy case, see *Rechtbank 's-Gravenhage, 14 September 2009, LJN BK 1197* (also mentioned at note 42 above) where a surrogacy agreement was entered into in the Netherlands (between a Dutch surrogate mother and a Dutch same-sex male couple). The surrogate mother gave birth in France to take advantage of the French law permitting her to give birth anonymously. One of the men acknowledged paternity before the French civil status registrar. However, subsequently, the Dutch court held that the French birth certificate violated Dutch public policy since the rule establishing the legal maternity of the birth mother was a fundamental rule of Dutch family law.

fori, in other jurisdictions a broad range of connecting factors may be applied either in the alternative or in a cascade: *e.g.*, the habitual residence, domicile, residence⁵⁸ or nationality of the child,⁵⁹ the nationality of one⁶⁰ or both parents⁶¹ or the residence of the parents.⁶² In the absence of uniform rules on the law applicable to the establishment of legal parentage by operation of law or by agreement, these differing rules have the potential to cause difficulties in cross-border cases.

(c) The establishment of legal parentage by voluntary acknowledgement

21. Some civil law jurisdictions permit a putative father (usually an unmarried father) to voluntarily acknowledge paternity before a competent public authority. In some jurisdictions it is possible for the putative father to do this on his own, but in other jurisdictions the consent of the mother and / or child must be obtained.

22. In many States an acknowledgement of paternity will require a formal declaration by the putative father which is authenticated by the civil status registrar or another designated official. Legal systems permitting this form of “voluntary acknowledgement” usually do not limit the jurisdiction of their authorities to authenticate such an acknowledgement. This can be explained by the fact that, in these legal systems, the acknowledgement of paternity is only a declaration of the man that he is the child’s father. The registrar authenticating the acknowledgement would need to send the document to the foreign registrar who keeps the child’s birth record. However, this appears to only take place where there are international agreements in place.⁶³

23. Once a State has been informed of a voluntary acknowledgment in relation to a child whose birth record it keeps, it will usually apply its own applicable law rules to determine whether the acknowledgement validly establishes legal paternity.⁶⁴ These applicable law rules differ significantly from one State to another. Examples of common connecting factors used in these applicable law rules are: the nationality of the author of the acknowledgement,⁶⁵ the residence of the author of the acknowledgement,⁶⁶ the habitual residence of the child⁶⁷ and the nationality of the child.⁶⁸ However, it should be noted that, in many States, one *or more* of these connecting factors may apply, with a view to favouring the establishment of legal parentage. The *formal* validity of the acknowledgement is often determined by the law of the State where the acknowledgement was made. The interplay between the applicable law designated under these rules and the law designated to legal parentage arising by operation of law or agreement (see (b) above) varies greatly depending upon the legal system concerned and, in practice, has the potential to cause further difficulties and uncertainty in cross-border cases.

⁵⁸ *E.g.*, Argentina, Brazil, Paraguay, Spain, Switzerland, Uruguay and Venezuela.

⁵⁹ *E.g.*, Spain.

⁶⁰ *E.g.*, France.

⁶¹ *E.g.*, Germany, Japan and the Netherlands.

⁶² *E.g.*, the Netherlands.

⁶³ *E.g.*, the ICCS’ *Convention of 12 September 1997 on the international exchange of information relating to civil status*. This Convention provides that when a civil registrar of a Contracting State enters an acknowledgement of a child in a civil status register, he / she must send an extract from the record of the acknowledgement to the civil registrar for the place of birth of the child if that place of birth is situated in the territory of another Contracting State (Art. 3 of the Convention).

⁶⁴ However, some States do not have *specific* applicable law rules in relation to voluntary acknowledgements and may use their applicable law rules mentioned in (b) above.

⁶⁵ *E.g.*, France, Japan, the Netherlands and Switzerland.

⁶⁶ *E.g.*, the Netherlands and Switzerland.

⁶⁷ *E.g.*, the Netherlands and Switzerland.

⁶⁸ *E.g.*, France, Germany, Japan, the Netherlands and Switzerland (regarding the consent of the child).

