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**International Commercial  
Gestational Carriage:  
enforcement of contracts for  
services in the European Union**

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# Summary

The options of procreation, reproduction or bringing into existence a child of a particular parentage, including motherhood, are related to the advancement of science. Nowadays it is possible for a woman to become pregnant and afterwards give birth to a child which, by using medical assistance, is actually made from other woman's oocyte. The term gestational carriage refers to being pregnant and thus carrying a child gestationally which, based on a contract, is done as a service for another woman who has intended to become mother of the child.

The right to move and receive services in the European Union is hindered if no enforcement of contracts for services of international gestational carriage can take place across member states' borders. Movement is not free if it is subsequently leaving the concluding parties of these contracts – intended mother and gestational carrier – and the children born as a result of the consequential services in limping legal situations.

This thesis, with the aim of applying law to subject matter of this thesis, characterizes arrangements for gestational carriage as the essence of employing an assisted reproduction method. It illustrates how differently the European Union states have reacted to the use of this procreation service and the interest in legalization of children born as a result of this. Concluding that member states' substantive laws do not support the enforcement of these contracts internationally, this thesis focuses on an overview of how European Union law relates to the matter. It demonstrates that European Union has not initiated and implemented suitable arrangements in this situation. It has not still used its competence of creating private international law measures that could, by allowing each state to preserve their traditions in the sensitive issue of employing procreation methods, ensure the best interests for children created in a nontraditional way.

This thesis considers that European Union may draw inspiration for reconciliation of the involved interests from several legal instruments of other organizations that address similar matters. The thesis mainly focuses on the Hague Conference on Private International Law measures even if these measures are not aimed at nor are incidentally relevant for enforcement of contracts for services of international commercial gestational carriage. This is true not only because of scope of application for these instruments but also due to the fact that, if they actually offer a workable legal status establishment for children, as, for instance, adoption, they do not ensure the realization of rights for use of nontraditional procreation methods

across borders in the European Union. Thus substantive law of all its states regarding the receiving and preserving of status for children born as a result of gestational carriage arrangements in a unified way are not accorded. Convergence is a utopian idea, considering that in various cultures the understanding of what is the correct attitude towards women, their way of creating children and how to correctly treat these children, for various reasons as, for instance, religion, is divergent. It is utopian to imagine that there will be no use of right to procreate provided for in international human rights documents by employing methods that are as convenient as possible.

From this, the thesis concludes that in the absence of globally applicable solutions the European Union may, according to its competence and the arsenal of legal instruments available to it, sufficiently facilitate enforcement of contracts for services of international commercial gestational carriage in its territory by providing not only theoretical free movement and freedom to receive services but also the real implementation of these rights. It may do so by ensuring that private international law harmonized by its regulations assists in mutually recognizing legal statuses necessary for the children born as a result of employing gestational carriage arrangements to have, at the very least, a mother that was intended and a state that can ensure their best interests for the rest of their lives.

# Disclaimer

The legal argument in this thesis is not written to discriminate anyone on basis of citizenship, origin (including national, racial, ethnic and ancestry), colour, religion or belief, physical or mental disability, age, sex (including pregnancy and childbearing), sexual orientation, partnership, marital or other family status, political or other opinion, source of income and social condition or other grounds protected by the law concerned.

# 1.Introduction

## **Subject**

This thesis is about the possible use of European business law in order to protect children for the creation of which contracts for services of international gestational carriage are concluded. These contracts between the intended mother and gestational carrier should be enforced in the best interests of children.

## **Problem and research purpose**

Children are born but due to conflicts of laws they may be without state and a legal mother. Contracts concluded on international commercial gestational carriage may not be enforced in the European Union and as a result the service providers may not receive payments and the intended mothers may not become the legal mothers of the children.

Commercialization has become one of the main reasons for non-enforcement of these contracts and children remaining in legal limbo status. The European Union member states are more prepared to allow enforcing arrangements of altruistic gestational carriages than commercial ones and this means that the intended mothers' right to procreate is denied only because commercial contracts were concluded for services. On the other hand, carriers would be exploited if they are not paid for the services.

The contract enforcement across borders is especially complicated since there are states that forbid these modern reproductive services. Some limit these services according to various conditions and some ignore them.

Persons who wish to conclude contracts for services of international commercial gestational carriage try to use the freedom to move and receive services in the European Union in member states where the applicable law on substance is more favourable to them. Indirectly they are thus realizing a choice of law and forum, but it does not operate properly for reaching objectives of contract-concluding parties. Due to uncoordinated divergences of laws prevalent in this field that do not prevent the limping status of children born in these circumstances this fundamental freedom for European Union citizens is hindered.

## **Research approach**

Throughout this thesis different instruments of international law are analysed before analyzing European Union law tools as the most relevant. They are considered in order to identify possibly useful legal measures for enforcement of contracts for services of international commercial gestational carriage in the European Union. The core of this thesis is that European Union citizens' free movement and freedom to receive procreation services right is limited by divergent national laws of European Union member states on gestational carriage services. Enforcement of arrangements of these services internationally can be facilitated by private international law development.

## **Research question**

Should the intention of becoming a mother be enforceable ground for determining legal motherhood in cases of international commercial gestational carriage in the European Union?



## **2.Method, material and delimitations**

The traditional legal research method is employed in order to perform a review of current legal problems in international commercial gestational carriage within the European Union which require innovative solutions. The thesis focuses on the specific issue of enforcement of contracts for services concluded between intended parents and gestational carrier regarding the international use of this assisted reproduction method for a fee in the European Union. It considers this question in the best interests of the children born as a result of such arrangements.

