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State of play of cross-border surrogacy arrangements – Is there a case for regulatory intervention by the EU?

I. Introduction

A recent study conducted by *Laura Carpaneto* for the EP Legal Committee on the cross-border placement of children highlights important deficiencies with regard to the cooperation of Member State authorities in matters of international family law. Surprisingly, given the very limited and specialized scope of the study, the primary policy recommendation asks for a „new autonomous regulation, devoted exclusively to parental responsibility matters“.¹

The point is well-taken: European coherency would be served by such, as indeed by virtually every EU regulation, coherency being a necessary side-effect of unification itself. But what about national diversity? With Iceland having suspended the accession process, a possible Brexit looming as well as anti-European resentment rising both to the left and to the right in the Member States, our time may ask for a very cautious approach to unified EU regulation. This holds true particularly in family law. Here, amidst a myriad of other private legal fields geared essentially towards pale efficiency, truly ethical and political societal choices are still being made. Our topic for today bears the clearest testimony of this fact: Many Member States not only deny surrogacy arrangements any legal effect, but have in fact criminalised it. According to recent comparative studies, only the United Kingdom, Greece and Rumania expressly allow surrogacy and even that exclusively within the confines of strict regulation.² Such express regulation, however, usually does not cover *international* surrogacy arrangements, i.e. surrogacy not being conducted on a Member State's home turf, but abroad.

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¹ Cross-border placement of children in the European Union, May 2016, available at <http://www.europarl.europa.eu/supporting-analyses>.

² See *Diel*, *Leihmuttertschaft und Reproduktionstourismus*, Frankfurt am Main 2014; *Duden*, *Leihmuttertschaft im internationalen Privat- und Verfahrensrecht*, Tübingen 2015; *Thomale*, *Mietmuttertschaft*, Tübingen 2015. The comparative study commissioned by the EP, *Brunet et al.*, *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2013, available at <http://www.europarl.europa.eu/studies>, clearly not only needs to be updated but also extended, so as to take cognizance of the Member States' recent recognition policies with regard to *international* surrogacies.

This international regulatory lacuna invites international arbitrage or, on a somewhat more critical note, system shopping. It hence comes at no surprise that European courts of late have frequently been confronted with the question of how to deal with international surrogacy *ex post facto*. In a typical setting, after a child is given birth to abroad by a surrogate, intended parents bring the child “home” to the EU, claiming legal parentage before Member State courts and authorities. Unlike national surrogacy, such international surrogacy arrangements raise issues „concerning family law with cross-border implications“, upon which the European Union – be it through unanimity procedure in accordance with Art. 81 para 3 TFEU be it through enhanced cooperation as provided for in Art. 20 TEU and Art. 326 seqq TFEU³ – can legislate, consulting the EP.

In the following, I will first clarify the concept of surrogacy and underscore the ethical and political reasons why most Member States are strictly against it (II.). This sets the stage for a brief analysis of cross-border surrogacy and the private international regulatory challenges it poses to surrogacy-prohibiting states. The procedural facet of the international public policy exception will emerge as the main playing field where conventional legal arguments have to be wielded (III.). I will then move on to discuss European Citizenship, Human Rights and the principle of the superior interest of the child as norms overarching conventional private international law and allegedly tilting public policy analysis in favour of recognizing foreign surrogacy arrangements (IV.).

Despite these arguments, however, only adoption provides the adequate procedural framework for ensuring the key superior interest of the child and protecting his or her human rights. Hence, the resolution of international surrogacy disputes depends on Member States being able *not* to recognize foreign parental orders and certificates based on surrogacy so authorities can condition parentage of intended parents on conducting an adoption procedure. Until such or similar result is reached on a global level, be it through an amendment of the 1993 Hague Convention or be it through ratification of an instrument with similar characteristics, national legislation appears both necessary and sufficient. That is why, at the moment, I see no immediate need for the EU to take *regulatory* action in the matter of international surrogacy. Rather, the EU should consider working on a model adoption law or adoption guidelines in order to inspire and support Member States legislation and legal

³ On the second option, consider notably the Rome-III Regulation. See also: *Thomale*, *Zeitschrift für Europäisches Privatrecht*, 2015, 517, 526 seqq.

practice.⁴ This may include a “fast-track” adoption procedure in surrogacy cases (V.).