24. With a view to harmonising the applicable law rules on voluntary acknowledgement and favouring the establishment of legal parentage of children born out of wedlock, in 1980, the International Commission on Civil Status concluded the *Convention on the applicable law to voluntary acknowledgment of children born out of wedlock*.⁶⁹ The Convention sets out a conflict rule pointing at alternative laws governing voluntary acknowledgements and states that, once a declaration of acknowledgment has been made in accordance with one or other of these laws, the declaration can be recognised and considered as valid in all other Contracting States.⁷⁰ However, the Convention has not yet reached the necessary number of ratifications to enter into force. This seems to be due to the restrictive approach adopted in the Convention to the use of public policy exception (which had already been the subject of very lengthy discussions among the drafters).⁷¹

25. However, it should be noted that in other legal systems, jurisdiction to register a voluntary acknowledgement of paternity is strictly confined (*e.g.*, in Sweden authorities are only able to register an acknowledgement if the child is resident in Sweden). This is because, in such jurisdictions, a voluntary acknowledgement cannot be registered without a public authority certifying it as a "valid" acknowledgement. This requires an investigation into the child's legal parentage by the public body. In these circumstances the public authority will apply Swedish law (*lex fori*) to determine whether an acknowledgement can be validly made (*i.e.*, whether the putative father is the legal father).

(d) Decisions concerning legal parentage given by judicial or administrative authorities

Jurisdiction to determine legal parentage

26. Grounds of jurisdiction to establish or contest legal parentage seem to differ greatly between States. Some States do not have specific rules regarding jurisdiction in matters of legal parentage. In these States the rules governing jurisdiction to establish / contest parentage may be the general rules on jurisdiction in civil matters.⁷² Often in these States at least one possible ground of jurisdiction will be the domicile of the defendant.⁷³ Other States have specific rules regarding jurisdiction for parentage disputes.⁷⁴ Some of these specific rules again rely upon the domicile of the defendant as at least one possible ground of jurisdiction;⁷⁵ other possible grounds might be the residence of the child,⁷⁶ the residence of the putative father,⁷⁷ or the nationality of any of the parties.⁷⁸ A number of States will additionally accept jurisdiction on the basis of *forum necessitatis*.⁷⁹

⁶⁹ ICCS Convention No 18, *Convention on the voluntary acknowledgement of children born out of wedlock*, signed at Munich on 5 September 1980.

⁷⁰ See Explanatory Report to ICCS Convention No 18, adopted by the General Assembly in Munich on 3 September 1980.

⁷¹ See *ibid.* note 70, regarding Art. 4 of the Convention.

⁷² *E.g.*, France, The Netherlands

⁷³ In France it appears that the French Court will *also* have jurisdiction in relation to the establishment or contestation of parentage if either the applicant or defendant has French *nationality*. In the Netherlands it appears that jurisdiction may also be found upon the domicile or habitual residence of "any interested party" (*i.e.*, the child, the legal parent(s) and the putative father).

⁷⁴ *E.g.*, England and Wales, Germany and Sweden.

⁷⁵ *E.g.*, England and Wales.

⁷⁶ *E.g.*, Germany ("habitual residence") and Sweden.

⁷⁷ *E.g.*, Spain and Sweden (only where putative father is defendant to the application).

⁷⁸ *E.g.*, Germany and Spain.

⁷⁹ *E.g.*, France and the Netherlands.

Applicable law to determinations of legal parentage

27. In terms of the applicable law rules relating to determinations of legal parentage, initial research suggests that States of the common law tradition usually apply the *lex fori* to the establishment, as well as the contestation of parentage. In contrast, other applicable law rules are often used in States of the civil law tradition. However, the content of the rules differs considerably from State to State. The rules may designate: the law of the habitual residence⁸⁰ or nationality⁸¹ of the child, the law of the common nationality⁸² or residence⁸³ of the putative parents, the law of the nationality of the mother⁸⁴ and, under certain circumstances, the law of the forum.⁸⁵ However, many of these States, in order to favour the establishment of parentage where possible, will apply connecting factors in the alternative or in a "cascade" (where parentage cannot be established by an application of the first law designated).

28. It should be noted that specific applicable law rules will often apply to the voluntary acknowledgement of children (see (c) above).

Recognition of foreign decisions regarding legal parentage

29. In many States foreign decisions or orders establishing parentage are recognised by operation of law. It appears that the most common grounds for non-recognition of a foreign decision are: (1) lack of jurisdiction of the foreign court according to its own jurisdiction rules, (2) violation of public policy of the State where recognition is sought; (3) the existence of fraud; and (4) the existence of a previous decision contradicting the decision to be recognised.

