Translation from the original French

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SURROGACY
AND
THE CIVIL STATUS OF THE CHILD

IN ICCS MEMBER STATES

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This note contains information concerning the following 13 States: Belgium - France - Germany - Greece - Italy - Luxembourg - the Netherlands - Poland - Portugal - Spain - Switzerland - Turkey - the United Kingdom

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Foreword

The International Commission on Civil Status (ICCS) [1] is an international intergovernmental organisation created by the Protocol signed at Bern on 25 September 1950. Its aim is to facilitate international co-operation in civil-status matters and to further the exchange of information between civil registrars. To this end, it carries out any studies and work, in particular by drawing up recommendations or draft conventions, aimed at harmonising the provisions in force in the member States on matters relating to the status and capacity of persons, to the family and to nationality and at improving the operation of civil-status departments in those States. It co-ordinates its activities with those of other international bodies and furthers relations with bodies dealing with matters having an interest for civil-status purposes. It may also, in areas within its competence, enter into collaboration with third States with a view to furthering co-operation between them and the member States.

According to its founding document, the ICCS has to compile and keep up to date a documentation on legislation and case-law setting out the law of the member States on the aforesaid matters, which information the States undertake to supply free of charge to the ICCS for its studies and work (Art. I of the above-mentioned Protocol).

This is the context in which the present study is situated, its object being to review the current situation regarding a phenomenon encountered by most of the member States for several years, namely recourse to surrogacy arrangements. Following the constantly increasing number of couples or individuals applying for registration of children born abroad and for whom there existed suspicions that recourse had been had to a foreign surrogate mother, States wished to review the current situation in this matter. In order to collect more precise information on the legislation, practice and case-law in this area, a questionnaire was prepared at the end of 2009 to which the States were invited to reply. It quickly became apparent that the extent of the phenomenon seemed to be greater in some States than in others and that the provisions varied in consequence.

The States' replies have been incorporated in this synopsis, successive drafts of which were prepared by Frédérique Granet and the ICCS Secretariat General. In September 2013 the ICCS General Assembly decided to publish the study on the ICCS's Internet site, whilst leaving the National Sections with a final period of time in which to re-read and validate, amend or complete the replies. This synopsis incorporates all the data collected together and some additional material; the last up-dates were received in October 2013.

[1] The ICCS has its seat at 3 place Arnold, Strasbourg (France), where the Secretariat General has its premises. The official language of the ICCS is French, but the greater part of its documents are translated into English and other languages. More information on the ICCS and its activities can be found on its Internet site at the address : http://www.ciec1.org

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IN ICCS MEMBER STATES

Introduction

For many years the progress achieved in the matter of medical techniques for assisted reproduction has enabled couples of different sex to bring their planned parenthood to fruition. Claims have also been made by single individuals or homosexual couples living together. Depending on the circumstances and the provisions of domestic law applicable in each of the ICCS States, a donation of sperm or eggs or a donation of an embryo can be envisaged, or also recourse to surrogacy. It is this last possibility that is dealt with by this synopsis, which shows that the law is both very diversified and in constant evolution in the ICCS States.

On a subject of this kind, it must first of all be recalled that in all the ICCS States maternity is founded on birth by virtue of the principle *Mater semper certa est,* that the indication of the mother's name in the record of birth suffices to establish maternity, save for the requirement in Italy of maternal acknowledgment in order to establish natural parentage in accordance with Article 250 of Civil Code, and that it is obligatory to designate the mother in the record of birth except in France, Italy and Luxembourg, where the law permits anonymous birth (*accouchement sous X).* In addition, the rules on the establishment of paternity differ from those on maternity and, as regards paternity, a distinction has to be drawn depending on whether the child was born in or out of wedlock. This may have effects on the manner of establishing the parentage of a child born under a surrogacy arrangement.

In the second place, account has also to be taken of the fact that surrogacies may correspond to several types of situation: one is that of a child conceived with a couple's gametes under an arrangement made with a surrogate mother who undertakes to be responsible for the pregnancy and the birth and then to give the baby to the commissioning couple, the surrogate mother being only the gestational carrier; another is that of a child conceived with the sperm of a man, who may be one of the members of the commissioning couple or an anonymous donor, and an egg of the surrogate mother, the latter undertaking to give the baby to the commissioning couple and being both a genetic and a gestational carrier; yet another is that of a child conceived with or without the gametes of a single commissioning person and born of a surrogate mother who has undertaken to give the child to that person at birth and, as the case may be, may be only a gestational or a genetic and gestational carrier.

Certain ICCS States have special legislation on this subject, some to prohibit recourse to a surrogate mother (France; Germany; Italy; Portugal; Spain; Switzerland; Turkey) (I), some, on the other hand, to permit it, but in a very strict legal framework (United Kingdom: Human Fertilisation and Embryology Act 1990, amended by the Human Fertilisation and Embryology Act 2008; and Greece: Act No. 3089 of 19 December 2002, completed by Act No. 3305/2005 of 27 January 2005) (II). This legislation has different effects on the civil status and the parentage of the child, although the position is not so clear-cut as it may happen that the contrast between these legal systems is blurred by the fact that the absence of legislation is sometimes taken not to mean prohibition. This, for example, is the case with the Belgian legislation (Act of 6 July 2007 on medically assisted reproduction and the destination of surplus embryos and of gametes) which at present neither permits nor prohibits expressly surrogacy arrangements, although several Bills have been tabled; these Bills, none of which has yet been adopted, retain the principle that surrogacy is prohibited, but it should be noted that some of them permit and organise it by way of exception and subject to compliance with strict conditions. In

Luxembourg, Bill 6568 reforming the law on parentage, tabled on 25 April 2013, proposes to add to Article 6 of the Civil Code a second paragraph to the effect that any surrogacy arrangement is null. In the Netherlands, Article 151b of the Penal Code expressly prohibits surrogacy arrangements for commercial purposes, but the medical regulations in force govern medical procedures for fertilisation *in vitro* combined, if appropriate, with a surrogacy arrangement and the procedures for licensing medical establishments (*Planningsbesluit in-vitrofertilisatie*, Staatcourant 1998/95, 14-18; it may be mentioned that, following cases of international surrogacy, Parliament debated this subject with a view to modifying the Netherlands law, but with no effect.

The foregoing demonstrates that the problems raised by surrogacy seem to be more complex and varied than those raised by a simple donation of gametes.

Practice also shows that civil-status departments receive applications for recognition of the effects of a birth record validly drawn up or a judgment validly delivered in a foreign country in conformity with the foreign local law, with all the consequences for the nationality of the child. It also happens that the authorities of a State receive simply an application for travel documents to enable the child to be admitted onto the national territory of the intending couple or intending parent. The most serious difficulties arise in cases of international surrogacy and, depending on the States involved, variable solutions derive from their international law. The weight attached to international public order in the requested State then has a strong effect in States that prohibit surrogacy, even though the argument based on the best interests of the child referred to in the New York Convention on the Rights of the Child is frequently advanced in support of applications lodged by the intending parents (III).

I. The prohibition of surrogacy arrangements and its effects on the child's civil status

In the States that have adopted special legislation, the prohibition and nullity of surrogacy arrangements are expressly laid down for ethical and moral reasons. That is the case in Germany (Act of 13 December 1990 on the protection of the embryo [*Gesetz zum Schutz von Embryonen, Embryonenschutzgesetz - ESchG*], entered into force in 1991); in Spain (Act No. 14/2006 of 26 May 2006 [*Ley sobre técnicas de reproducción humana asistida*], entered into force on 28 May 2006); in France (Art. 16-7, Civil Code); in Italy (Act No. 40 of 19 February 2004 [*Norme in materia di procreazione medicalmente assistita*]); in Switzerland (Art. 119 of the Federal Constitution of 18 April 1999, entered into force on 1 January 2000, and Articles 4 and 31 of the Federal Act of 18 December 1998 on medically assisted reproduction, entered into force on 1 January 2001); and in Turkey (Regulation No. 24359 of 31 March 2001 on medically assisted reproduction [*Uremeye yardimci tedavi merkezleri yönetmeligi*]).

However, even if there is no special law, the prohibition may also derive from other legislative provisions, as is the case in Poland where Parliament clearly indicated its position in the Act of 6 November 2008, entered into force on 13 June 2009, on the modification of the Family and Guardianship Code. The prohibition may also result from an interpretation by the courts of the provisions on the establishment in law of maternity and on the validity of contracts, although the case-law remains delicately drafted (Belgium), or again from a State's conception of public order (Luxembourg).

In Germany, any medical procedure relating to surrogacy is forbidden by the above-mentioned Act on the protection of the embryo. Any contract with a surrogate mother whereby a woman declares herself ready to be fertilised artificially or naturally, or to have transferred to her or to carry in another manner an embryo which did not come from her is immoral and therefore null.

Medical procedures of such a kind are punishable and incur a sentence of deprivation of liberty not exceeding three years or a fine (Art. 1, paragraph 1, ESchG). On the other hand, neither the surrogate mother nor the persons having recourse to her services incur any penalty. Again, putting individuals

in touch with surrogate mothers is forbidden by the Act on the placing of children in adoptive families [*Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern, Adoptionsvermittlungsgesetz - AdVermiG*], but in the case of placing of adoptive children, the surrogate mothers and the intending parents incur no penalty.

If a surrogacy arrangement were concluded contrary to the law, the child's legal mother would be the surrogate mother and not the intending mother, in accordance with Article 1591 of the BGB which regards the woman who gave birth to the child as the legal mother and is a provision of public order. This solution is applicable under German law with no distinction being made according to whether the egg at the origin of the child's conception was an egg of the surrogate mother or of the intending mother, because, under Article 1591 of the BGB, it is the birth alone which determines who is the legal mother and there is no specific procedure to establish whether a child was born of a surrogate mother and no action to contest maternity.

Legal paternity, for its part, is based on marriage with the mother at the date of birth (Art. 1592, no. 1, BGB), or on acknowledgment of paternity (Art. 1592, no. 2, BGB), or again on a court decision (Art. 1592, no. 3, BGB). The man whose sperm was used to conceive the child and is his or her intending father, would be able to acknowledge the child only if the mother were not married, were effectively designated as the mother in the birth record and had consented to the acknowledgment of paternity. It is only in a case where different men might be considered to be the father by virtue of the legal rules relied on in accordance with Article 19, EGBGB (so-called concurrent paternities) that biological paternity would conceivably play a part; If such a situation arose, and having regard to the general rules on a child's right of personality which also includes the right to Know one's parentage, the possibility might be envisaged of giving priority to the probable biological father with the aim of taking the actual parentage into account.