II. The key ethical challenge: objectification and commodification of the child

Surrogacy precipitates ethical concerns with regard to all parties. The precarious nature of the surrogate’s “service”, for example, which raises troubling issues of exploitation and unequal negotiating power, has been receiving widely spread attention.⁵ Less prominent are concerns voiced, e.g., by the German legislator that intended parents might need protection against their own prospective biases as to whether they will be able to deal with the process and the responsibilities engendered by a surrogacy arrangement.⁶ While these considerations certainly merit further analysis and discussion, their case against surrogacy is comparatively weak due to their paternalist nature. I will therefore concentrate on the *child’s* interests at stake, the child being the weakest party in the whole construction of surrogacy. At the outset, it is important to note that not at a single stage in a typical international surrogacy arrangement the child’s interests are even considered. Intended parents avail themselves of international arbitration to evade their home prohibitive laws and pay surrogacy agencies to organise the process abroad. A contract with the surrogate is being concluded, after which a Judgment of Paternity, Parental order or the like is obtained. The child is not a subject but an object of every single step just mentioned. Before the child even comes into existence, it is already being paid and contracted for, that contract typically even providing for the intended parents’ right to order an abortion within certain limits. Then, once the child is born, the judicial paternity procedure conducted is largely declaratory.⁷ This outlined objectification in itself raises deep ethical resentment in many Member States, holding it to run against the child’s human dignity.

⁴ Cf. similar recommendations made by *Fenton-Glynn*, Adoption without consent – Update 2016, May 2016, at 56, available at <http://www.europarl.europa.eu/supporting-analyses>. This would be a complement to the regulation of international adoption cases as being discussed by the Draft Report on cross-border adoptions, 11th of May 2016, 2015/2086(INL).

⁵ See inter alia European Parliament, Plenary sitting, 30th of November 2015, A8-0344/2015 at 114, noting that the EP “Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments.” □

⁶ *Thomale*, Mietmuttertschaft, Tübingen 2015, 15.

⁷ On Californian law see *Thomale*, Mietmuttertschaft, Tübingen 2015, 47 seqq.

A second, related but not identical, issue is commodification. Children are, drastically speaking, produced “on demand”, using wombs rented out for that very purpose. Such commercial interests, bordering solicited adoption and similar kinds of child-trafficking, are stigmatised even by many surrogacy-allowing states, which would, like e.g. the UK and Greece, allow altruistic surrogacy while prohibiting any remuneration to be paid to the surrogate. However, such restrictions are not effectively enforceable as “expenses reasonably incurred”⁸, which still may be compensated, are vague enough to include profit margins and because side-payments in general are hard to keep track of. What is more, international arbitrage will always allow the most liberal regulation to win the day. That is, as long as states like, e.g., the State of California expressly allow commercial surrogacy, commodification will stay an issue of international surrogacy as a whole.

III. The key private international legal challenge: defining the scope of the procedural public policy exception

The paradigm setting for international surrogacy provoking international legal conflict is the system-shopping scenario between a surrogacy-prohibiting receiving state and a surrogacy-allowing state of origin.

There are two fundamentally different ways, in which foreign law can be imported into a legal order. One is through the receiving state’s courts applying the conflict of law rules of the *lex fori*. Another is through recognition of foreign judgments by the receiving state’s courts.

Let us *first* turn to the conflict of law regime. More often than not, Member States’s choice of law rules will use nationality of the alleged parents or the habitual residence of the child as a connecting factor by which to determine the substantive law applicable to a child’s parentage. In most cases, this would lead to the application of the law of the forum (*lex fori*), following the *mater semper certa est* dogma of surrogacy prohibiting states. That law of the forum would pronounce the delivering surrogate rather than the intended mother to be the child’s legal mother, thus not yielding the result desired by the intended parents.

Therefore, the *second* venue, recognition of foreign judgments, is more commonly pursued.

⁸ Art. 54 Section 8 Human Fertilisation and Embryology Act (2008), UK.