30. It should be noted that some States may still refuse to recognise a foreign decision on the basis of a lack of jurisdiction according to the jurisdiction rules *in the State where recognition is sought*. Some States may also refuse recognition where the foreign court applied a law different from that which would have been designated by the applicable law rules of the State in which recognition is sought.

VI. INTERNATIONAL SURROGACY ARRANGEMENTS: SOME OF THE BROADER CONCERNS

(a) The protection of vulnerable persons

The children

31. International surrogacy arrangements raise obvious and real international child protection concerns; for example, possible child abuse and child trafficking of the children born as a result of the arrangements. If there is little or no regulation in the State where the surrogacy arrangement takes place (*e.g.*, rules on screening / assessing possible intending parents), it is not hard to see how the possibility may arise for either children to be "commissioned" specifically for trafficking / abuse purposes or to end up entangled in such dangers. Indeed, in a domestic context, one example of such a case already exists: the *Huddleston*⁸⁶ case is a chilling reminder of the possible dangers to children

⁸⁰ *E.g.*, Spain and Switzerland.

⁸¹ *E.g.*, Spain.

⁸² *E.g.*, Japan.

⁸³ *E.g.*, the Netherlands.

⁸⁴ *E.g.*, France.

⁸⁵ *E.g.*, Sweden.

⁸⁶ *Huddleston v. Infertility Clinic of America Inc.* (20 August 1997) (Superior Court of Pennsylvania) – available at < <http://caselaw.findlaw.com/pa-superior-court/1190217.html> > (last consulted 22 March 2011). This reported decision relates to the wrongful death action which the surrogate mother instituted against the fertility clinic.

which unregulated⁸⁷ arrangements can pose. In this case, a twenty-six year old male was able to enter into a surrogacy arrangement as a sole intending parent with a surrogate mother in Pennsylvania, facilitated by a fertility clinic. The surrogate mother was artificially inseminated with the intending father's sperm. In accordance with the surrogacy agreement, the child was handed into the father's care a day after birth. The child died approximately six weeks later as a result of repeated physical abuse.

32. In relation to child trafficking, it is known that arrests have already been made as a result of the fact that one surrogacy agency was thought to be engaging in such practices.⁸⁸

33. Other child protection concerns which international surrogacy arrangements raise include the position of the child if one / both intending parents decide they no longer want the child⁸⁹ or the position of the child if the surrogate mother decides she wishes to keep the child.⁹⁰ Also, the right of a child to know his / her identity has already been mentioned above. Part of this identity is a child's right to know his / her origins and background. Careful consideration needs to be given to the right of the child to know, for example, the identity of the surrogate mother or any gamete donor, and how this will balance against the right of the surrogate and any donors to anonymity.

The surrogate mother

34. In relation to surrogate mothers, concerns for safety and well-being are perhaps particularly acute where the mothers live in conditions of poverty. In these circumstances, concerns have arisen that women may be coerced, or even forced, into becoming surrogate mothers. Unfortunately, it seems that these concerns are not fanciful. On 25 February 2011, the BBC reported that police in Thailand had discovered a Taiwanese-run surrogacy agency which had allegedly coerced and, in some cases, forced Vietnamese women to become surrogate mothers. The Thai Public Health Minister was reported as stating that, in some cases, it appeared that the women had been raped.⁹¹ However, even in more routine cases, as one commentator has put it, it "is debatable whether women are choosing freely to become surrogates, or that their will is socially and economically constructed."⁹² In terms of the sums of money involved for such surrogates, it has been estimated that in States such as India, surrogate mothers may be able to earn approximately ten times their husband's income per year for one surrogacy.⁹³ As another commentator has stated: "When the 'choices' can be so dire, it is

⁸⁷ It is apparent from the case report (*ibid.* note 86) that, at this time, Pennsylvania had not legislated in the area of surrogacy. The court stated, "although Pennsylvania has not legislated in the area of surrogate parenting, many other states have enacted legislation addressing surrogacy situations in which the participants to a surrogacy agreement are required to undergo psychological testing. Such requirements are meant to ensure that the surrogate will be emotionally able to part with her child and that the child born of a surrogacy contract will be placed in the care of persons who will give the child love, affection and guidance."

⁸⁸ See note 91 below.

⁸⁹ *E.g.*, because the IPs have ended their relationship or because the child born is disabled.