The general objective of the legislation is to arrive at convergence between biological and legal parenthood. Rectification of legal paternity is admitted only by means of court proceedings to contest paternity as mentioned in Articles 1599 *et seq.* of the BGB, notably because of a wish to maintain legal security. It follows that the man to be registered as the father is in principle the one who is considered to be the legal father, even if it is improbable that he is the biological father. The verification will bear only on the question whether the conditions for establishing legal paternity are satisfied by virtue of the *lex causae* mentioned in Article 19 of the EGBGB, that is to say -according to Article 1592, no. 1, of the BGB when German law is applicable- the existence of a valid marriage at the time of the birth. No steps are taken to verify whether the parentage link is in conformity with the biological truth. Yet the following points concerning contestation of paternity deserve to be mentioned: account should be taken of the fact that, in German law, the absence of any verification of biological paternity gives rise to a risk of abuse in the matter of acquisition of German nationality and a residence permit. To counter this risk, the authorities designated by regulation have been given the possibility of contesting acknowledgments of paternity (Art. 1592, no. 2, of the BGB) when there is no social or family link between the man acknowledging paternity and the child and when the acknowledgment creates the legal conditions required for the entry or the legal residence of the child or of one of the parents into or in Germany, that is to say where a fictitious acknowledgment of paternity is suspected (Art. 1600, § 1, no. 5, of the BGB).

Furthermore, under Article 1600, paragraph 1, no. 4 of the BGB, the child is, like his or her mother, legal father or biological father (putative), entitled to contest his or her paternal parentage in order to bring court proceedings subsequently to establish paternity against his or her genetic father.

Finally, both the child and the mother and the legal father may, under Article 1598a of the BGB, require the other parties involved to consent to a test for genetic parentage in order to determine parentage by this means.

However, if recourse has been had to a surrogate mother, it could be envisaged that the intending parents proceed to adopt, this being the only possible way of establishing a legal link between the

child and the intending mother. On this point, Article 22 of the EGBGB provides that German law is applicable if the adopter is a German national. In such circumstances, an adoption by one or both of the two spouses, the intending parents, is a matter for the law governing the general effects of marriage, in accordance with Article 14, paragraph 1, of the EGBGB. If it transpires that German law is applicable, the conditions required for the adoption of the child are derived from Articles 1741 *et seq.* of the BGB. Account must then be taken, notably, of the fact that, under Articles 1745 *et seq.* of the BGB, the consent of the other parties involved is required and that any agreement between the intending parents and the surrogate mother involving consent to the adoption is null.

In Belgium, the Act of 6 July 2007 on medically assisted reproduction and the destination of surplus embryos and of gametes authorises the parental plans of a couple or of "any person having decided to become a parent by means of medically assisted reproduction, whether or not it be effected initially with their own gametes or embryos". Belgian law does not mention surrogacies, so that there is no express prohibition. However, a clear majority of legal writers consider that a surrogacy contract would be contrary to Articles 6 and 1128 of the Civil Code. Article 6 forbids derogating by private contract from laws relating to public order and good morals, and Article 1128 provides that only things that are in legal commerce may be the object of contracts, which is not the case with gametes, embryos or a woman's reproductive functions. There are several reasons why surrogacy contracts are illegal: absence of informed consent of the gestational carrier and incompatibility with public order principles relating to the impossibility of disposing of the human body and to personal status. The contract would therefore be vitiated by a ground for absolute nullity and, in consequence, could not be enforced as regards either the handing of the child to the commissioning couple or the payment to the surrogate mother of the promised remuneration.

However in the absence of legislation, the case-law is delicately drafted. Amongst the decisions on the merits handed down by the courts and although they are still not very numerous, one can distinguish two tendencies that meet opposing concerns: on the one hand, to ensure compliance with Articles 6, 1128 and 1131 of the Civil Code; on the other hand, to safeguard the interests of the child conceived and born in such circumstances.

Thus, the Ghent Court of Appeal held that Parliament did not intend through the existing rules to allow a child to be ordered from a surrogate mother (Ghent, 16 January 1989, T.G.R. 1989, p. 52). It also refused to approve the adoption of a child born following a remunerated surrogacy contract, by the wife of the biological father (the biological mother being the surrogate mother). The court assimilated remunerated surrogacy to a sale of a child, with the result that the adoption was not based on valid grounds and that the fundamental rights of the child were not respected (Article 344-1 of the Civil Code). Again, surrogacy is contrary to human dignity because it makes of the child a thing in commerce, which is contrary to domestic and international public order. The court relied in support of its reasoning on Articles 1 and 5 of the Universal Declaration of Human Rights to which reference is made by the European Convention on Human Rights, Article 35 of the Convention on the Rights of the Child and Articles 1 to 3 of the optional Protocol to the Convention on the Rights of the Child, and also Articles 6, 1128 and 1131 of the Civil Code (Ghent, 30 April 2012, RGDC 2012/8, p. 372).

On the other hand, several judgments came out in favour of the child's adoption. In the case of a child who had been conceived with the gametes of the adoptive parents, a married couple, and then carried and delivered by the sister of one of them, with no remuneration being paid to her, the Turnhout Court of First Instance held that if the surrogate mother does not make any profit, the arrangement is not contrary to public order. It also considered that adoption by the commissioning couple would be in conformity with the interests of the child who had been conceived by fertilisation *in vitro* with the gametes of the two adopters, who were thus "social-genetic" parents, only the gestation and the delivery having been undertaken by a third person close to them (Turnhout Juvenile Court, 4 October 2001, R.W. 2001, no. 6 of 6 October 2001). The Antwerp Court of Appeal

came to the same decision in a case where the surrogate mother was the child's biological grandmother (Antwerp, 14 January 2008, R.W. 2007-2008, no. 42, p. 1774).

A judgment of the Brussels Juvenile Court also approved a plenary adoption by a married couple of a child conceived by fertilisation *in vitro* effected with the gametes of the husband and the wife and carried by the latter's sister, "such being the interest of the child" (Brussels Juvenile Court, 4 June 1996, J.L.M.B. 1996, p.1182 and *Revue du Droit de la santé 1997, p.124*).

The same court gave an identical decision concerning a child who had been carried by a third party and was genetically the son of the applicant and her husband, the latter having acknowledged him. The court found that no other Belgian legal proceedings, not even the action to contest maternity, made it possible to confer on the child the maternity that corresponded to his biological parentage, even though scientific progress sometimes implied distinguishing between the genetic and the surrogate mother. It held that "in these circumstances, the adoption procedure is, in a certain fashion, used to fill a gap in the law or, at least, to deal with a situation that it had not envisaged", that the adoption was founded on just grounds and that it served the best interests of the child (Brussels Juvenile Court, 6 May 2009, J.L.M.B, 2009/23, p. 1083). The Brussels Juvenile Court came to the same conclusion in a judgment concerning the adoption by a woman of her husband's child, who had been conceived with a third party suspected of having acted as a surrogate mother (Brussels Juvenile Court, 23 August 2012, Act. Dr. Fam., 2013/5, p. 99).

Although it regarded the practice of surrogacy as illegal from the point of view of both its purpose and its cause, the Namur Juvenile Court declared to be founded on just grounds and in conformity with the best interests of the child the adoption by a married homosexual couple of a child born following a surrogacy arrangement, the surrogate mother, the sister of one of the applicants, being the genetic mother and the embryo having been obtained through an anonymous sperm donation. According to this judgment, "it is not for the court to rule on the legality or otherwise of the practice of surrogacy but to rule in the light of the child's interests in being adopted .... The question of the adoption must be distinguished from that of the validity of the surrogacy" (Namur Juvenile Court, 7 January 2011, Act. Dr. Fam., 2013/5, p. 96).

In Spain, Article 10, sub-paragraph I, of Act no. 14/2006 of 26 May 2006, entered into force on 28 May 2006, maintained the prohibition that had been introduced by an Act of 22 November 1988. Thus, a contract providing for the gestation, with or without remuneration, of a child by a woman who will renounce a maternity link in favour of the intending parent or parents or a third party is automatically null. The Act (Art. 27 and 28) provides that the authors of medical acts contravening its provisions shall be penalised by a fine of from 10,000 to 1 million Euros, coupled with the closure of the medical establishment or the medically assisted reproduction services. But the intending parent or parents incur no penal sanction.

The Act (Art. 10, sub-para. 2) also recalls that since the maternity of a child born following a surrogacy arrangement is determined by the delivery, only the surrogate mother would be considered to be the legal mother, to the exclusion of the intending mother. As for paternity, the father could apply for the establishment of his paternity in the conditions laid down by the ordinary law (Art. 10, sub-para. 3, of the above-mentioned Act).

In France, it is in the Act on Bioethics, n° 94-653 of 29 July 1994, that Parliament judged it necessary to legislate by introducing into the Civil Code a new Article 16-7, classified by Art. 16-9 as a matter of public order, which provides that "any agreement bearing on reproduction or gestation on behalf of a third party is null" and absolutely void. Article 16-7 upholds the solution formulated by the Plenary Assembly of the Court of Cassation in a judgment of 31 May 1991 -delivered following an appeal on points of law lodged by the Public Prosecutor in the interests of the law, having regard to Articles 6, 1128 and 353 of the Civil Code- according to which "an agreement whereby a woman undertakes, even free of charge, to conceive and carry a child and then to abandon it on its birth contravenes

both the public order principle of the inalienability of the human body and that of the inalienability of the status of persons" (Cass Ass. Plen., 31 May 1991, Bull. civ. n° 4). Articles 16-7 and 16-9 were not modified when successive revisions of the Acts on Bioethics were effected by Act no. 2004-800 of 6 August 2004, and then by Act no. 2011-814 of 7 July 2011. As regards the Court of Cassation, its First Civil Chamber maintains its well settled case-law, which it repeated again in two judgments of 13 September 2013 (appeals on points of law no. 12-18.315 and no. 12-30.138): it refused to recognise in France the civil-status effects of birth records drawn up abroad for children born of a surrogate mother pursuant to an arrangement concluded by French citizens abroad. Furthermore, at the criminal level, surrogacy is punished as involving a breach of the child's civil status and is assimilated to passing off a child which constitutes a misdemeanour liable to imprisonment for three years and a fine of 45,000 Euros (Article 227-13 of the Criminal Code). There can be considered to be principal offenders the surrogate mother if she concealed her parentage link with the child, the intending mother if she simulated such a link and, if she is married, her husband if he declared a false parentage to the civil-status authorities. In addition, under Article 227-12 of the Criminal Code, actions taken by intermediaries in order to facilitate or bring about the surrogacy constitute misdemeanours liable, according to the case, to imprisonment for six months and a fine of 7,500 Euros, imprisonment for one year and a fine of 15,000 Euros or imprisonment for two years and a fine of 30,000 Euros.