Intended parents first obtain Judgments of Paternity or similar certificates issued by the State of origin's authorities. After that, they demand the recognition of that act in the receiving State. However, such recognition usually doesn't happen automatically. One precondition that can be found in virtually every private international law, is the public policy exception. It allows receiving States to vindicate fundamental values against judgments stemming from legal orders that do not share these values. This asks receiving states' courts to strike a delicate balance between external coherence, i.e., in the case of surrogacy, avoiding limping parentage relationships on the one hand and internal coherence, maintaining the democratic social choice made against surrogacy within the receiving State, on the other hand. Conventional wisdom has it that two aspects typically govern this balancing exercise. *First*, the incompatibility of the foreign judgment with the *lex fori* has to be manifest and evident. This is, because it is on an exceptional basis only that general rules of mutual recognition should be exempted. *Second*, a domestic nexus is required in order to justify receiving State's values and social choices to trump those of the State of origin. It seems clear that this classical private international analysis speaks against recognition of typical international surrogacy arrangements. Not only are prohibitions on surrogacy usually driven by vital concerns of human rights and cultural ethics, ticking the "manifest and evident" box, but typical cases show even a double domestic nexus, both the intended parents being nationals as well as habitual residents of the receiving State and the child's intended habitual residence falling in line accordingly. Conversely, if for the sake of argument one were to apply a best law approach, neither any vital interest nor any domestic nexus can be identified, linking the State of origin with the case. Therefore, if we were to apply a conventional private international analysis to international surrogacy arrangements, at least the motherhood of the intended mother could not be recognized.

IV. Overriding private international law with European Citizenship, Human Rights and the principle of the superior interest of the child

Neither Member State courts nor the ECtHR have been restricting their theories of international surrogacy arrangements to above said private international analysis. Rather, we have been witnessing a constitutionalisation of procedural public policy in a form rarely seen hitherto. While it has been a common theme to hold national guarantees of human rights *against* the recognition of foreign law and foreign judgments via public policy, human rights are now alleged in order to justify ousting the public policy exception itself. This ties in with a

similar usage of the internationally recognized principle of the superior interest of the child. The standard argument goes as follows: Despite national prohibitions on surrogacy being legitimate *ex ante*, i.e. as a preventive measure, the actual birth of a child through surrogacy supersedes this preventive logic, asking for recognition of extraterritorially accomplished facts. The one and only way to protect the child's interests, human rights and indeed livelihood, it is being alleged, lies with accepting the intended parents as legal parents. However, while some Member States' courts have adopted this view,⁹ others have opposed it.¹⁰ I shall quickly outline, why the latter position appears more convincing to me.

First, we should acknowledge the disastrous policy implications of allowing, if you concede the term, *enfants accomplis* in an officially surrogacy-prohibiting state. For, at the bottom line, it means compromising the state's policy on procreational ethics, taking away any deterring effect from the internal prohibition against surrogacy. This is regrettable even more so as one motive behind a ban on surrogacy is the very child's best interest, which, paradoxically, proponents of recognition *against* those prohibiting rules are pretending to advocate. Conversely, vindicating national rules against surrogacy is not merely sanctioning a *fraude à la loi*, committed by the intended parents. Rather it is a *fraude à l'enfant*, whose protection lies at the heart of that law. *Second*, basing the argument for recognition of foreign surrogacy judgments or certificates *ex post facto* on the child's best interest is question-begging as it seems forced to presume what really remains to be shown, namely that the recognition of parentage relationships between the intended parents and the child is indeed in the latter's and not only in the former's best interest. At the recognition stage, the only qualities intended parents have been showing are the readiness to pay and to evade national laws in order to get a child. Those are characteristics they share with any child purchaser, hence giving no reason to assume recognition could be better for the child than placement, adoption or public care. We will pick up this issue in the next section.

If international surrogacy arrangements are conducted with a Member State – assuming, for the sake of argument, that despite no evidence to that effect there were any Member State whose surrogacy law are sufficiently liberal to invite such system shopping – European

⁹ Such as the Austrian Constitutional Court and the German Supreme Court.