⁹⁰ See also the "contractual issues" mentioned below.

⁹¹ See < <http://www.bbc.co.uk/news/world-asia-pacific-12575566> > (last consulted 22 March 2011).

⁹² Jyotsna Agnihotri Gupta, "Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies", 13 *Eur. J. Women's Stud.* 23 at 32 (2006).

⁹³ Usha Rengachary Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India", (2008) 39:1 *Cumberland Law Review* 15 at 54.

possible that Indian women may be pressured by their families, brokers, and personal circumstances to lend their bodies for cash."⁹⁴

35. The treatment and care given to surrogate mothers may also be of concern, depending upon the State concerned and the particular arrangement reached with the intending parents (most usually medical expenses are paid for by the intending parents).

The intending parent(s)

36. A significant difficulty for couples wishing to become parents through international surrogacy arrangements is the amount of misinformation which currently exists. Indeed, in the recent English case of *Re L* [2010] EWHC 3146 (Fam), the Judge stated: "It is also necessary to observe that it is still the case that the most careful and conscientious parents (as these are) are still receiving incorrect information...".

37. This ties in with the issue of regulation of agencies (see (b) below). There are many agency websites which can be described as, at best, misleading. It also seems that international surrogacy is an area where reliable legal advice may be difficult to obtain.

38. Another difficulty for intending parents is the possibility of criminal proceedings being brought against them as a result of misunderstandings or difficulties with the birth certificate of the child. There have been reported instances of such difficulties.⁹⁵

(b) The regulation of agencies

39. Consideration also needs to be given to the possible regulation of any agencies involved in the international surrogacy process. At the current time, State regulation of such agencies varies. Further, many agencies are involved in not only the "matching" process (matching intending parents with a surrogate mother), but also carrying out the medical treatment. Whilst in some States agencies are only allowed to operate on a not-for-profit basis, in other States agencies are making a significant financial profit as a result of the arrangements (*e.g.*, in India).

40. A possible model for regulation would be the approach adopted in the 1993 Hague Intercountry Adoption Convention setting out procedural safeguards and a system of "accreditation" for those bodies providing services.

⁹⁴ *Ibid.* note 93.

⁹⁵ *E.g.*, In August 2008, an Indian couple were detained at the Mumbai airport and jailed when they attempted to take a 16-month old child to Canada (seemingly following a domestic surrogacy arrangement). The couple was charged with carrying a fraudulently obtained passport for the child which listed the couple as parents instead of the child's biological and gestational mother. According to a deputy commissioner involved in the case, "It seems like a matter of surrogacy. Whatever the case might be, the passport has to document the details accurately." See "Baby girl's fake passport lands couple in trouble", *Times of India*, 15 August 2008, < <http://timesofindia.indiatimes.com/articleshow/3367440.cms> > (last consulted 22 March 2011).

(c) Co-operation between State authorities

41. In order to ensure any international regulation is effective, there will need to be clear channels of communication between States.⁹⁶ The Central Authority mechanism which has been used with such success in the Hague Conventions on Legal Co-operation and subsequently in the modern Hague Children's Conventions may be of relevance in this regard.

(d) Contractual issues

42. Consideration may need to be given to the contractual aspects of international surrogacy arrangements. In most jurisdictions, including many States where surrogacy arrangements are permitted, surrogacy agreements are not enforceable contracts. However, if one or other party reneges on the agreement or is not able to act in accordance with the agreement for any reason, it is possible that a contractual remedy may be sought by one of the parties. This may, in turn, raise a number of issues including, for example, capacity or legality, on which the two legal systems concerned, may have different rules.

(e) International surrogacy and the 1993 Hague Intercountry Adoption Convention

43. Lastly, there is concern⁹⁷ that, due to the current need for States to create *ad hoc* remedies in international surrogacy cases, intercountry adoption under the 1993 Convention has been used, and may be used in future, to resolve these cases. This is not the place for a detailed explanation as to why use of the 1993 Convention is inappropriate to resolve the difficulties surrounding international surrogacy.⁹⁸ However, it can be quickly established that some of the *basic* requirements of the 1993 Convention simply cannot be fulfilled in international surrogacy cases. For example: (1) Consents – Article 4 c) (4) of the 1993 Convention states that the consent of the mother (where required) must be given *after* the birth of the child. This is difficult in a surrogacy case since the surrogate mother will have usually agreed to relinquish her parental rights before the child has even been conceived. Article 4 c) (3) of the 1993 Convention requires that the necessary consents “have not been induced by payment or compensation of any kind”. This requirement is clearly at odds with a *commercial* surrogacy arrangement. (2) Subsidiarity – it is difficult to see how the “subsidiarity principle” (Art. 4 b) of the 1993 Convention), which requires due consideration to be given to the possibility of placement of the child in the State of origin, can be satisfied in an international surrogacy case. (3) Procedural safeguards – Article 17 of the 1993 Convention requires that, before a child is “entrusted” to the prospective adopters, a number of essential procedures must have been completed and the Central Authorities of