In Italy, Act no. 40 of 19 February 2004 (Rules on medically assisted reproduction [*Norme in materia di procreazione medicalmente assistita]*) regulated access to assisted reproduction medical techniques which it reserved strictly for heterosexual couples of full age both of whose members are alive, married or living together, of age to procreate and afflicted by medically established sterility (Art. 1). The Act permits only techniques that use gametes of the couple (Art. 4.3), on pain of an administrative sanction of from 300,000 to 600,000 Euros imposed on anyone who uses gametes not provided by the couple under treatment (Art. 12) or contravenes the other prescribed conditions (Art. 12.2). In Art. 12.6 the Act adds that anyone who in any way effects, organises or makes publicity for the commercialisation of gametes, embryos or surrogacy incurs a penalty of deprivation of liberty of from three months to two years and a fine of from 600,000 to 1 million Euros. These penalties are in principle directed against doctors who have utilised an assisted reproduction technique that is prohibited by law. They are also liable to suspension from practice for between one and three years. As for the medical establishments in which the acts were carried out, they risk revocation of their licence to practice assisted reproduction. However, neither the surrogate mother nor the intending parents incur any penalty.

Since surrogacy is contrary to the fundamental principles of Italian law, a surrogacy arrangement is automatically null as having an illegal purpose, even if it was concluded in a foreign country in accordance with the local law.

Whilst Article 8 of the Act provides that the parentage of children conceived by approved assisted reproduction may be established on the part of the couple under treatment, Article 9 provides that the contrary is true in case of medically assisted reproduction effected in breach of the Act. Thus, under Article 9.3, the donor of gametes (man or woman) or, in general, the man or woman who did no more than provide the biological material needed for the reproduction without wishing to be a father or mother or to assume the related parental responsibilities, cannot legally be considered to be the child's father or mother. As regards maternity, only the surrogate mother will be regarded as the legal mother, to the exclusion of the intending mother. This is because, under Italian law (Art. 269, sub-para. 3, of the Civil Code), the legal mother of a child is the woman who gave birth to him or her, whether the child was born during his or her mother's marriage or was declared by her as a child born out of wedlock (even if he or she was born during the marriage but was not conceived with the mother's husband). It may also be pointed out that it is possible for the biological mother to declare that she does not wish to be designated in the child's birth record. If the surrogate mother is not married, or even if she is but has declared her child as born out of wedlock, the intending father may

acknowledge the child as his on the conditions laid down in Articles 250 *et seq.* of the Civil Code; if the acknowledgment precedes the birth, it must be made by both parents at the same time, or by the father after the acknowledgment of maternity preceding the birth and with the mother's consent.

In Luxembourg, the prohibition of surrogacy arrangements derives at present from the domestic conception of public order. Existing legislation does not make it possible to set aside a surrogate birth by recourse to the rules on proof of maternity, whether it be legitimate or out of wedlock (this distinction being furthermore destined to disappear if the Bill 6568 tabled on 25 April 2013 and reforming the law on parentage is adopted). Proof of maternity may derive in both cases from factual possession of status, defined as "a sufficient combination of facts that indicate a relationship of parentage between an individual and the family to which he or she is said to belong". In the absence of factual possession of status, parentage may even be proved by using witnesses. It is true that if it is alleged that there has been passing off of a child or substitution of children, even involuntary, either before or after the drawing up of the birth record, Article 322-2 of the Civil Code allows that proof thereof would be admissible and could be provided by any means, but in the case of a surrogacy arrangement it is improbable that one of the interested parties would report it. It remains true that such an arrangement would be illegal as it would conflict with Luxembourg public order. For the future, the above-mentioned Bill 6568 would modify Article 6 of the Civil Code, included in the Preliminary Chapter concerning "the publication, the effects and the application of laws in general" and would complete it by a second sub-paragraph providing that "any surrogacy arrangement is null".

Article 363 of the Luxembourg Criminal Code provides for a penalty of up to imprisonment for between five and ten years for persons guilty of concealing a child, substituting one child for another or passing off a child as the offspring of a woman who did not give birth to him or her. The same penalty would be incurred by persons who commissioned the same acts, if they materialise.

A decision of the Superior Court of Justice specified the meaning of the concepts of "passing off" a child and "concealing" a child: "*the basic ingredient of passing off a child is the introduction of a child into a family to which he or she does not belong, whilst concealment of a child consists of the criminal action of suppressing proof of his or her civil status, without any attempt on his or her life" (Superior Court of Justice, 11 November 1957, p. 17, 189).*

Since it is a criminal offence to pass off a child as the offspring of a woman who "did not give birth to him or her", it becomes very clear that in Luxembourg law maternity originates in the fact of giving birth to a child, a clarification that does not appear expressly in the Civil Code but is evident in the eyes of its drafters. The mother of a child is therefore the woman who gave birth to him or her, whether or not she provided her genetic material for his or her conception.

On the basis of this provision a civil registrar who knowingly drew up a birth record indicating the maternity of a woman who does not appear in the birth notice could be held to be criminally liable, as could a woman and/or a man who acknowledged that he is the father of the child who led the civil registrar to record a maternity based on a passing off. It is obvious that a Luxembourg civil registrar would not run the risk of committing such acts: the birth notices are kept and enable the truth of declarations to be checked. The equally rash act of midwife who entered a false name in the birth notice would entail the same penalties. In most cases the acts would probably also be characterised as forgery and uttering forged documents.

Under Article 5 of the Code of Criminal Procedure, *any Luxembourg national who has committed outside the territory of the Grand Duchy a crime punishable under Luxembourg law may be prosecuted and tried in the Grand Duchy.* Accordingly, a Luxembourg couple or a Luxembourg woman who concluded a surrogacy arrangement could be prosecuted on this count in Luxembourg.

Likewise, the foreign co-perpetrator of or accomplice to a crime committed outside the territory of

the Grand Duchy by a Luxembourg national could be prosecuted in the Grand Duchy, jointly with the accused national or after the latter's conviction. Theoretically this provision could conceivably be applied to a foreign civil registrar or any other person (such as a midwife) who, even abroad, enabled a child to be passed off or concealed and proceedings could be instituted against him or her in a Luxembourg criminal court.

Disciplinary sanctions may also be envisaged, notably against medical professionals.

The above-mentioned Bill would add to the Civil Code an Article 391 quater making it an offence to serve as an intermediary between a person or a couple wishing to have a child and a woman who agrees to carry that child with a view to handing him or her over to them. An attempt is similarly punishable and the commission of such acts habitually or for profit would incur the double of the specified penalties. On the other hand, the woman who agreed to act as a surrogate mother would not be punishable under criminal law.

In the Netherlands, a regulation dating from 1997 concerns medical procedures for fertilisation *in vitro* (FIV), coupled where appropriate with a surrogacy arrangement, and the establishments licensed to carry them out. It lays down strict conditions and a guide of good practices has been drawn up on this basis by the Netherlands Obstetrics and Gynaecology Society (Guidelines on IVF-surrogacy). Only the Amsterdam hospital (Amsterdam VU Medical Centre) is licensed to practice FIV coupled with a surrogacy arrangement. The intending parents and the surrogate mother, who is generally one of their close relatives, will conclude a surrogacy arrangement. If the surrogate mother is married, her husband must also give his consent. The surrogate mother must be less than 44 years old, be in good health and have already given birth to one or more children and thus carried out her own family planning. She must be motivated by the altruistic desire to help a couple to become parents when they cannot reproduce naturally and she must agree to hand over to them the child to be born. Most of the intending couples are Netherlands nationals living in the Netherlands. The intending mother must be unable to bring a pregnancy to term, either on account of sterility or because her life would be endangered, and she must be less than 40 years old at the time of the treatment. In addition, the Child Protection Department, which is involved in the whole process from the beginning, will require proof that the intending parents do not have a criminal record.

The child must be conceived by FIV with the gametes of the two intending parents, which excludes homosexual couples. At birth, parentage is legally established on the part of the surrogate mother solely by virtue of the delivery, in accordance with Article 198 of the Civil Code which makes no distinction according to whether or not the woman concerned is the genetic mother. If she is married and her husband consented to the surrogacy arrangement, his paternity is presumed by virtue of the ordinary law. A transfer of parental responsibility is pronounced in favour of the intending parents who may then submit a joint application for adoption subject to the conditions prescribed by the ordinary law, namely provided that at the time of the adoption they have been living together for at least three years, that they have brought up the child in their home for at least one year and that granting the adoption is in the the best interests of the child. If the husband of the surrogate mother did not consent to the arrangement, he can contest his paternity and obtain its annulment. The paternity of the intending father could then be legally established and parental responsibility transferred to him. The intending mother could also apply for the adoption of her husband's child. If the surrogate mother is not married, the child is legally attached to her at birth. With her consent, the intending father may acknowledge the child and then his wife can submit an application for adoption.

The surrogacy arrangement may provide that the intending parents are to reimburse to the surrogate mother the expenses she incurred during the pregnancy and the delivery. However, Article 151b of the Criminal Code expressly penalises surrogacy for commercial ends by providing that intermediaries are liable to fines and imprisonment, the intending parents themselves not being subject to such penalties.

In Poland, there is no special legislation on surrogacy. Nevertheless, the wishes of the Polish Parliament have been declared in a very clear manner since the Act of 6 November 2008, entered into force on 13 June 2009, on the modification of the Family and Guardianship Code, by stating expressly in Article 61 of the Code that the mother is the woman who gave birth. The wording of this Article was chosen in order to dispel any doubts in the case of a surrogate mother and to avoid any dispute between a woman who provided an egg and could not be considered to be the legal mother and the woman who gave birth to the child and who alone would be legally regarded as the mother. An action to contest maternity could be admitted only if a woman other than the one who gave birth had been entered as the mother in the child's birth record.

An arrangement concluded between the intending father and mother or the intending mother and a surrogate mother would certainly be annulled under Article 56 of the Civil Code as being contrary to the rules of life in society and it could even be thought that such nullity would be based on the Act of 6 November 2008.

In Portugal, surrogacy is forbidden by Article 8 of the Act on Medically Assisted Reproduction, whether or not the contract provides for remuneration. If such a contract were concluded contrary to the Act, the parentage of the child on the part of the surrogate mother would be established under the principle *Mater semper certa est*.