Mostly academic articles and books relevant to the subject matter are employed. They supplement the law and relevant case law in this field, which the courts in many states are forced to approach in a creative manner. As the issues concerned are of a cross border nature, interpretations provided by courts with international jurisdiction are considered as the most relevant.

Main sources of law employed for researching the subject matter are also international. They include European Union primary and secondary law, Hague Conference on International Law conventions and various human rights documents.

A significant part of the employed academic writing is not of European Union origin but it is used for a more precise demonstration of concepts to whom law concerning European Union is further applied.

The thesis does not include comparative analysis of European Union member states law but instead uses their experiences as examples where significant. Situations beyond European Union borders are also described but only to the level necessary to show the essence of the subject matter.

Some delimitations will be further explained in the context where they belong.

Since the thesis is concluded by analysis of law development possibility, it includes a brief recommendation regarding policy.

For the purposes of this thesis, only material available up to April 2013 is considered.

# 3. Disposition

The thesis is structured according to the following plan that indicates main point of departure for the main chapters in a consistent sequence.

Contracts for services of commercial gestational carriage are already being concluded for several decades. Their enforcement is still inadequately mutually coordinated in the whole world (5). European Union has no supranational law on gestational carriage that could be applied in all member states (6). The various substantive laws on gestational carriage in European Union member states have not been harmonized (6.1). Therefore they may be in conflict in international cases, and for this reason it is necessary to choose what to apply (7).

European Union regulations determining actions in cases of conflict of law do not explicitly include guidelines which would determine the choice of substantive law in international gestational carriage cases (7.1). European Union member states or the European Union are free to apply other private international law. Relevant rules may be sought in international conventions or be of domestic origin (8).

When it is chosen which state's law to use, the common core in European Union member states is that the determination of legal motherhood is based on the best interests of child (9). In order to fulfil these interests, the states apply family law which is not a proper legal instrument in the case of gestational carriage (9.1). They usually do not acknowledge contracts for services of commercial gestational carriage as legally binding and do not enforce these, although these contracts actually ensure the best interests of child (9.2).

The advocates of unenforceability of these contracts and the following non-enforcement are trying to prove that such contracts are not only unenforceable at the very least but also illegal and void (9.2.1).

If these contracts are not enforced, women cannot fulfil their right to procreate, since conclusion of international arrangements, in order for procreation to take place, threaten with the possibility that children born as a result of these contracts may be denied the motherhood of these women (10). Non-enforcement of intention to be a mother is an obstacle to freedom to move and receive services in European Union which are dependent on European Union citizenship (11).

European Union should and could limit non-enforcement including enforcement of contracts for services of international commercial gestational carriage in its area of freedom security and justice (12).

# 4. Contract for services of international commercial gestational carriage

Contract ('arrangement' or 'agreement')<sup>1</sup> for services of commercial gestational carriage ('full surrogacy'<sup>2</sup>) is concluded when one woman ('intended mother')<sup>3</sup> promises the other ('gestational carrier'<sup>4</sup>) remuneration in consideration of a promise that she will 'carry'<sup>5</sup> a child to term in her womb and transfer it to the paying woman. This 'preconception'<sup>6</sup> or 'prefertilization'<sup>7</sup> contract provides for the creation of child to take place via assisted procreation (typically creating embryos by 'in vitro fertilization'<sup>8</sup>) by using oocyte and male gamete<sup>9</sup> obtained from humans in correspondence with the paying woman's choice. The created child is accordingly the paying woman's offspring<sup>10</sup> if her own oocyte is used.<sup>11</sup> The created child is not her genetic offspring if she opts to use a donor's oocyte.<sup>12</sup>

The use of medical assistance does not imply that all the intended mothers necessarily opt for contracts for services of international commercial gestational carriage due to being 'infertile'. Intended mothers may search for gestational carriers simply 'because they find pregnancy and childbirth undesirable.' They may

<sup>1</sup> Vanessa S. Browne-Barbour, 'Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?' (2004) 26 Whittier Law Review 429, 430-432.

<sup>2</sup> Aristides N Hatzis, "Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 413.

<sup>3</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 19; 'Gestational Surrogacy' (Brown Fertility Conceiving Miracles) <<http://www.brownfertility.com/gestationalSurrogacy.asp>> accessed 5 April 2013.

<sup>4</sup> 'Gestational Carrier' (The Source of New Beginnings: Reproductive Medicine Associates of New Jersey) <<http://mani.com/treatment-options/third-party-reproduction/gestational-carrier>> accessed 5 April 2013; 'Gestational Carrier' (Houston IVF) <<http://www.houstonivf.net/Services/ThirdPartyReproduction/GestationalCarrier.aspx>> accessed 5 April 2013; 'Gestational Carriers (Surrogacy)' (Baby Center) <[http://www.babycenter.com/0\\_gestational-carriers-surrogacy\\_4099.bc](http://www.babycenter.com/0_gestational-carriers-surrogacy_4099.bc)> accessed 5 April 2013; 'Definitions for "Gestational Carrier"' (Meta Glossary) <<http://www.metaglossary.com/meanings/675828/>> accessed 5 April 2013.

<sup>5</sup> 'What is a Gestational Carrier?' (Wise Geek) <<http://www.wisegeek.com/what-is-a-gestational-carrier.htm>> accessed 5 April 2013.

<sup>6</sup> Vanessa S. Browne-Barbour, 'Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?' (2004) 26 Whittier Law Review 429,

<sup>7</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2250.

<sup>8</sup> Anne Goodwin, 'Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements' (1992) 26 Family Law Quarterly 275, 276.

<sup>9</sup> Karen M Sly, 'Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee' (1982) 18 Gonzaga Law Review 539, 551.