⁹⁶ An interesting approach is currently being discussed by India in this regard. The *Draft Assisted Reproductive Technologies (Regulation) Bill 2010* requires that any persons wishing to enter into an international surrogacy arrangement with a surrogate mother in India must ensure and establish to the assisted reproductive technology clinic through proper documentation prior to entering into the arrangement that they would be able to take the child / children born through surrogacy outside of India to the State of their origin or residence following the child's birth. “Proper documentation” is defined as, “a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple / individual.” From the Permanent Bureau's limited review, this draft bill seems to be the first legislation which considers cross-border co-operation in the area of international surrogacy. However, the draft bill is not without controversy (see the article written by Malhotra & Malhotra commenting upon the 2008 version of the draft legislation, “Commercial Surrogacy in India” [2009] *IFL* 9).

⁹⁷ *Ibid.* note 7.

⁹⁸ See also note 5.

both States must have agreed that the adoption may proceed. The Central Authorities should only do this when they are satisfied that the proper procedures (e.g., the exchange of files coming from the child and the prospective adopters) have been applied and that there are no legal obstacles to the adoption. In contrast, an international surrogacy arrangement will often provide that the child will be “entrusted” to the intending parents without any prior formalities or safeguards. (4) Prohibition on contact – there is a general rule in Article 29 of the 1993 Convention that there should be no contact between the prospective adopters and the child’s parents until a number of basic conditions have been satisfied (except in the case of an in-family adoption). A surrogacy arrangement is obviously inconsistent with this principle since contact will be established between the intending parents and the surrogate when the surrogacy agreement is entered into and possibly when any medically assisted reproduction treatment takes place.

VII. INTERNATIONAL AND REGIONAL EFFORTS

44. There are a number of international and regional efforts which have been, or are being, undertaken which touch upon issues related to the legal status of children in cross-border cases. However, it should be noted that none of the efforts set out below comprehensively establish private international law rules, or indeed rules relating to cross-border co-operation either generally in relation to the legal status of children, or in relation to international surrogacy.

45. The International Commission on Civil Status (ICCS) has as its aim the facilitation of international co-operation in civil status matters and the improvement of the operation of national civil status departments. The ICCS has long standing experience in establishing, through multilateral Conventions, co-operation between civil status authorities,⁹⁹ common substantive rules,¹⁰⁰ the harmonisation of civil status documents and the facilitation of their circulation,¹⁰¹ as well as common applicable law rules on the voluntary acknowledgement of parentage.¹⁰² However, as described above, the ICCS Conventions have dealt mainly with the exchange of information and the formal aspects of civil status documents and the work of this organisation in relation to private international law issues regarding the legal status of children is limited. In light of the expertise of the ICCS in the area of co-operation in civil status matters, any possible work that the Hague Conference might carry out in this field will need to give careful consideration to the activities of the ICCS and the existing Conventions concluded under its aegis.

46. In terms of regional efforts, the Council of Europe has taken a number of initiatives to attempt to harmonise the *substantive law* of Member States regarding the legal status of children. The 1975 *European Convention on the Legal Status of Children Born Out of Wedlock* (ETS No 85) enabled progress to be made regarding the protection of children against discrimination based on their parents’ status.¹⁰³ However, a broader instrument is currently being drafted within the Council of Europe which covers the rights and legal status of children and parental responsibilities in respect of children.¹⁰⁴ This draft

⁹⁹ In particular, the *Conventions on the international exchange of information relating to civil status* of 4 September 1958 and of 12 September 1997.

¹⁰⁰ In particular, the *Convention on the establishment of maternal descent of natural children*, Brussels, 12 September 1962.