In Switzerland, Article 119 of the Federal Constitution of 18 April 1999 and Articles 4 and 31 of the Federal Act of 18 December 1998 on Medically Assisted Reproduction (LPMA; RS 810.11) prohibit any kind of surrogacy.

According to Article 2, letters a and k, LPMA, medically assisted reproduction refers to any method making it possible to bring about a pregnancy outside the natural union of a man and woman, in particular insemination, fertilisation *in vitro* with the transfer of an embryo and the transfer of gametes. Surrogacy denotes the fact that a woman agrees to carry a child conceived by means of a method of medically assisted reproduction in order to hand him or her to third parties definitively after the delivery. In any event, a surrogacy arrangement concluded in Switzerland in breach of this Act is null.

Furthermore, under Article 31 LPMA anyone who applies a medically assisted reproduction method to a surrogate mother is liable to imprisonment or a fine. A person who acts as intermediary in such an act is also liable to the same penalty. However, the intending parents incur no criminal penalty after having recourse to a surrogate mother.

In Turquie, surrogacy arrangements are forbidden by Regulation no. 24359 of 31 March 2001 on medically assisted reproduction [*Uremeye yardimci tedavi merkezleri yönetmeligi*].

II. The legality and legal framework of surrogacy arrangements and the child's civil status

Whilst setting a very strict framework, Greece and the United Kingdom authorise surrogacy, but on conditions that are not identical. Likewise, the legislation produces very different effects as regards the child's civil status.

In Greece, surrogacy was authorised by Act 3089/2002 of 19 December 2002 on medical assistance for human reproduction. This Act added Articles 1455 to 1460 to the Civil Code and modified Articles 1461 to 1484 on parentage. It was completed by Act no. 3305/2005 of 27 January 2005 on the implementation of methods of medically assisted reproduction, entered into force on 27 February 2005.

Act 3089/2002 contains notably provisions that deal specifically with recourse to surrogate mothers. It provides that the use of this artificial reproduction technique is allowed on certain conditions,

some general (that is, applicable to various medically assisted reproduction techniques) and others specific (that is, applicable exclusively in the particular case).

The general conditions concern the age of the person assisted (an age limit of 50 years is fixed for the commissioning woman and the surrogate mother) and medical inability to procreate or the risk of transmitting a serious illness. Under Article 1455 of the Civil Code (introduced as a result of Article 1 of Act 3089/2002), "medical assistance for human reproduction (artificial procreation) is allowed only as a response to impossibility to procreate naturally or to avoid the transmission to the child of a serious illness. Such assistance is allowed up to the age of the assisted person's ability to procreate naturally". This provision is completed by Article 1458 of the Civil Code, specific to the question of recourse to surrogate mothers. It provides notably that "*the transfer into the body of another woman of embryos that are foreign to her and gestation by her are permitted ... if it is established that gestation is impossible for her* [the woman wishing to have a child] *and that the woman who undertakes the gestation is fit to do so, having regard to her state of health*".

The procedure for authorising recourse to a surrogate mother is also covered by Act 3089/2002. The decision is given by application of the provisions of the Code of Civil Procedure concerning non-contentious jurisdiction (Art. 4, Act 3089/2002, modifying Art. 121 of the Introductory Act on the Civil Code). Act 3089/2002 also specifies that the transfer into the body of another woman of embryos foreign to her and gestation by her are permitted by court authorisation granted before the transfer, if there is a written contact without consideration between the persons wishing to have a child and the woman who will give birth, and her husband if she is married. The court authorisation is granted after an application by the woman wishing to have a child. The consent given must have been free and informed. Any financial consideration is forbidden, save for reimbursement of the expenses of pregnancy and delivery and, if appropriate, the payment of an indemnity corresponding to the salary lost by the surrogate mother during the pregnancy, up to a maximum assessed by an independent authority. It may be noted that judgment no. 452/2006, delivered by the Lefkade Regional Court, authorised the commissioning woman's mother to be the surrogate mother.

Finally, it is provided (Art. 4 of Act 3089/2002, modifying Article 121 of the Introductory Act on the Civil Code) that the authorisation is given by application of the provisions of the Code of Civil Procedure concerning non-contentious jurisdiction and that the Article 1458 solution is applicable "only if the requesting woman and the gestational woman are domiciled in Greece" (Art. 8 of Act 3089/2002). This is because, on account of anxiety to avoid "procreational tourism", the Greek legislation is applicable only in favour of a commissioning woman domiciled in Greece and on condition that the same is also true of the surrogate mother (Art. 8 of the Act of 19 December 2002). This has the indirect consequence that a woman who holds Greek nationality but is domiciled abroad cannot benefit from the Act unless she establishes her domicile in Greece. On the other hand, a foreigner domiciled in Greece may become a mother there with the assistance of a surrogate mother, which will then give rise to the question in private international law of the establishment of the maternity link.

Breach of the Act is criminally punishable by a penalty of deprivation of liberty of at least two years and a fine of at least 1,500 Euros. The same penalties apply to intermediaries.

The effects of authorised recourse to a surrogate mother in the matter of civil status and parentage are governed by the new Article 1464 of the Civil Code, introduced by Act 3089/2002. It provides that "in case of artificial reproduction and gestation by another woman in accordance with Article 1458, the woman to whom the authorisation was granted is presumed to be the mother of the child. This presumption will be rebutted by an action contesting maternity, introduced within six months from the birth, either by the presumed mother or by the gestational woman, if it is established that the child is biologically related to the latter. The contestation is made by the woman entitled to take the action herself, or by her special attorney, or, with the court's authorisation, by her legal representative. Following an irrevocable court decision allowing the action, the child has,

retroactively from birth, the gestational woman as his or her mother". The Greek legislation is thus very original as concerns the parentage of a child conceived and born in these circumstances. By way of exception to the general principle *Mater semper certa est*, set out in classic manner in Article 1463 of the Civil Code, Article 1464 deems the woman who obtained the court authorisation to be the legal mother and provides that she is to be designated as such in the birth record from the outset. The husband's paternity is presumed in application of the ordinary law, if the birth took place during the marriage or in the 300 days following its dissolution or annulment (Art 1465 of the Civil Code). In the case of an unmarried couple, the partner must give his consent by notarial deed to the medical assistance for procreation effected by recourse to a surrogate mother (Art. 1456, § 1, sub-para. b), which consent counts as voluntary acknowledgment of paternity (Art. 1475 of the Civil Code). Whether the couple having the benefit of the authorisation be married or not, the paternity is thus inscribed in the birth record.

As regards civil status more specifically, Act 3089/2002 amends Act 344/1976 on civil records and, in particular, Article 20 thereof that makes it obligatory to declare the birth to the civil-status authorities for the place of birth by producing an attestation from the doctor or the midwife who was present at the birth. If recourse is had to a surrogate mother, Act 3082/2002 specifies that "the court authorisation granted to the woman wishing to have a child shall also be produced".

In the United Kingdom, the Surrogacy Arrangements Act 1985 had prohibited private contracts concluded for profit, in the United Kingdom or abroad, between a couple and a surrogate mother who undertook to be responsible for the pregnancy and the delivery against remuneration, and such contracts were null. Surrogacy arrangements were subsequently permitted and strictly regulated by the Human Fertilisation and Embryology Act 1990. This Act was amended by the Human Fertilisation and Embryology Act 2008, entered into force on 6 April 2009, and completed by subsequent regulations and then by the Human Fertilisation and Embryology Act 2010, entered into force on 16 April 2010, so as to permit unmarried couples and same-sex couples to have recourse to a surrogate mother and to become legal parents.

In general, recourse to a surrogate mother is allowed with, however, certain restrictions. Surrogacy for profit is forbidden, with the intending parents being able to pay only the reasonable expenses of the surrogate mother.

The commissioning couple may consist of the two genetic parents or only one of them; it is also possible that neither member of the couple has a genetic link with the child, as when the child was conceived through an egg and a sperm donation, including a donation by the surrogate mother.

The surrogate mother could not be forced to hand the child over to the intending parents, even if a contract had been signed and the expenses of the surrogacy had been paid.

At the outset, unlike the situation under Greek law, the birth is registered in the traditional way under the name of the surrogate mother who, because she has given birth, is alone deemed to be the legal mother in accordance with the rules in force in the whole of the United Kingdom.

As regards paternity, the Human Fertilisation and Embryology Act 1990 and the laws on nationality provide that the husband or the companion of the surrogate mother is the child's father if he consented to her undergoing the treatment. If she is not married at the time of birth or if the husband had not consented to the treatment, the child will have no legal father; however, the husband will be presumed to have consented until the contrary is proved.

Subsequently, if the intending parents wish to become the legal parents of the child, they may apply, six weeks after the birth and before the expiry of a period of six months, for an adoption order or a parental order which will have the effect of transferring the parental rights and duties to them. Obtaining a parental order is subject to several conditions: at least one of the two intending parents must have a genetic link with the child and the surrogate mother and the legal father must have given their unreserved consent. A parental order enables the child to be re-registered in a separate

register of births held by the Registrar General, with the commissioning couple being entered as the child's parents. The original birth record will be annotated so as to mention the re-registration and the certified copies issued for all legal purposes must be based exclusively on the re-registered record.

The 1990 Act was amended in April 2010 so as to allow unmarried couples and same-sex couples who have entered into a civil partnership to have recourse to a surrogate mother and then to obtain a parental order.

III. The international recognition of foreign civil-status records or judgments concerning a child born of a surrogate mother and its effects on the child's situation

It can be observed that, on account of the strictness of the rules, couples ask which country they should turn to in order to enter into relations with a foreign surrogate mother, a step that is facilitated by the Internet. As shown by concrete cases, the foreign countries chosen are varied, in Europe (for example, Ukraine, Georgia or Russia) or outside Europe (for example, the United States of America, India, Israël, Canada). The questions then arise of the recognition or otherwise of the effects of the birth record drawn up abroad in conformity with the local law or of the recognition of the judgment that establishes a parental link with the couple or person who commissioned the child born to a surrogate mother.

On this point the question of multilateral co-operation has arisen. For example, in this perspective the Consuls General of eight European States, nearly all ICCS members (Belgium, the Czech Republic, France, Germany, Italy, the Netherlands, Poland and Spain) sent in 2010 a joint letter to several clinics in India asking them no longer to offer possibilities of surrogacy to their nationals who had not previously consulted their Embassy (http://www.hindustantimes.com/Inde-news/Mumbai/IVF-centres-direct-foreigners-to-consulates-over-surrogacy-issue/Article1-572534.aspx). Mention should also be made of the preliminary report *on the issues arising from international surrogacy arrangements*, prepared in March 2012 by the Hague Conference on Private International Law (http://www.hcch.net/upload/wop/gap2012pd10fr.pdf).