<sup>10</sup> Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 Journal of Private International Law 627, 629.

<sup>11</sup> Vanessa S. Browne-Barbour, 'Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?' (2004) 26 Whittier Law Review 429, 436.

<sup>12</sup> Marsha Garrison, 'Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage' (2000) 113 Harvard Law Review 835, 898.

want, among other reasons, for example, ‘to avoid the health risks, pain, psychological distortion, or annoyance of pregnancy.’<sup>13</sup>

A specific contract ‘for services’ is concluded because the gestational carrier is a service provider who performs a task by employing a part of her body.<sup>14</sup> She receives money for the child’s gestational carriage or ‘leasing her womb’ for performing gestational carriage in order for someone else to reach the goal of becoming a ‘legal’ mother to the carried child.<sup>15</sup> This thesis only concerns ‘legal’ parentage, specifically legal motherhood ‘since [for instance] the establishment of biological parentage is a medical matter’ unlike motherhood which ‘has been established in a manner prescribed by law.’<sup>16</sup> It is essential to define this because these contractual arrangements collectively directly involve at least three<sup>17</sup> different ‘mothers’:

1) ‘intended’<sup>18</sup> or ‘non-biological’ – the one who raises the child, but oocyte for child’s creation is not taken from her.<sup>19</sup> She is also called ‘commissioning’,<sup>20</sup> ‘social’ or ‘intentional’;<sup>21</sup>

2) ‘genetic’ is the one who contributes (donates) oocyte but does not carry the child to the term;

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<sup>13</sup> Katherine T Bartlett, ‘Re-Expressing Parenthood’ (1988) 98 Yale Law Journal 293, 335.

<sup>14</sup> Aristides N Hatzis, “‘Just the Oven’: A Law & Economics Approach to Gestational Surrogacy Contracts’ in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 420.

<sup>15</sup> Ebrahim Abdul Fadi Mohsin, *Abortion, birth control and surrogate parenting* (American Trust Publications 1991), 64.

<sup>16</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 6, para 8.

<sup>17</sup> Sarah Mortazavi, ‘It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy’ (2012) 100 Georgetown Law Journal 2249, 2277.

<sup>18</sup> European Parliament ‘Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?’ (Directorate - General for Internal Policies Policy Department Citizens’ Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 19; ‘Gestational Surrogacy’ (Brown Fertility Conceiving Miracles) <<http://www.brownfertility.com/gestationalSurrogacy.asp>> accessed 5 April 2013.

<sup>19</sup> Machteld Vonk, ‘The Role of Formalised and Non-formalised Intentions in Legal Parent-Child Relationships in Dutch Law’ in Katharina, Boele-Woelki (ed), *Debates in Family Law around the Globe at the Dawn of the 21st Century* (Intersentia 2009), 182.

<sup>20</sup> European Parliament ‘Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?’ (Directorate - General for Internal Policies Policy Department Citizens’ Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 8, 19; Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 52 – 53; Ruby L Lee, ‘New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation’ (2009) 20 Hastings Women’s Law Journal 275, 278; Daniel Gruenbaum, ‘Foreign Surrogate Motherhood: Mater Semper Certa Erat’ 2012 60 American Journal of Comparative Law 475, 492.

<sup>21</sup> Aristides N Hatzis, “‘Just the Oven’: A Law & Economics Approach to Gestational Surrogacy Contracts’ in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 414.

3) 'gestational' is the one who carries child to the term but does not contribute (donate) the oocyte.<sup>22</sup> Since she also gives birth to the child, she is also called 'birth' mother,<sup>23</sup> 'parturient'<sup>24</sup> or 'gestational host'.<sup>25</sup> Because she carries the child she is called a 'gestational carrier'<sup>26</sup> for the purposes of this thesis.

Additionally, one more person can be a mother according to, for instance, some kind of marital or rather a partnership (with any of the previously mentioned women) presumption.<sup>27</sup> (This may be similar to determining the legal father based on mother's testimony, his acceptance, being in wedlock for a determined time period before the child's birth, genetic or any other claim that interested persons may attempt to invoke in various jurisdictions). It is not, however, especially relevant in the context of this thesis.

In contracts for services of gestational carriage one of the parties is always a gestational carrier. The other party may theoretically be different intended parents (for instance, a married couple or registered partners). Practically, the service performed by gestational carrier substitutes something only possible by intended parent of one specific sex, namely, the woman. A child is borne by a woman, and the primary rights conflict is between her and the woman who, based on the contract, is the intended mother for the specific child. The intended mother is, however, not necessarily a single mother<sup>28</sup>. It is important to note that the thesis does not argue that the intended mother should be a single mother (or discuss that the child should only have one legal parent and it should definitely be the mother). Discussion regarding obtaining legal parentage for another person (who is neither the intended mother nor the gestational carrier) would unnecessarily exceed the page limit of this thesis. The same would be true for an overview of various rights and obligations following from legal motherhood. This is the reason why this thesis

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<sup>22</sup> Machteld Vonk, 'The Role of Formalized and Non-formalized Intentions in Legal Parent-Child Relationships in Dutch Law' in Katharina Boele-Woelki (ed), *Debates in Family Law around the Globe at the Dawn of the 21st Century* (Intersentia 2009), 176.

<sup>23</sup> Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 630-631.

<sup>24</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 *American Journal of Comparative Law* 475, 505.

<sup>25</sup> Jamie Levitt, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, 452-453.