¹⁰ See notably to this effect the Supreme Courts of Spain, Italy and France. They are joined by the Swiss Supreme Court. Specifically on the Swiss and the Italian decisions see: *Thomale*, Anerkennung kalifornischer Leihmutterdekrete in der Schweiz, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2/2016, 177 seqq. as well as *Thomale*, Anerkennung ukrainischer leihmutterchaftsbasierter Geburtsurkunden in Italien, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, forthcoming.

Citizenship as contained in Art. 21 TFEU may give public policy balancing yet another spin. The CJEU notably in *Garcia Avello* and *Grunkin-Paul* has given European Citizenship a rather wide reading, considering also “serious inconvenience for those concerned at both professional and private levels”¹¹ to fall within the scope *ratione materiae* of Art. 21 TFEU. However, any “objective consideration” proportionately pursued yields sufficient justification for this form of free movement. Such consideration is evidently present with regard to surrogacy prohibiting laws as a part of national public policy.¹²

Therefore, international surrogacy arrangements, be they with EU Member States or Third States, do not justify overriding the public policy exception with European Citizenship, Human Rights or the principle of the superior interest of the child.

V. Policy recommendation: non-recognition, but instead preferred adoption

As could be shown, not only do international surrogacy arrangements run counter to classical public policy of surrogacy-prohibiting states, but they also fail to warrant intended parents’ parentage to be in the best interest of the child. My policy recommendation is twofold. *First*, Member States must be allowed and indeed – for the sake of internal coherence – *should* decline any recognition of foreign judgments or certificates awarding parentage based on surrogacy agreements, if, as typically in system shopping cases, there is a sufficient domestic nexus. *Second*, the superior interest of the child has to be protected by implementing the one procedure that is truly geared towards that interest and is based on detailed international and national regulation to that effect – adoption. The adaptation of adoption procedure to surrogacy arrangements should be the main focus of legal reform. One could imagine, for example, fast-track procedures for surrogacy children if their genetic descent from the intended parents can be ascertained or if the legal parentage of *one* intended parent is already established independently, i.e. the adoption procedure only focussing on the other intended parent. Also, intended parents may be put on top of the applicants’ list or be given special consideration in the adoption process. However, all this has to be done under the auspices of *the child’s* best interest. Such procedure not least fully complies with the requirements set out by the ECtHR in its well-known *Mennesson* decision.¹³ Therein, the ECtHR derived from Art.

¹¹ CJEU C-353/06, *Grunkin-Paul*, at 23.

¹² See CJEU C-208/09, *Sayn-Wittgenstein*, at 81 seqq., explicitly recognizing public policy as a justification for limiting free movement of European Citizens.

¹³ ECtHR, No. 65192/11 and 65941/11, 26th of June 2014, *Mennesson* and *Labassée*.

8 ECHR the right *of the child* (1) not to be withheld the *possibility* (2) to establish parentage relationships with his or her genetic (3) parents. Reformed adoption procedure would allow such possibility, while subjecting it to a thorough examination, whether it really lies in the child's interest to have the intended parents – as opposed to other applicants – as his or her legal parents.

In the long run, I see an international treaty on surrogacy as the ultimate goal of global legal integration. It seems tempting, as has been done before, to suggest some seemingly small amendments to the 1993 Hague Convention on protection of children and co-operation in respect of intercountry adoption.¹⁴ However, perhaps we should not get our hopes too high on that, the Hague Parentage Project still dwelling at a rather early stage and the prospects of ratification, once a text were to be agreed upon, being largely unknown. In any event, international surrogacy arrangements ask questions that need to be answered right now as we speak. Therefore, quick national legislation is required. Where does this leave the EU? I believe, for the time being, the EU should hold back on regulating the issue and rather adopt a more managerial, advisory role. While this can and should include supporting the Hague Parentage project, developing a model adoption law in order to provide a blue-print for Member State legislation and to promote adoption reform inside the Member States seems even more urgent and useful.

¹⁴ See to that effect *Bertschi*, *Leihmutterchaft*, Bern 2014, 226 seqq.; *Thomale*, *Mietmutterchaft*, Tübingen 2015, 81 seqq.