In Germany, surrogacy is incompatible with fundamental principles of law and is accordingly null and void in domestic law as a matter of principle, even if it derives from a contract concluded and carried out in a foreign State where it is allowed (in Ukraine, for example). All German nationals are supposed to be aware of the prohibition of surrogacy in Germany law.

In such a case, it must be asked whether a legal parentage has been established under the *lex causae* referred to in Article 19 EGBGB. Under German private international law parentage is determined according to the law of the State of the child's habitual residence (Art. 19, paragraph 1, 1st sentence of the Introductory Act on the Civil Code [*Einführungsgesetz zum Bürgerlichen Gesetzbuche* -EGBGB]. It can also be determined according to the law of the State of which one or the other of the parents is a national (Art. 19, paragraph 1, 2nd sentence EGBGB). If the mother is married, parentage may in addition be determined by the law concerning the effects of marriage referred to in Article 14, paragraph 1 EGBGB (Art. 19, paragraph 1, 3nd sentence EGBGB). As for maternity, this variety of options may have the result that different women may be considered to be the legal mother. For example, that can be the case if the foreign law (such as Californian law), contrary to German law (Article 1591 BGB), attributes the child to his or her genetic mother. In seeking a solution to this problem, account has to be taken of the fact that the application of foreign legal norms is excluded if the result would be manifestly incompatible with essential principles of German law (Art. 6, EGBGB), bearing in mind that in this context account must be taken of the relativity of public order. The closer the links with Germany, the more it should be presumed that Article 6 EGBGB is applicable. Account should also be taken of Article 1591 of the BGB, which attributes maternity solely on the basis of the

birth, that is to the surrogate mother. In this context, it is impossible to by –pass the prohibition of surrogacy, so that *in fine* one should rely on the German legal order which attributes the child to the surrogate mother solely by virtue of the birth.

In international situations where there is still a lack of clear legal bases, the law will evolve as and when the courts are called upon to examine the decisions taken by the competent authorities on the national territory, so that German diplomatic or consular missions do not have to evaluate or anticipate a decision of the authorities and courts in Germany.

As for paternity, Article 19 EGBGB is usefully completed by Article 23 EGBGB, to the extent that the latter also refers to the law of the State of which the child is a national as regards the conditions for consenting to the acknowledgment of paternity.

If the intending father is a German national, paternity on his part can be determined in accordance with German law, by virtue of Article 19, paragraph 1, 2nd sentence EGBGB. His paternity cannot be legally presumed on the basis of Article 1592, No. 1 of the BGB since he is not married with the surrogate mother, but it could result from an acknowledgment based on paragraph 2 of Article 1592 of the BGB or instead from a court decision in accordance with paragraph 3. If the surrogate mother was married, the establishment of her husband's paternity could prevent an acknowledgment by the German intending father until the husband's paternity had been successfully contested. Accordingly, such an acknowledgment by the intending father can be made only in limited circumstances, irrespective of whether or not the two parents are inscribed in the foreign birth record. In addition, Article 23 EGBGB concerning the mother's consent to the acknowledgment of paternity must be taken into account yet again: it provides that consent to a declaration of parentage is a matter for the law of the State of the child's nationality but that German law should nevertheless be applied if the child's best interests so require. In such cases, the German consular officials would be competent by virtue of Article 2 of the Consular Officials Act [*Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse – Kons*]. In practice, one indulgent judgment has been found in which a court upheld the validity of an acknowledgment made by the father (AG Nürnberg, 14 Dec. 2009 – UR III 0264/09, UR III 264/09).

Valid establishment of parentage on the part of a German national may lead to the issue of a travel document for the child, based on his German nationality (Art. 1, 1st sentence of the Passport Act [*Passgesetz – Passg*]), which derives from the establishment of paternity on the part of a German national (Art. 4, paragraph 1 of the German Nationality Act [*Staatsangehörigkeitsgesetz - StAG*]). Consequently, if paternity has not been validly established, the child will not have German nationality and will not be able to have German travel documents or a German passport issued to him or her. As a general rule, the intending father could not therefore leave the territory (say, of Ukraine) with the child to take him or her into Germany without holding appropriate travel documents. Before a German passport is issued, the national authorities competent in the matter of parentage and name (civil-status department) and of nationality (administrative authority) must be consulted and their decision awaited. It is possible to appeal to a court against a negative decision on their part.

In a general way, embassies and consulates have been instructed to refuse to authenticate foreign birth records in situations involving surrogacy. A visa for the purposes of adoption will not be granted unless, by analogy, the conditions laid down in Article 6 of the Act on implementation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption ([*Gesetz zur Ausführung des Haager Übereinkommens vom 29. Mai 1993 über den Schutz von Kindern und die Zusammenarbeit auf dem Gebiet der internationalen Adoption (Adoptionsübereinkommens-Ausführungsgesetz – AdÜbAG*] are met, that is to say if an international adoption procedure is in progress in which the authorities of both the State of origin of the child and the receiving State are participating.

In Belgium, no specific procedures exist for verifying that a child is the biological issue of the person or persons claiming to be his or her parents, but the legal provisions on the establishment and

contesting of parentage apply in conformity with the rules of Belgian private international law if an arrangement has been concluded abroad. In practice, the Department of Foreign Affairs reports that it is sometimes clear from the papers submitted to diplomatic and consular posts that the persons concerned have had recourse to the services of a surrogate mother. Two situations have to be distinguished: recognition of a foreign birth record and recognition of a foreign court decision establishing the child's parentage.

As to recognition of a foreign birth record, reference should be made, in the absence of a specific provision, to the Code of Private International Law and, in particular, to its Articles 27 (recognition of foreign authentic records) and 62 (law applicable to parentage). Several conditions must be met before a birth record drawn up abroad will be recognised in Belgium:

- In the first place, the record must satisfy the conditions required under the law of the State where it was drawn up for it to be classified as authentic.
- In the second place, the validity of the record must be established in accordance with the law applicable under the Code of Private International Law. To verify the validity of the record, the choice-of-law rules contained in this Code (Circular of 23 September 2004 on aspects of the Act of 16 July 2004 introducing the Code of Private International Law concerning personal status, *Moniteur belge*, 28 September 2004, p. 69600) should be applied. In this case, the rule on parentage set out in Article 62 of the Code of Private International Law should be followed and it should be verified, for each of the parents, whether the birth record is valid under the law of the State of which he or she was a national at the moment of the child's birth. Consequently, if the mother was Belgian at the time of the birth, the maternity recorded in the foreign birth record will be evaluated under Belgian law. Under Article 312 of the Civil Code, the person designated in the birth record is the mother of the child, with the result in Belgian law that the mother is always the woman who gave birth. A foreign birth record recording the maternity of the intending mother is therefore not valid and so cannot be recognised. Paternity is also governed by Belgian law if the father is Belgian. If the paternity entered in the foreign birth record is established on the basis of the presumption of paternity as regards the intending mother (Article 315 of the Civil Code), it is problematic to the extent that the maternity itself has been rejected.
- In the third place, the Act specifies that special account should be taken of Articles 18 and 21 of the Code of Private International Law, concerning respectively fraudulent evasion of the law and public order.

It follows from the foregoing that a birth record drawn up abroad recording the parentage of Belgian intending parents cannot be recognised in Belgium on the basis of Articles 27 and 62 of the Code of Private International Law. The same should apply to a request for recognition of a foreign birth record drawn up in favour of the intending parent or parents – assuming they have the nationality of a State whose law permits recourse to surrogacy – who reside in Belgium, even though the birth record is valid under the law of the State of which they are nationals.

As regards the case where the maternity and/or the paternity of the intending parents is established not in a birth record drawn up abroad but by a court decision pronounced abroad, recognition of the court decision pronounced abroad, recognition of the court decision is subject to the conditions referred to in Article 25 of the Code of Private International Law (Article 22 of the said Code). In such a case, the questions of the compatibility of recourse to surrogacy with public order and with fraudulent evasion of the law remain central.

A person who contests a refusal by a civil registrar to recognise the authentic record or the foreign court decision may appeal to the court of first instance (Articles 23 and 27 of the Code of Private International Law).

The practice followed, according to the Department of Foreign Affairs, is that diplomatic posts have received instructions not to recognise any effects for foreign documents produced in this context (birth records, judgments, …). This position is adopted even if the procedure, as laid down by the local law, has been scrupulously followed. What has effects abroad, in the case in hand, produces no effects in the Belgian domestic legal order.

When the persons concerned contact diplomatic posts or the Department of Foreign Affairs before taking any steps, they will receive a serious warning that if they follow this procedure, even when appropriate by following the foreign local law, the posts will refuse to recognise the maternity and/or the paternity, will issue no travel document and will invite them to address themselves to the competent court of first instance (reference to Articles 23 and 27 of the Code of Private International Law).

Several court decisions delivered on this matter show that *in fine* the judge generally establishes the parentage, by recognition and/or adoption based on the best interests of the child. Some of these decisions are summarised below.

- Civ. Antwerp, 19 December 2008: A man and a woman, both Belgian nationals, married and resident in Belgium, had recourse to the services of a surrogate mother in Ukraine. A DNA test shows that, from a genetic point of view, the applicants are the parents of the children (twins). In the children's birth records, drawn up in Ukraine, the applicants are referred to as the legal parents. The Belgian Embassy refused to recognise the Ukrainian birth records.

  In accordance with Article 27, §1 of the Code of Private International Law, the birth records satisfy the conditions required for their authenticity under the law of the State where they were drawn up, namely Ukrainian law. Validity, for its part, is established in accordance with the law applicable by virtue of the Code of Private International Law, taking account of Articles 18 and 21 of that Code.

  Establishment of parentage is governed by Article 62 of that Code, which prescribes application of the law of the State of which the applicants are nationals, that is Belgian law in the present case. The birth records must therefore be reviewed on the basis of the conditions laid down by Belgian law. The judgment also states that no foreign record can produce effects in Belgium if its contents cannot theoretically be drawn up in Belgium. According to Belgian law on parentage, the woman who gave birth to the child must be considered to be his or her mother, and will be mentioned as such in the birth record. The tribunal also noted that the validity of the records produced in Belgium as "birth records" could not be established, but it considered on the other hand that, in the absence of fraudulent evasion of the law, those birth records could be considered to be valid authentic records from which is appeared that the husband wished to recognise the children and that such recognition was not contrary to international public order. That recognition had the effect of attributing Belgian nationality to the children.