<sup>26</sup> 'Gestational Carrier' (The Source of New Beginnings: Reproductive Medicine Associates of New Jersey) <<http://rmani.com/treatment-options/third-party-reproduction/gestational-carrier>> accessed 5 April 2013; 'Gestational Carrier' (Houston IVF) <<http://www.houstonivf.net/Services/ThirdPartyReproduction/GestationalCarrier.aspx>> accessed 5 April 2013; 'Gestational Carriers (Surrogacy)' (Baby Center) <[http://www.babycenter.com/0\\_gestational-carriers-surrogacy\\_4099.bc](http://www.babycenter.com/0_gestational-carriers-surrogacy_4099.bc)> accessed 5 April 2013; 'Definitions for "Gestational Carrier"' (Meta Glossary) <<http://www.metaglossary.com/meanings/675828/>> accessed 5 April 2013.

<sup>27</sup> Marsha Garrison, 'Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage' (2000) 113 *Harvard Law Review* 835, 852.

<sup>28</sup> Linda D. Elrod, 'A Child's Perspective of Defining a Parent: The Case for Intended Parenthood' <[http://www.law2.byu.edu/jpl/papers/v25n2\\_Linda\\_Elrod.pdf](http://www.law2.byu.edu/jpl/papers/v25n2_Linda_Elrod.pdf)> accessed 5 April 2013, 255.

looks at legal motherhood ('maternal affiliation'<sup>29</sup>) but does not consider parental 'responsibility' (which in various international law sources are called 'responsibilities').<sup>30</sup> There is also no deep analysis of reasons why someone needs the status to be established after conclusion of the contract, although there are many reasons, for instance, inheritance.<sup>31</sup>

Commercial aspect arises if the contract provides for the gestational carrier to receive payments that exceed the carriage-related 'necessary' expenses,<sup>32</sup> for instance, for medical services, transport, place of residence, healthy nutrition suitable for a pregnant woman, and lost income. Respectively, it is referred to as commercial not because there are payments to be made to 'faciliator[s]', for example, medical institution that assists the procreation, intermediary that finds a matching gestational carrier for the intended mother or legal adviser,<sup>33</sup> but because payment is received by the gestational carrier. It follows from this that 'A commercial [gestational carrier] is anyone who is paid money to bear [or carry] the child for other people and terminate her parental rights, so that the others may raise the child as exclusively their own.'<sup>34</sup> (Opposite to this is the other type of gestational carriage, namely, altruistic gestational carriage which takes place with, at the very most, covering the necessary expenses incurred by the altruistic gestational carrier).<sup>35</sup>

These contracts gain an international dimension if they are concluded between the intended mother and gestational carrier from different states. The market for these

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<sup>29</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 8, para 14; Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 28.

<sup>30</sup> Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (Explanatory Memorandum, Revised version proposed by Nigel Lowe) CJ-FA (2010) 6 Rev. 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20\\_2010\\_%206%20E%20Explanatory%20Report%20\\_vs%2029%2004%202011\\_%20\\_2\\_.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20_2010_%206%20E%20Explanatory%20Report%20_vs%2029%2004%202011_%20_2_.pdf)> accessed 5 April 2013, para 85.

<sup>31</sup> European Parliament, 'Recognition and Registration of Civil Status Documents in Cross-border Cases,' (Directorate – General for International Policies of the Union, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde) <[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 5.

<sup>32</sup> Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 629.

<sup>33</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *Georgetown Law Journal* 2249, 2253.

<sup>34</sup> Elizabeth S Anderson, 'Is Women's Labor a Commodity?' (1990) 19 *Philosophy & Public Affairs* 71, 71.

<sup>35</sup> Aristides N Hatzis, "'Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 413.

services is fast expanding globally<sup>36</sup> and its expansion is encouraged by financial factors, such as the difference of prices for services in different places,<sup>37</sup> as well as legal factors, such as differences in substance of law applicable to contractual relationships,<sup>38</sup> namely, there is ongoing search for economy and the most favourable law. Since this kind of '[r]eproductive tourism will continue to thrive' then, regarding enforcement of related agreements, there is the need for cross borders lawmakers reaction in order to at least 'avoid foreseeable harm'.<sup>39</sup>

Legal issues may arise when, even after employing their own so-called free and legal arrangements across borders, the contract concludes or a child born as a result of this contract do not have a clear basis for employing some kind of rights. Namely, there is a need for some 'public documents' that, in the context of this thesis, may be 'civil status records such as birth (...) plus judicial documents such as court rulings or documents issued by a court'.<sup>40</sup> However, institutions of different states regard the contract concludes' intentions differently, for example, applying proper law 'to obtain a passport for the child',<sup>41</sup> or 'recognition of a foreign judgment, such as one declaring the commissioning woman the legal mother of the child' may not be easy.<sup>42</sup>

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<sup>36</sup> Tod M Krim, 'Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother' (1996) 5 *Annals of Health Law* 193, 225.

<sup>37</sup> Gillian K D Crozier, Dominique Martin, 'How to Address the Ethics of Reproductive Travel to Developing Countries: a comparison of national self-sufficiently and regulated market approaches' (2012) 12 *Developing World Bioethics* 45, 45.

<sup>38</sup> Ruby L Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) 20 *Hastings Women's Law Journal* 275, 276; Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 629.

<sup>39</sup> Farrad E Blyth, 'A., Reproductive Tourism – a Price Worth Paying for Reproductive Autonomy?' (2005) 25 *Critical Social Policy* 91, 91.

<sup>40</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 4.

<sup>41</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 *American Journal of Comparative Law* 475, 488.

<sup>42</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 *American Journal of Comparative Law* 475, 489-490.