¹⁰¹ In particular, the *Convention introducing an international family record book*, Paris, 12 September 1974; the *Convention on the exemption from legalisation of certain records and documents*, Athens, 15 September 1977; the *Convention on the recognition and updating of civil status booklet*, Madrid, 5 September 1990.

¹⁰² In particular, the *Convention on the voluntary acknowledgment of children born out of wedlock*, Munich, 5 September 1980.

¹⁰³ See, in particular, its Preamble.

¹⁰⁴ The Draft Recommendation on the rights and legal status of children and parental responsibilities (May 2010 version) of the Committee of experts in Family Law of the Council of Europe, available at < http://www.coe.int/t/dghl/standardsetting/family/Meetings_drafting_committee_en.asp > (last consulted 22 March 2011).

instrument recommends the adoption of rules related to legal parentage in the context of medically assisted reproduction¹⁰⁵ but does not attempt to harmonise practices in relation to surrogacy.¹⁰⁶ However, this last item has been part of a recommendation of the Ad Hoc Committee of Experts on Progress in the Biomedical Science (CAHBI) in their 1989 report.¹⁰⁷

47. Also within Europe, the European Union is currently considering the possibility and feasibility of EU action to facilitate the circulation of civil status documents within the EU, as well as the recognition of legal parentage in other EU Member States.¹⁰⁸ A Green Paper has been published on this topic and responses to the Paper are due by 30 April 2011. Regarding international surrogacy, a research document produced for the Committee on Legal Affairs of the European Parliament¹⁰⁹ has recommended that, “the EU should put efforts into the elaboration of international convention on private international law aspects of cross-border surrogacy in a close communication with the Hague Conference for Private International Law” (sic).¹¹⁰

48. The Permanent Bureau is also aware that work is currently being carried out by a number of academic institutions relating to the legal status of children in cross-border cases, particularly as regards international surrogacy cases.¹¹¹

49. Any future work of the Hague Conference in this field will require consideration to be given to all of the above initiatives to determine how best to utilise the research and

¹⁰⁵ Arts 14, 15(4), 17(2), 18 and 19(1) of the Draft Recommendation (May 2010 version).

¹⁰⁶ Arts 7(3) and 8(2) of the Draft Recommendation (May 2010 version).

¹⁰⁷ Principle 15 on surrogate motherhood.

¹⁰⁸ See the Green Paper published by the European Commission, “Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records”, COM (2010) 747 final; and see the document produced for the Committee on Legal Affairs of the European Parliament on this topic, “Recognition and Registration of Civil Status Documents in Cross-Border Cases”, Professor P. Lagarde (available at < <http://www.europarl.europa.eu/studies> >).

¹⁰⁹ “Recognition of parental responsibility: biological parenthood v. legal parenthood, *i.e.* mutual recognition of surrogacy agreements: what is the current situation in the MS? Need for EU action?”, Associate Professor V. Todorova (available at < <http://www.europarl.europa.eu/studies> >).

¹¹⁰ *Ibid.* note 109, at p. 30.

¹¹¹ *E.g.*, Aberdeen University (Professor P. Beaumont and K. Trimmings) are undertaking an extensive study into the private international law aspects of international surrogacy arrangements. The work on this project commenced on 1 August 2010 and will be ongoing for two years. The ultimate goal of the research is to explore possible types of international regulation of surrogacy arrangements, and to prepare a document that would serve as a basis for a future international Convention on aspects of surrogacy arrangements. See < <http://www.abdn.ac.uk/law/surrogacy/> > for further information regarding this study. See also the thesis of K.J. Saarloos (Maastricht University, April 2010) on “European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage”. The thesis concentrates on a possible EU initiative but this is without prejudice to the fact that discussion of these matters may be appropriate at a global level and, in particular, at the Hague Conference. See also the report commissioned by the Minister of Justice of the Netherlands, “Draagmoederschap en illegale opnemings van kinderen”, by K. Boele-Woelki, I. Curry-Sumner, W. Schrama, M. Vonk (Universiteit Utrecht – Molengraaff Instituut voor Privaatrecht), published in January 2011 and available (in Dutch, but with an English summary) at <http://www.wodc.nl/onderzoeksdatabase/draagmoederschap.aspx?cp=44&cs=6796> (last consulted 22 March 2011). See also work by J. Verhellen (Ghent University): “Draagmoederschap: het (Belgische) IPR uitgedaagd” (unofficial translation: Surrogacy agreements: a challenge to (Belgian) PIL), forthcoming article in Dutch to be published in *Tijdschrift voor Privaatrecht*; Professor Verschelden (Ghent University): “Pleidooi voor een familierechtelijke regeling van draagmoederschap” (unofficial translation: Plea for family law rules for surrogacy agreements), forthcoming article in Dutch in *Tijdschrift voor Privaatrecht*; A.V.M. Struycken, “Surrogacy, a New Way to Become a Mother? A New PIL Issue”, *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, edited by K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides; Eleven International Publishing – Schulthess, The Hague – Zürich, 2010, pp. 354-372; and P. Lagarde, “La gestation pour autrui : problèmes de droit interne et de droit international privé”, *Revue hellénique de droit international*, 2/2009, pp. 511-520.