  The intending (and genetic) mother then turned to the Antwerp Juvenile Court (Civ. Antwerp, 22 April 2010, *T.Fam*, 2012/2, P.43) with a view to adopting the children. On the basis of the domestic adoption procedure, the court ordered the adoption, taking the view that it was not for it to deal with so fundamental an issue as surrogacy and that the adoption was in the interests of the children.

- Civ. Huy, 22 March 2010, *J.T.*, 2010, p.420: A married homosexual couple decided to have recourse in the United States (California) to a surrogate mother, who gave birth to two children of whom one member of the couple is the biological father. Before the birth and in accordance with local law, the persons concerned obtained a judgment declaring the intending parents to be the legal and natural parents of the children to be born. The birth record was drawn up with an indication of their names, as having that status. Transcription of those records in Belgium was refused.

Basing itself on Articles 27 and 21 of the Code of Private International Law, the court considered that it had competence to examine the compatibility with public order of the surrogacy arrangement, in that the latter had given rise to the birth records the refusal of recognition whereof was under discussion. The court based its analysis on Belgian international public order and on Belgium's international undertakings (Convention on the Rights of the Child and Convention for the Protection of Human Rights and Fundamental Freedoms) and considered that "if it were to recognise the validity of the birth records at issue, the court would be giving effect to the surrogacy arrangement and would thereby be accepting the principle that, even before they are born, children may be the object of a commercial contract".

The court therefore held that the surrogacy arrangement was contrary to public order by virtue of Articles 27 and 21 of the said Code and that the birth records constituted a fraudulent evasion of the law. It refused the recognition and transcription of the birth records drawn up in California, "in that they were the final step in a combined process designed to allow a couple to receive into their home children conceived in implementation of a surrogacy arrangement".

This judgment was reversed on appeal on procedural grounds (Liège, 6 September 2010, *J.T.*, 2010, p. 634). Basing itself on Articles 27 and 62 of the Code of Private International Law, the appeal court recognised the birth records and authorised their transcription in the civil-status registers, but solely insofar as they mentioned a parentage link as regards the biological father. It rejected, on the other hand, the parentage link as regards the other intending parent.

The appeal court considered that Belgian law - applicable in the case since the intending parents were Belgian nationals – would have permitted a parentage link to be established as regards the biological father on the strength of Article 329 of the Civil Code (recognition) given that paternity was not established by operation of law. In addition, Article 330, §2, of the Civil Code does not allow the paternity link to be contested as regards the biological father. As regards the other intending parent, on the other hand, the appeal court noted that Belgian law does not allow the existence of a double original paternity link and that Article 143 of the Civil Code excludes the application of a presumption of paternity in the case of a marriage between two persons of the same sex.

The unlawfulness of the surrogacy arrangement, the appeal court affirmed, cannot adversely affect the best interests of the children guaranteed by Article 3 of the Convention on the Rights of the Child and Article 22bis of the Constitution.

- Civ. Brussels (ref.), 6 April 2010, RTDF, 2010/4, p.1164: A Belgian man went to India in order to have recourse to surrogacy with the anonymous donation of an egg. He is the child's genetic father. The birth record drawn up in India mentions that the father of the child is this intending father (acknowledgment by notarial deed) and that the mother is unknown, in accordance with Indian law. The person concerned applied to the president of the court of first instance to obtain a travel document for the child and a ruling that the child would be staying in Belgium at his home.

  The court considered that the surrogacy arrangement was illegal. Nevertheless, the parentage link could be recognised under Belgian law on the occasion of proceedings before a court examining the merits of the case. This was because the court noted that the person concerned had recognised the child by notarial deed, that the child did not possess Indian nationality, that the applicant had really taken care of the child since his birth and that, in consequence, a privileged link and a family situation had been created between them. It did not seem to be in the child's interests to remain in India, a situation that would be contrary to Article 8 of the European Convention for the Protection of Human Rights. The court

therefore directed the Belgian State to issue to the person concerned a visa or a laissez-passer in the child's name so as to allow him to return to Belgian territory with the child.

- Civ. Brussels, 15 February 2011: A homosexual couple decided to have recourse in Ukraine to a surrogate mother and she gave birth to a child of whom one member of the couple is the biological father and a Belgian national. The birth record, drawn up in Ukraine, mentions the surrogate mother as the child's mother and the biological and intending father as his father. In accordance with Ukrainian law, parental authority was conferred by a judgment on the intending father. The Belgian authorities refused to recognise the birth record and to issue a passport to the child.

  In accordance with Article 27, §1, of the Code of Private International Law, the Ukrainian birth record met the conditions required under Ukrainian law for its authenticity. As regards validity, this was established in accordance with the law applicable by virtue of the Code of Private International Law, taking Articles 18 and 21 of that Code into account. The establishment of parentage is governed by Article 62 of that Code, which prescribes the application of the law of the State of which the applicants are nationals, namely Belgian law in the present case. The paternity established by the foreign birth record had therefore to be reviewed on the basis of the conditions laid down by Belgian law. The court considered that the applicant's acknowledgment of the child, established in the Ukrainian birth record, was in conformity with the requirements of Article 329 of the Civil Code, the mother having validly consented to that acknowledgment. The acknowledgment was not contrary to international public order, in that it was an acknowledgment of a child by his biological father and was in the child's interests. Neither had there been fraudulent evasion of the law, given that marriage between same-sex partners and adoption of a child in that context are not forbidden.

- Civ. Liège, 15 March 2013, Act. dr. fam. 2013/5, p.93: the City of Liège having refused to transcribe in the civil-status registers the American birth records of two children born through surrogacy with an anonymous donation of eggs, the intending parents (a homosexual couple) applied to the court, as the main issue, for recognition of the judgment delivered by the Superior Court of California which established the double parentage on their part of each of the two children and, as a subsidiary issue, for the recognition of the birth records drawn up by the City of Los Angeles.

  Since the birth records were no more than the implementation at the administrative level of the Californian judgment, the court deduced that the application had to be examined from the point of view of recognition of a foreign judicial decision, namely on the basis of Articles 24 and 25 of the Code of Private International Law. There was therefore no call to enquire as to the law that would have been applicable if the provisions of the Code had been applied and as to whether those provisions had been complied with. It had to be verified whether one of the grounds for refusal mentioned in Article 25 of that Code was not applicable, notably manifest incompatibility with public order and fraudulent evasion of the law. The court considered that the foreign decision was not manifestly incompatible with Belgian international public order. In the circumstances, the court decided that it was not appropriate to "un-knit partially the American decision, with all the negative consequences that such a step would imply as regards the interests of the children and the coherence and permanence of their personal status, given that it is certain that the link will be re-established by means of subsequent adoption proceedings". In addition, there could be no question, in the court's view, of fraudulent evasion of the law, given that the applicants had not artificially acquired another nationality with the sole purpose of having their intended parentage legitimated. As a result, the court authorised the transcription of the birth records drawn up on the basis of the American decision.

In **Spain**, on the initiative of the administrative authorities and in the interests of children born of surrogate mothers, the Directorate General of Registers published the Instruction of 5 October 2010, on the registration of the parentage of children born through a surrogacy arrangement, directing civil-status departments to follow certain rules, of limited scope, on procedural recognition. Articles 1 and 2 of this Instruction lay down the following rules:

According to Article 1:

"1. Registration of the birth of a minor, born abroad following surrogacy techniques, can be effected only if the decision of the competent court determining the child's parentage is attached to the application for registration.

2. Except if an international agreement was applicable, the foreign judicial decision must be subjected to the *exequatur* procedure provided for by the Civil Procedure Act 1881. For the registration of a birth to proceed, the application for registration and the order of the court closing the said *exequatur* procedure must be deposited with the Spanish civil-status department.

3. Notwithstanding the foregoing, if the foreign judicial decision originated in proceedings similar to Spanish non-contentious proceedings, the civil registrar will, as a pre-condition to registration, effect an ancillary review in order to determine whether the judgment can be recognised in Spain. In the course of that review, the registrar must verify:

(a) the regularity and formal authenticity of the foreign judgment and of all the other documents that may have been produced.

(b) that the original court based its international jurisdiction on criteria equivalent to those laid down in Spanish legislation.

(c) that the procedural rights of the parties, in particular of the pregnant woman, have been guaranteed.

(d) that there has been no infringement of the best interests of the minor and the rights of the pregnant woman. In particular, it must be checked whether the latter's consent was obtained freely and voluntarily, with no mistake, fraud or violence, and that she has sufficient natural capacity.

(e) that the judgment is final and that the consents given are irrevocable or, if they were subject to a time-limit for revocation under the applicable foreign law, that such time-limit has expired without anyone having exercised his or her option to revoke."

And according to Article 2 of the Instruction:

"In no case shall there be accepted for registration of the birth and parentage of the child a foreign civil-status certificate or a simple declaration, accompanied by a medical certificate concerning the child's birth, that does not record the identity of the pregnant woman."

In **France**, there is no legal provision making recognition of foreign civil-status records conditional on their inscription in the registers. Yet French intending parents most often wish their child to have a French birth record and request the diplomatic or consular authorities directly to transcribe the foreign record in the civil-status registers.

Only the Nantes Public Prosecutor is competent in the matter of the civil status of French citizens abroad. If he or she suspects that there has been surrogacy, he or she may request that the transcription be deferred pending the results of the enquiry which he or she will conduct into this suspect birth. Once the enquiry is completed, he or she may either authorise or object to the transcription. When the application is being examined, no distinction is drawn according to whether the child was conceived with the gametes of the intending parents or of third-party donors, since the prohibition of surrogate reproduction or gestation is general. No procedure exists for verifying whether the child is really the biological child of the intending parent or parents. However, the intending parent or parents often pray in aid a private biological expert report, or even their consent

to undergo any expertise that might be ordered by the court. Concretely, the steps provided for for checking whether a surrogate mother gave birth to the child consist above all of an enquiry into the origin of the planned pregnancy and the conditions in which the pregnancy proceeded. In this respect, information on the supervision of the pregnancy and the production of the pregnancy booklet are conclusive. Enquiries into the material living conditions of the woman who gave birth may also be of interest. If the Public Prosecutor refuses transcription of the foreign birth record, the intending parent or parents may bring proceedings against him or her in the Regional Court. On this point, the Court of Cassation adheres to a very settled case-law. It has recently re-affirmed the consequences in this area of the principle that surrogacy arrangements are forbidden. In two decisions handed down on 13 September 2013 (appeals no. 12-18315 and no. 12-30,138) the First Civil Chamber of the Court of Cassation thus considered that the transcription of such birth records must be refused given that the child's birth was "*the end product, in fraudulent evasion of French law, of a whole process comprising a surrogacy arrangement, an arrangement which, even though it may be lawful abroad, is null as being an absolute nullity on grounds of public order under Articles 16-7 and 16-9 of the Civil Code*". The Court of Cassation also specified that *"in the presence of this fraud, neither the best interests of the child guaranteed by Article 3§1 of the International Convention on the Rights of the Child nor respect for private and family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms can be usefully pleaded."* The Court of Cassation also confirmed one of the judgments that had been appealed against on the ground that it had annulled the recognition of the intending father's paternity following an action to contest paternity introduced by the Public Prosecutor for fraudulent evation of the law; in doing so, it rejected in the same way the arguments based on the best interests of the child and respect for private and family life.