## 4.1.Surrogacy

Gestational carriage is not a replacement term for such a procreation method as 'surrogacy'. It is important to note that this term is popularly being used incorrectly in many sources when discussing gestational carriage. 'Surrogacy' and 'surrogate' as terms may be used when referring to every woman whose child has originated from her own oocyte and who is herself pregnant with the child<sup>43</sup> who, after delivery, is supposed to be transferred to the intended parents. (It does not matter if she became pregnant naturally or 'artificial insemination' was used).<sup>44</sup> Since this kind of service has been possible since the dawn of humanity even without the development of assisted reproduction, it is often referred to as 'traditional surrogacy'.<sup>45</sup> (Gestational carriage is a relatively new method of assisted reproduction, and this kind of pregnancy was first reported in 1980s).<sup>46</sup>

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<sup>43</sup> Martha A Field, *Surrogate Motherhood* (Harvard University Press 1988) 5.

<sup>44</sup> Brian J Carney, 'Where do the Children Go? – Surrogate Mother Contracts and the Best Interests of the Child' (1988) 22 *Suffolk University Law Review* 1187, 1188 -1189.

<sup>45</sup> Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the Internatioanl Level' (2011) 7 *Journal of Pivate International Law* 627, 629;  
'Gestational Surrogacy' (Brown Fertility Conceiving Miracles)  
<<http://www.brownfertility.com/gestationalSurrogacy.asp>> accessed 5 April 2013.

<sup>46</sup> James M Goldfarb, Cynthia Austin, Barry Peskin, Hannah Lisbona, Nina Desai, Richardo L de Mola, 'Fifteen Years Experience with an In Vitro Fertilization Gestational Pregnancy Programme' (2000) 15 *Human Reproduction* 1075, 1075-1078; Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *Georgetown Law Journal* 2249, 2250.

# 5. Global law on enforcement of contracts for services of international commercial gestational carriage

In most states of the world gestational carriage services are prohibited.<sup>47</sup> In many states, even if the activity itself and enforcement of contracts for international commercial gestational carriage is not explicitly forbidden, a planned or unplanned impediment may arise in the fact that the status of legal mother in majority of states may be assigned to the birth mother which means the gestational carrier or, in a little bit more liberal states, such an intended mother who has employed altruistic gestational carriage services. It is not taken into account even if she is a genetic mother of the child.<sup>48</sup> In other words, in most states where intended motherhood may possibly be enforceable ground for obtaining legal motherhood, it is not true if the child carriage service has been performed for a fee.<sup>49</sup> Even if the state does not prohibit such activities but strictly regulates some aspects of them, it may create problems not only to those who attempt to realize them locally but, more importantly in the context of this thesis, those who have sought the option of performing these activities elsewhere.<sup>50</sup>

If there is no success at attempting to reach the goals of such cardinal measures as, for instance, Turkey's attempt to prohibit gestational carriage services extraterritorially<sup>51</sup> then, despite limitations set by individual states, their institutions may and are forced to deal with conflicts related to these arrangements not only in local<sup>52</sup> but also international matters. Specifically, due to the created children's status and other reasons they may be forced to decide on recognition and enforcement of decisions made by other states' institutions if gestational

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<sup>47</sup> Marsha Garrison, 'Surrogate Parenting: What Should Legislatures Do?' (1988-1989) 22 Family Law Quarterly 155, 155.

<sup>48</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 5.

<sup>49</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2270.

<sup>50</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 7.

<sup>51</sup> Susan L Crockin, 'Legal Perspectives on Cross-boarder Reproductive Care' Reproductive BioMedicine Online 2011, 23, 812.

<sup>52</sup> Marsha Garrison, 'Surrogate Parenting: What Should Legislatures Do?' (1988-1989) 22 Family Law Quarterly 155, 155.

carriage has occurred elsewhere<sup>53</sup> where the concluding of such contracts is not only not illegal but is legally enforceable, even if only in accordance with strict conditions imposed by the states.<sup>54</sup>

Legislative responses to enforcement of contracts for services of international gestational carriage, at the moment, also differ within various other world countries. Australia is one of the examples where the severity of regulations varies in one country.<sup>55</sup> The United States of America also do not have unified (federal) regulations regarding these arrangements, and from this, it follows that states and parties employing these arrangements have discretion for their actions even within one country's limits.<sup>56</sup> While most of the states who have chosen to regulate various aspects of gestational carriage do not support their enforcement and assign the gestational carrier as the legal mother and, even if they do, then they support only commerce free carriage,<sup>57</sup> there are also some states where gestational carriage activities 'flourishes as a lawful business'.<sup>58</sup> For example, California is a place where it is possible that intention of becoming a mother is enforceable ground for determining legal motherhood in cases of arrangements for gestational carriage<sup>59</sup> and it is the most famous with its lawfulness of commercial gestational carriage.<sup>60</sup> 'Automatically by law' intended mother may become the

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<sup>53</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013; 9, 11; Aristides N Hatzis, "'Just the Oven': A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 413; Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 505.

<sup>54</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 2.

<sup>55</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 7.

<sup>56</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 Vanderbilt Journal of Transnational Law 271, 297- 298; Aristides N Hatzis, "'Just the Oven': A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 416; Katherine Drabiak, Carole Wegner, Valita Fredland, and Paul R Helft, 'Ethics, Law, and Commercial Surrogacy: A Call for Uniformity' (2007) 35 Journal of Law, Medicine & Ethics 300, 302-303; Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2258.

<sup>57</sup> Anne Goodwin, 'Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements' (1992) 26 Family Law Quarterly 275, 277; Marsha Garrison, 'Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage' (2000) 113 Harvard Law Review 835, 851.

<sup>58</sup> Margaret Brazier, 'Regulating the Reproduction Business?' (1999) 7 Medical Law Review 166, 179.