information, to consider possible collaboration and to avoid any duplication of work.

VIII. HOW CAN THE HAGUE CONFERENCE ASSIST IN THIS FIELD?

50. It is not difficult to envisage what might be the possible contents of a comprehensive future instrument concerning the private international law aspects of the establishment and contestation of legal parentage. It might contain for example:

- uniform rules on the jurisdiction of courts or other authorities to make decisions on legal parentage which have general effect (*i.e.*, *erga omnes*);
- uniform rules on the applicable law;
- corresponding rules providing for the recognition and enforcement of such decisions;
- uniform rules on the law applicable to the establishment of legal parentage by operation of law or by agreement;
- applicable law or recognition principles concerning the establishment of parentage by voluntary acknowledgement.

While such a complete set of rules might be ultimately desirable, there needs to be further consideration of the practical need for, and the prospects of achieving consensus on, such a broad set of principles. Further work is needed to assess with more precision the nature and the scale of the practical problems that are generated by the lack of uniform global rules on jurisdiction, applicable law, recognition and enforcement in this field. There is also further work of a comparative law nature needed on national developments both in domestic law and in the evolution of private international law solutions at the national and regional level.

51. Another approach would be to focus on the “burning issues” such as those concerning international surrogacy, identified in section VI above. This could involve “tailor-made” rules on some of the private international law aspects mentioned above. In addition, such an approach might include provisions on administrative co-operation in the field of international surrogacy, for example, setting out safeguards to protect persons within the surrogacy process who are at risk of exploitation, suppressing improper financial gain, and possibly establishing a system of accreditation for bodies providing international surrogacy services. One might also envisage certain provisions concerning the contractual aspects of international surrogacy arrangements.

52. The issues raised in this paper touch upon difficult questions of public policy. It is an area in which there will be differences of opinion about the proper balances to be struck, for example, between regulating the conduct of adults and ensuring protection for the rights or welfare of the born child, or between party autonomy and the pursuit of other public policy objectives such as the suppression of commercialism in human reproduction. There are also implications for the areas of immigration and citizenship.

53. On the other hand, the challenges which will confront an international effort to establish uniform private international law rules governing parentage or regulating cross-border surrogacy should be seen against the imperative of protecting the vulnerable persons concerned, and in particular the children who are the unknowing products of the ever more complex methods by which adults generate children. Fundamental rights and interests of the child are implicated, including the right not to suffer adverse discrimination on the basis of birth or parental status,¹¹² the right of the child to have his / her interests regarded as a primary consideration in all actions concerning him / her,¹¹³ as well as the child's right to a name and to acquire a nationality.¹¹⁴

54. If there is sufficient interest among Members of the Hague Conference in engaging in further work in the areas covered by this paper, the Permanent Bureau proposes to the Council the following as possible next steps:

- The Permanent Bureau should be asked to intensify its work on the private international law aspects of the establishment and contestation of legal parentage, in particular on the broader range of private international law issues arising from international surrogacy arrangements. The Permanent Bureau should during the next year develop a questionnaire, to be circulated among Members of the Hague Conference for the purpose of gathering information on the practical needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach.
- The Permanent Bureau should also consult with the legal profession and health and other relevant professionals concerning the nature and incidence of the problems occurring in this area.

54. In view of existing commitments, and especially the volume of work in connection with the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, it may be realistic to plan for an interim report on progress to the Council in 2012, and a full report in 2013.

¹¹² Art. 2, UNCRC.

¹¹³ Art. 3, UNCRC.

¹¹⁴ Art. 7, UNCRC.