The result of these decisions is that the foreign birth records cannot be transcribed and that, independently of any transcription, they cannot produce any effects as regards the parentage of the child. In referring for the first time to fraudulent evasion of the law and in rejecting all considerations linked to the best interests of the child and respect for private and family life, the Court of Cassation went beyond its previous case-law in which it had held that the absence of transcription did not deprive the children concerned of their paternal and maternal parentage recognised by the foreign law.

Before those two judgments, the Minister of Justice had sent on 25 January 2013 a circular, immediately applicable, to the chief registrars of the courts of first instance and to principal legal advisers and public prosecutors (Circ. 25 January 2013 on the issue of French-nationality certificates – surrogacy arrangement – foreign civil status, NOR: JUSC1301528C, BO MJ No. 2013-01 of 31 January 2013) in order to facilitate the issue of French- nationality certificates (FNC). In that circular, the Minister recalled that "the attention of the Ministry has been drawn to the conditions for issuing FNC to children born abroad of French citizens when it appears, with sufficient probability, that recourse has been had to an arrangement for surrogate reproduction or gestation." In these circumstances, Public Prosecutors' offices were requested, "provided that the other conditions are satisfied", to ensure that these applications are accepted "when the parentage link with a French citizen is shown by a foreign civil-status record having probative value under Article 47 of the Civil Code". But, "on the other hand, faced with a foreign civil-status record not having probative value, the chief registrar of the court of first instance will be entitled, after consulting the Nationality Office in advance, to refuse to issue an FNC"; it is specified that "mere suspicion that recourse was had to such an arrangement concluded abroad is not sufficient to refuse an application for an FNC if the local civil-status records confirming the parentage link with a French citizen, legalised or bearing an apostille save for treaty provisions to the contrary, have probative value within the meaning of the above- mentioned Article 47." In all cases, "a copy of the file and of the French-nationality certificate issued or of the refusal to issue it" must be transmitted to the Nationality Office. Consequently, even if the circumstances suggest that there was a surrogacy arrangement, registrars are instructed to issue the certificate applied for without any verification of the reality of the parentage entered,

whenever the foreign civil-status record has probative value under Article 47 of the Civil Code. An acknowledgment by a French intending father entered in the record may thus serve as a basis for obtaining a French-nationality certificate.

As for the Ministry of Foreign Affairs, it will, on the basis of a decision of 4 May 2011 of the *Conseil d'Etat*, authorise the issue of a "travel document" enabling the intending parents to enter the national territory with the child in the name of the right to private and family life. In practice, the Ministry of Foreign Affairs has established and circulated a specific procedure making it possible to detect pointers to recourse to a surrogacy arrangement by a French citizen abroad, to put the files in order (production of documents, hearing of the intending parents and the surrogate mother), to defer the preparation or transcription of the birth record and to remit the case for examination to the Nantes Public Prosecutor.

In **Greece**, Article 8 of Act 3089/2002 deals only with the fixing of the field of territorial application of the Act itself without any reference to the treatment of similar situations created abroad. The legislation being silent, one is entitled to hesitate between the need to apply a conflict rule, and to decide which rule, or to have recourse to the recognition method. However, since recourse to surrogate mothers is authorised by only some legal orders, formulation of a bilateral conflict rule seems not to be possible for the moment, and recognition appears to be the only realistic solution in similar situations which do not fall within the scope of the above-mentioned Act. This problem had already arisen, in similar terms, before the promulgation of the 2002 Act: in the case in question, argument was heard as to the lawfulness of the transcription in the Greek registers of a British birth record relating to a child born in the United Kingdom of an English woman and conceived with an egg and the sperm of two Greek spouses, the foreign record indicating that the commissioning spouse was the mother of the child. In an opinion delivered in 1998, the State Legal Council, on a reference from the Athens special office, had found firstly that, in accordance with Act 344/1976 on civil-status records, the civil registrar checked only the formal conditions of the foreign record, to the exclusion of the substance of the record in question and the law applied, within the limits imposed by compliance with Greek public order. Moreover, this solution of the Legal Council, which was later re-affirmed on several occasions, concerns any civil-status record, including birth records for children born through the intervention of a surrogate mother. In addition, the Legal Council noted that foreign laws allowing recourse to a human reproduction technique did not conflict with public order, even though in 1998 surrogacy had not yet been introduced into Greek law. Greek law had nevertheless already enunciated the principle that the use by medical establishments of various artificial fertilisation techniques was lawful, but without specifying the conditions.

Act 3089/2002 having resolved this last problem, it could be maintained that the question of public order no longer arises. However, under this new legislation recourse to surrogate mothers is strictly regulated, so that it might be considered that certain of the conditions laid down are a matter of public order. This might apply to the principle of court authorisation which is at tbe basis of a surrogate maternity or even to the prohibition on remunerating the surrogate mother.

When the foreign record refers to the foreign decision authorising recourse to a surrogate mother or when the commissioning spouse or spouses, having Greek nationality, produce such a decision to the Greek civil-status authorities and ask for a birth record for the child so born abroad to be drawn up in accordance with Article 42 of Act 344/1976, the problem of the recognition of the foreign decision arises. In the absence of specific legislative provisions, even in Act 3089/2002, the conditions for recognition of such a judgment remain to be determined and, on this point, one may have doubts. This is because two provisions of Greek law could apply: Articles 780 and 905§4 of the Code of Civil Procedure, concerning in the matter of civil status the recognition of foreign decisions delivered in the context, respectively, of non-contentious or contentious proceedings. The effect in practice of the determination of the legal regime for recognition of the decisions in question is considerable because of the differences between the above-mentioned provisions, as regards both the procedure to be followed and the conditions of effectiveness of the foreign decisions. An *exequatur* is necessary

only in the cases falling under the above-mentioned Article 905§4, whereas non-contentious judgments regulated by Article 780 are binding in Greece by operation of law if they were validly delivered. The conditions of validity of foreign decisions, whether subject or not to an *exequatur* procedure, also vary according to their procedural nature: verification of the applicable law determines the effectiveness of non-contentious decisions whereas such verification is not permitted for contentious judgments. This is because Article 780 provides that a non-contentious foreign decision can be recognised only if the foreign court applied the same rule as that which the Greek courts would have applied if the case had been brought before them and if they were competent by virtue of the private international law applicable to the case under Greek law.

Although the prevailing view is that the procedural nature of a foreign judgment falls to be determined by applying the Greek concepts relating thereto, legal writers and case-law are generally divided as to the legal regime for the recognition of foreign non-contentious decisions that determined a civil-status question. Since there are no special solutions in Greek law on the recognition of foreign decisions authorising recourse to a surrogate mother, no distinction can be drawn according to the civil status of the Greek citizen. Moreover, no provision is made for a procedure verifying whether the child in question was born of a surrogate mother or whether he or she is really the biological child of the person claiming to be the parent, since the Greek authorities are generally not authorised to modify foreign public records.

In **Italy**, Article 269 of the Civil Code provides that the legal mother is the woman who gave birth to the child; accordingly, in the case of surrogacy occurring in a State which authorises it and would allow maternal parentage to be established on the part of the intending mother, that parentage would not be recognised in Italy because of the prohibition of surrogacy by Act no. 40/2004 and the foreign birth record or judgment could not be transcribed in the Italian civil-status registers as this would be contrary to the public order provisions found in Articles 64 and 65 of Act no. 218/1995. On this point mention may, however, be made of a judgment delivered on 13 February 2009 by the Bari Court of Appeal, holding that an English decision admitting the establishment of parentage on the part of the intending mother could be transcribed in the Italian civil-status registers, in the best interests of the child, taken to be a criterion for evaluation in international public order ("*Non vi è contrarietà all'ordine pubblico internazionale nella trascrizione del provvedimento inglese che assicura anche il rispetto del diritto comunitario garantendo un'unicità dello status del minore e la libera circolazione delle persone*"). But this is a decision that has remained isolated until now.

When a child born abroad of a surrogate mother was conceived with the sperm of an intending father of Italian nationality, he can acknowledge the child in Italy in the conditions of the ordinary law found in Articles 250 and 254 of the Civil Code and, in case of contestation, paternity could be proved by any means, including a DNA test. In accordance with Articles 44-57 of Act no. 184/1983, relative to the adoption of minors in particular cases, the intending mother may seek to adopt the child acknowledged by her husband in this way. In the case of a record of an acknowledgment of paternity of a child born out of wedlock drawn up abroad, its validity in Italy would be governed by Articles 64 and 65 of Act no. 218/1995 on the recognition of foreign judicial and administrative decisions, provided that they are not contrary to public order.

If the gametes of the intending parents did not serve for the conception of the child, they could proceed to his or her adoption in the forms established by Act no. 184/1983, as modified by Act no. 149/2001 (adoption of minors, called legitimating, or international adoption *[adozione di minori c.d. legittimante ou adozione internazionale]*).

In **Luxembourg**, since that country's diplomatic and consular agents have no functions in the matter of civil status and so do not draw up civil-status records, they will not be called upon to evaluate whether a parentage established abroad should be recognised or not and they have not received any specific instructions for cases of children born of surrogate mothers. No procedure and no verification of the biological link are provided for.