<sup>59</sup> David D Meyer, 'Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood' (2006) 54 American Journal of Comparative Law 125, 135.

<sup>60</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 26.

legal mother in Illinois and Nevada.<sup>61</sup> Florida and Texas also feature simple-to-use methods for how the children's legal mother may be the intended mother.<sup>62</sup> Out of these states, only Nevada and Florida, accompanied by Arkansas, directly apply the contract approach for determining the legal mother.<sup>63</sup> Illinois law supports the commercial aspect. By allowing to at least recompense gestational carrier's expenses, commercial aspect is also allowed by Utah and Texas.<sup>64</sup>

Outside the United States of America, commercial gestational carriage arrangements are lawful and, perhaps for this reason, popular in Ukraine<sup>65</sup> where 'automatically by law'<sup>66</sup> following gestational carriage arrangements, intended mother may become the legal mother.<sup>67</sup> Outside Europe the intended mother may become the legal mother in, for example, South Africa.<sup>68</sup> In Asia, one example of state that regulates surrogacy but at the same time is very liberal allowing the intended mother to become a legal mother, is Israel.<sup>69</sup> Similarly attractive to gestational carriage arrangements concludes is Russia.<sup>70</sup> Countries especially beneficial for those who seek not only unrestricted gestational carriage but also economic gain are India<sup>71</sup> and Thailand<sup>72</sup> where there is no law of limiting character.<sup>73</sup> These few examples demonstrate that the law approach to

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<sup>61</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 490.

<sup>62</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2281.

<sup>63</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2347.

<sup>64</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 1080.

<sup>65</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 26.

<sup>66</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 490

<sup>67</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dgh/standardsetting/family/CJ-FA%202008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dgh/standardsetting/family/CJ-FA%202008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 10, 12.

<sup>68</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2280-2281.

<sup>69</sup> Aristides N Hatzis, "'Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003); Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 Journal of Private International Law 627, 629; Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2280.

<sup>70</sup> Ruby L Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) 20 Hastings Women's Law Journal 275, 284; Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2272.

<sup>71</sup> Ruby L Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) 20 Hastings Women's Law Journal 275, 276; Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2272.

<sup>72</sup> Gillian K D Crozier, Dominique Martin, 'How to Address the Ethics of Reproductive Travel to Developing Countries: a comparison of national self-sufficiently and regulated market approaches' (2012) 12 Developing World Bioethics 45, 46.

<sup>73</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2273.

enforcement of contracts for services of international gestational carriage differs extensively and the fact that intended motherhood is enforced does not mean that, in this state, something more will be enforceable instead of just reasonable compensating of gestational carriage expenses.

This very brief overview of the world states' law also demonstrates that enforcement of contracts for services of international gestational carriage is not only an cross boarder issue of a specific region; it is a 'global' issue and, consequently, creates problems of respective scale regarding the following personal statuses.<sup>74</sup> A typical problem regarding enforcement of contracts for services of international gestational carriage is the fact that, due to its cross borders non-coordination, situations sometimes arise where 'child is stateless and with uncertain parentage.'<sup>75</sup> Not all states provide the intended mother with legal motherhood, and this may result not only with existence without this mother; it may also contribute to statelessness. This may happen in the instance of applying various states' law, but, to illustrate, we may use the following example: if the carrier delivers a child meant for an intended genetic mother from another state, it may not receive the carrier states' citizenship because, according to its law, there is no link with the carrier. The intended mother's state may, however, refuse to provide the child with its citizenship if, in this state, the citizenship follows from the legal mother's citizenship and the intended mother cannot be considered the legal mother for any important reason, which is often the public policy<sup>76</sup> invoking for disclaiming the consequences of activity taking place in a foreign state.<sup>77</sup> Solutions can, of course, be sought, there are some states, for instance, who allow the mother to adopt 'her own' child in this child's interests,<sup>78</sup> or apply other "ad hoc, ex post facto" remedies' for 'reducing the harmful impact of this legal limbo for

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<sup>74</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 6; Hague Conference on Private International Law Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 10, March 2012) <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> accessed 5 April 2013, 5, 8.

<sup>75</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 9.

<sup>76</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2275, 2274, 2285.

<sup>77</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 9, 11.

<sup>78</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2276, 2278.

Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 504.

children<sup>79</sup> but these are extraordinary solutions instead of being the most appropriate of all possible solutions that would attempt to stand against such situations where 'The legal uncertainty can only be disadvantage to the child.'<sup>80</sup>

The parties who conclude contracts for services of international gestational carriage are also searching for a solution, namely, looking for safe harbours for their activities,<sup>81</sup> but there is still no global framework for their convenience that would coordinate the option of leaving said harbours and returning to where they have come from or traveling elsewhere with the child born as a result of contract arrangements.<sup>82</sup> The world features such a variety of legislative responses to contracts for services of international gestational carriage that 'it is unlikely that an international agreement recognizing [gestational carriage] will be adopted in the near future'.<sup>83</sup> The fact that a new concept does not possess a coordinated, as in specifically in the context of this thesis, cross-borders aspects' coordinating law, is not to be viewed unequivocally as something negative. It is possible that, when a practical and not very effective applying of the states' solutions has taken place, it illuminates the issues demanding a unified international reaction. This, on the other hand, may allow to reconcile the involved interests in a justified way instead of just randomly as might happen when addressing hypothetical problems.<sup>84</sup>

This thesis concentrates on issues that touch upon facilitation of enforcement of contracts for international commercial gestational carriage specifically in the European Union, where, just like anywhere else in the world, 'The regulation of [gestational carriage] arrangements varies considerably from nation to nation, both in content and in quickness of response.'<sup>85</sup>

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<sup>79</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 5.

<sup>80</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 5.

<sup>81</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 290.

<sup>82</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *Georgetown Law Journal* 2249, 2273.

<sup>83</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 297.

<sup>84</sup> Marsha Garrison, 'Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage' (2000) 113 *Harvard Law Review* 835, 852.

<sup>85</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 278.

## 6. Divergence in national laws regarding gestational carriage

The various substantive laws on enforcement of contracts for international commercial gestational carriage in European Union member states have not been harmonized. Therefore the member states, in order to deal with this matter, have retained substantial flexibility to apply legal techniques from their own national substantive law. Similar to most states of the world law that does not permit to enforce contracts for services of commercial gestational carriage,<sup>86</sup> 'common ground' of European Union member states' substantive laws also provides that contract cannot be enforced in order for the birth mother to be forced to release her child to the mother intended in this contract and that she would 'automatically' receive a legal mother's status.<sup>87</sup> In European Union states contracts cannot be enforced for the service provider to receive remuneration for gestational carriage, even in states where gestational carriage as a method of assisted procreation is explicitly permitted by law because these states only recognize altruistic gestational carriage<sup>88</sup> (like Denmark).<sup>89</sup>

Although there are some states in the European Union who do not feature explicitly permissive gestational carriage arrangements rules (for example, Benelux states, Baltic states, Hungary, Romania, Cyprus, Czech Republic, Malta, and Slovakia),<sup>90</sup> those at least where medical manipulation necessary for performing gestational carriage are permitted, may assume an indication to implied permissive

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<sup>86</sup> Aristides N Hatzis, "Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 416.

<sup>87</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 8, 19.

<sup>88</sup> Aristides N Hatzis, "Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 415, 416.

<sup>89</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 8.

<sup>90</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 13; European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 18.

approach.<sup>91</sup> However, even in these states, just like in states with distinctly restrictive approach towards gestational carriage activities like Austria, Bulgaria, Sweden,<sup>92</sup> Finland,<sup>93</sup> Germany, France,<sup>94</sup> Portugal and Spain,<sup>95</sup> recognition and enforcement of legal motherhood based on intention isn't usual, because<sup>96</sup> European Union states' substantive law features a 'common core' that a child's legal mother is the birth mother<sup>97</sup> (in France, although the birth mother is legal mother, she receives this status in case of fulfilling the condition that she acknowledges it instead of delivering the child and executing the law-provided chance of staying anonymous) regardless of whether she has or has not a genetic link to the delivered child.<sup>98</sup> In case of gestational carriage it is respectively the gestational carrier instead of the mother intended by contract. The non-enforcement aspect of this contract is not supportive of the gestational carriage service and promoting the increase of its extent and thus may hypothetically aid in reducing the practice of contracts for services of commercial gestational carriage similarly to a ban of the activity itself.

Non-enforcement is not a proportional instrument for impeding the concluding of gestational carriage arrangements and eradicating the practice of its realization

<sup>91</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 18.

<sup>92</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 8.

<sup>93</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%202008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%202008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 13.

<sup>94</sup> Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 629; Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 4.

<sup>95</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 *American Journal of Comparative Law* 475, 480-481; Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *Georgetown Law Journal* 2249, 2275.

<sup>96</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *Georgetown Law Journal* 2249, 2275.

<sup>97</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%202008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%202008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 12;

European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 7, 12, 16.

<sup>98</sup> *Odievre v France* (2004) 38 EHRR 43, para 49; European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 16, 17.



because the help in reaching this goal is exceeded by damage it does to children who are, in the end, born as a result of the concluded arrangements. If, for some reason seemingly meant for protecting people, for example, due to the principles of dominating religion as in Italy,<sup>99</sup> some European states' law completely prohibits commercial gestational carriage<sup>100</sup> then it is clear that there can be no enforcement of contracts concluded for its realization and the goal of non-enforcement has been fulfilled. However, it is 'fact that prohibition does not resolve what happens to the child born through a [gestational carriage] arrangement'<sup>101</sup> because children are born and they need parents for, amongst other reasons, the lack of legal motherhood not to lead to the child going into the society's care system<sup>102</sup> which can reasonably occur in such cases when the birth mother who is also the gestational carrier is, unwantingly and without planning, assigned to be the legal mother instead of the one who was set down in the contract.

Perhaps, by realizing that non-enforcement is not in the children's best interests, gestational carriage and the resulting legal motherhood assigning for the intended mother is explicitly supportingly regulated in two European Union member states.<sup>103</sup> One of them is the United Kingdom where the legalizing of gestational carriage practice is substantiated by research on what should be a child's rights to legal civil status of being a specific mother's child. The second is Greece where the legalization of gestational carriage practice is founded on the rights to procreate to those who are unable to do so without medical assistance.<sup>104</sup> Although both these states do not enforce the contract itself, the promises given by parties in this contract are to be fulfilled.<sup>105</sup> However, again demonstrating how divergent is

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<sup>99</sup> Ruby L Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) 20 *Hastings Women's Law Journal* 275, 284.

<sup>100</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 289.

<sup>101</sup> Marsha Garrison, 'Surrogate Parenting: What Should Legislatures Do?' (1988-1989) 22 *Family Law Quarterly* 155, 155.

<sup>102</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 9.

<sup>103</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 8, 20.

<sup>104</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 21.