If a Luxembourg citizen wished to obtain a travel document for a child who was born abroad of a surrogate mother and previously unknown to the Luxembourg authorities, the decisions would be a matter for the national authorities in Luxembourg (Ministry of Justice for nationality and civil registrar for parentage and name). In this context, if a Luxembourg citizen produced to the Ministry of Justice (Nationality Department) or to the civil registrar for his or her place of residence a birth record or any other document relating to a child said by him or her to be his or hers and drawn up in accordance with the law applicable at the foreign place of birth, everything would depend on the exact content of such a document. In the case of a document that in no way revealed that the child had been born of a surrogate mother and that the parents indicated in the document are not the biological parents, the content could at the outside appear doubtful in view of the circumstances (for example, which woman is going to make a long voyage abroad in order to give birth to a child there ?). If, on the contrary, the document produced contained a pointer to the intervention of a surrogate mother, the parentage would certainly not be recognised in Luxembourg because a surrogacy arrangement could be considered there to be contrary to public order. In practice, no such situation has yet arisen. If there is no legislation and no specific procedure relating to the recognition of these situations, there is no doubt that in the event of a dispute such cases would fall within the jurisdiction of the civil courts.

Again, a provisional residence permit for the purposes of adoption can be issued by the Ministry of Foreign Affairs only if an international adoption procedure is in progress and if, in accordance with the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, both the authorities of the child's State of origin and those of the receiving State are participating therein. Such provisional permits are accordingly issued only if the Ministry of the Family (the central authority for the purposes of the Hague Convention) certifies the validity of the adoption procedure.

In the **Netherlands**, there have in practice been a variety of situations in which Dutch intending parents have concluded a surrogacy arrangement abroad. They can first of all request their consular authorities to issue a Dutch passport for the child and their request will be examined in the light of the Dutch rules of private international law, with the final decision being taken by the Ministry of Foreign Affairs. They can also request only a residence permit in order to bring the child back to the Netherlands, or more simply a tourist visa from the Immigration and Naturalisation Department so that the child can enter the national territory. It also happens that the intending parents take steps only once they have returned to the Netherlands. Recognition by the Dutch authorities of a birth record validly drawn up abroad in accordance with the local law or of a judgment delivered by virtue of the foreign local law and designating them as the legal parents could theoretically be granted under the conditions of the ordinary law (Article 101, book 10 of the Civil Code), but in practice a ground for refusing recognition could be derived from the fact that the arrangement leading to the birth of the child is unlawful in the Netherlands, as was decided by the Hague District Court in a judgment of 23 November 2009 (Case No. 328511/FA RK 09-317, unpublished). However, it can be mentioned that one judgment considered that the unlawfulness in domestic law of a surrogacy arrangement concluded in India could not have greater weight than the best interests of the child, with the court also relying on the existence of a private family life between the child and the man in question and on the right of each of them to respect for his private life guaranteed by Article 8 of the European Convention on Human Rights, in order to conclude by ordering the Dutch authorities to issue urgently a document authorising the minor’s entry onto Dutch territory (Harlem District Court, 10 January 2011, LJN BPP0426, NIPR 211 185).

In **Poland**, in the absence of specific provisions and guidelines, the authorities attempt to find *ad hoc* solutions and, in most cases, it falls to the courts to decide.

In the **United Kingdom**, a child born following an agreement between a British couple and a foreign surrogate mother is subject to United Kingdom law if the couple wish to bring the child onto United Kingdom territory. They must therefore comply with that legislation, notably as regards the application of the rules on parentage and on the absence of payment to the surrogate mother of sums in excess of the expenses reasonably incurred by her. Some foreign legal systems accept that

the intending parents acquire the status of parent automatically, either because they are designated as the father and mother in the birth record or because of the effect of a foreign judgment. However, if they live or are domiciled in the United Kingdom, it is possible that they will not be regarded as the legal parents, notably as regards authorisation to enter the territory and the child's nationality, and this may prevent their bringing the child to the United Kingdom. In that event, the solution is to apply for a parental order, which requires that at least one of them has a genetic link with the child. In addition, a difficulty may arise from the fact that they remunerated the surrogate mother in the context of an agreement for a valuable consideration, as is often the case; under the United Kingdom legislation, they will then have to request the court to authorise their payments before they can obtain a parental order. The court will examine the particular circumstances of the case before deciding whether an exception should be made to United Kingdom public policy, which forbids remunerated surrogacy.

When a child is born abroad of a surrogate mother, the birth must be registered in accordance with the law in force in the State where he or she was born. Subsequently, the commissioning couple may apply to a competent British court (England and Wales, Scotland and Northern Ireland) for a parental order, proceeding in the same way as if the birth had occurred in the United Kingdom. For that purpose, certain criteria laid down by regulations must be satisfied, notably the fact that the commissioning parents are domiciled in the United Kingdom, the Channel Islands or the Isle of Man.

Recommendations have been issued by the Foreign and Commonwealth Office recalling that « in some countries, the name of the 'commissioning couple' may be included in the birth record drawn up locally, either by court decision before the child's birth or in the framework of local law. This means that the surrogate mother and her partner will not be mentioned. It is therefore essential that consular posts exercise great care when determining the child's rights in the matter of nationality if he or she was born as a result of a surrogacy arrangement. In case of doubt, the application should be referred to the Nationality and Consular Registration Section in the Consular Directorate. The passport application and birth declaration forms held by consulates contain supplementary questions designed to determine who are the legal parents in the case of a child born of a surrogate mother. The birth record (if issued within 12 months of the birth) will constitute conclusive proof of paternity for the purposes of attributing nationality, independently of the fact that the man designated as the father may be regarded as such by the Human Fertilisation and Embryology Act 1990, unless the surrogate mother was married at the time of the birth. In the case of a child born before 1 July 2006, neither the foreign court decision nor the birth record will affect the legal position in the United Kingdom set out above (see II), but these documents could be used in support of an application for registration under paragraph 3(l) of the British Nationality Act 1981 if one or both of the designated parents are British citizens and it is clear that the child will be brought up as a member of their family (Chapter 35 – Conditions for the acquisition of British nationality by a child born by medically assisted reproduction or a surrogacy arrangement).''

In **Switzerland**, a 1992 referendum came out in favour of introducing into the Federal Constitution (Cst.) a provision concerning medically assisted reproduction. The Federal Act on medically assisted reproduction (LPMA; RS 810.11) and the Order of the same name (RS 810.112.2) came into force on 1 January 2001.

Article 119 Cst. and the LPMA lay down the conditions for the use of medically assisted reproduction. In particular, they prohibit recourse to surrogacy. However, the enactment of the LPMA did not lead to the enactment of rules of private international law governing the situation of a child born abroad following recourse to a surrogacy arrangement permitted abroad but prohibited in Switzerland.

The Cantonal civil-status supervisory authorities are generally competent to recognise a foreign decision relating to surrogacy (Art. 32 LDIP [Federal Act of 18 December 1987 on Private International Law; RS 291]). In the absence of specific private international law rules, those authorities have to find solutions by relying on the existing norms on the establishment of the parentage link, taking account of the fundamental principle of the child's best interests.

The parentage link may notably be established abroad by a birth record (Art. 70, LDIP), by an adoption (Art. 78 LDIP) or by an acknowledgment of the child (Art. 73 LDIP). The competent authority

will then have to examine whether one of the connecting - link criteria utilised by the LDIP to accept the validity of the decision rendered abroad has been satisfied.
Recognition of the foreign decision concerning the surrogacy must also be in conformity with the general principles of Swiss private international law and notably not be manifestly incompatible with Swiss public order. The interests of the child is the preponderent public-order criterion. The domestic law principle that the legal maternity link must be established automatically between the child and the woman who gave birth to him or her (*Mater semper certa est* ; see Article 252 sub-paragraph 1 of the Civil Code) has not been raised to the level of a rule of public order in international private law in order to avoid limping legal relationships (Message from the Federal Council to the LDIP, FF 1983 I 358).
If a surrogacy situation arising abroad is held to be manifestly incompatible with Swiss public order, the maternity of the commissioning mother will not be recognised. The paternity established abroad may be maintained or it may be suppressed at the same time as the maternity if the overall family situation created abroad is held to be manifestly incompatible with Swiss public order. A large number of situations can arise, according to whether it is a question of a single-parent commissioning family (mother alone or father alone), a commissioning family with two heterosexual parents or a same-sex couple.
If the parentage links resulting from a surrogacy situation abroad are not recognised in Switzerland, it will nevertheless sometimes be possible to establish a parentage link with one or both of the two commissioning parents by applying Swiss law. Paternity can in this case result from an acknlowledgment of the child, affiliation proceedings or an adoption. For acknowledgment and paternity proceedings, the maternity must have been established. Moreover, no other paternity must have been established, notably on the basis of the presumption of paternity of the husband of the surrogate mother. In that case, adoption is the only way of creating a new parentage link between the child and the commissioning father. The child's parents must in principle consent thereto unless their consent can be dispensed with in the restrictive conditions laid down by law (Article 265a to 265d of the Civil Code).
As regards the commissioning woman, if the surrogate mother has been entered in the Swiss civil-status register as the mother, parentage can be established only by adoption, provided that the parents have consented thereto or that their consent can be dispensed with (Art. 265a to 265d of the Civil Code). This is because the intending mother can neither acknowledge the child nor institute affiliation proceedings even though one of her eggs served for the conception.
A married person may adopt a child with his or her spouse or may adopt the child of his or her spouse, notably when the father has acknowledged the child. Marriage is possible in Swiss law only between two persons of different sex. A single person may adopt, but the adoption will break all the previous parentage links, notably those created by acknowledgment of the child by the commissioning father. Furthermore, adoption by a single person is exceptional, since the interests of the child generally require that he or she be integrated into a two-parent family. Swiss law on adoption does not at present allow a same-sex couple linked by a partnership or concubines (heterosexual or homosexual) to adopt together. However, discussions are in progress in Parliament on this subject (see also the judgment of the European Court of Human Rights in Emonet and Others v. Switzerland (http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-83991). Finally, the conditions for adoption, in particular those relating to age, are fairly restrictive (see Art. 265 and 266 of the Civil Code), so that intending parents are not always in a position to adopt.

Conclusion

This study well illustrates the current difficulties and uncertainties raised by surrogacy situations. This note was completed at the end of 2013 and is based on information supplied by the ICCS National Sections. It also takes up some of the information derived from the above-mentioned preliminary report drawn up by the Permanent Bureau of the Hague Conference and, as regards the Netherlands,

from the article by Ian Curry-Sumner et Machteld Vonk «Surrogacy in The Netherlands» (in K. Trimmings and P. Beaumont *(eds. International Surrogacy Arrangements: Legal Regulations at the International Level,* Hart Publishing, Oxford, 2013: http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849462808), which itself was based on the report by K. Boele-Woelki, I. Curry-Sumner, W. Schrama and M. Vonk, *Draagmoederdchap en illegale onneming van kinderen* (The Hague, WODC, 2011).