<sup>105</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 8.

states' law regarding gestational carriage arrangements, even these two 'most liberal'<sup>106</sup> European Union states achieve the result which is to be equalized with enforcement of contracts for services of gestational carriage in various ways. For this intention, Greece employs "pre birth" court order', which determines that the legal mother of the consequently delivered child will be the intended mother. Practically this not only ensures that the intended mother may become the legal mother, but also precludes the gestational carrier receiving an undesired status. This, however, only allows partial enforcement of the main clauses included in the mutual contract because the carrier cannot profit. Since law demands that both parties sign the agreement while residing in Greece, this creates a barrier for fulfilling international contracts for gestational carriage.<sup>107</sup>

In the United Kingdom, although 'at first instance' legal motherhood is assigned to the gestational carrier, intended mother may become the legal mother by following 'special judicial order', specifically 'parental order'<sup>108</sup> that 'results in automatic recognition of the motherhood for the intended mother reflected in the birth certificate'.<sup>109</sup> '[P]arental order' similar to usual adoption cases completely changes legal motherhood of the child born as a result of gestational carriage arrangements from gestational carrier to the intended mother. In addition to motherhood, a child born following gestational carriage arrangements may become citizen of the United Kingdom if the intended mother (or one of the parents to be) is already its citizen. This is one of the ways how the United Kingdom does not support 'international' aspect of contracts for services of international commercial gestational carriage. Parental orders cover only cases where the intended mother is also a genetic mother which means there cannot be donor oocytes<sup>110</sup> used and, for the order to be issued, a competent institution ascertains if the gestational carrier is capable in order to recognize her necessary agreement for transfer of motherhood. In order

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<sup>106</sup> Aristides N Hatzis, "Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 413.

<sup>107</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 20.

<sup>108</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 16, 17.

<sup>109</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 8.

<sup>110</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 *American Journal of Comparative Law* 475, 482 - 484.

for that to happen, there is also a short time limit.<sup>111</sup> In the United Kingdom, it is also possible to enforce the payment clause of contract. Although theoretically in the United Kingdom gestational carriage is only legal as far as the carrier performs it by only receiving the coverage of basic costs<sup>112</sup> and practically, without a special court assent, nothing more can be covered than the carrier's 'reasonable expenses' but assent 'is often given retrospectively'.<sup>113</sup> Intended mothers 'often pay [gestational] mothers, without prior authorization by the courts, more than 'reasonable expenses'. Typically the United Kingdom's 'courts are authorizing the payments retrospectively and granting the [intended mothers] the parental orders, anyway'. Thus full enforcement of contracts for services of commercial gestational carriage clauses (excluding international) is achieved which is in the scope of this thesis. 'This, in effect, honours the surrogacy agreement for the sake of [intended mothers] and the children involved rather than ignores the agreement for the supposed [and only supposed] sake of the children' which is more thoroughly discussed in chapter 9 regarding best interests of them.<sup>114</sup> It is possible that, realizing that with such an attitude towards contracts for services of commercial gestational carriage the United Kingdom may attract employers of gestational carriage arrangements from the many countries with severe limitations for intended mothers in this area,<sup>115</sup> but striving to avoid 'forum shopping' and 'procreative tourism', it acts similarly to Greece by demanding that the intended mother (or one of intended parents), for being able to use the parental order, must have the United Kingdom's domicile. If this is not true, the British courts have no competence to issue the order.<sup>116</sup> This is another limitation, by the imposing of which the United Kingdom does not support the 'international' aspect of contracts for services of international commercial gestational carriage. It can be concluded that even if the United Kingdom is one of states where some kind of after method for reconciliation is found, in the form of '[p]arental orders' it is far from perfect solution and 'it would

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<sup>111</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 485.

<sup>112</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 Vanderbilt Journal of Transnational Law 271, 283; Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2257.

<sup>113</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 485.

<sup>114</sup> Hugh V McLauchlan, Kim J Swales, 'Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts' (2009) 72 *Law and Contemporary Problems* 91, 96.

<sup>115</sup> Margaret Brazier, 'Regulating the Reproduction Business?' (1999) 7 *Medical Law Review* 166, 191; Ruby L Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) 20 *Hastings Women's Law Journal* 275, 288.

<sup>116</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 484 -485.

certainly benefit people wishing to enter [gestational carriage] arrangements not to have to rely on such remedies, which will in any case vary from state to state'.<sup>117</sup>

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<sup>117</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 6.

## 6.1. Council of Europe attempts to abolish substantive law

European states obviously have divergent approaches but mainly determining legal motherhood to children born as a result of concluding contracts for services of international commercial gestational carriage in the European Union is problematic because there is no appropriate law for enforcement of the intention to be a mother. When the cross border aspect is topical, some criticizing may be deserved by the situation when 'there are no rules yet on recognition by a [m]ember [s]tate of civil status-related situations created in another [m]ember [s]tate'.<sup>118</sup> This, among others, is the reason why discovering a solution for reconciling involved interests in these cases may not be swift.

The European Court on Human Rights has ruled that 'risk that the establishment of affiliation will be time-consuming and that, in the time, the child will remain separated in law from his mother' violates Article 8 of European Convention on Human Rights<sup>119</sup> which provides that 'Everyone has the right to respect for his private and family life.'<sup>120</sup> The Council of Europe has used the European Court on Human Rights experience to develop its own view that 'having no legal mechanism to establish or to challenge paternity is a violation of Article 8 of the European Convention on Human Rights.' This implies obligation, namely, 'as a general rule it is necessary to provide the legal possibility of establishing parental responsibility'<sup>121</sup> for which legal parenthood is relevant. Therefore it may be concluded that the fact of an absent instrument for legal motherhood determination may also violate the same article because, among other reasons, custody and the duty to take care of a child's wellbeing may be dependent on legal motherhood. If there is no such tool, as in the case of gestational carriage arrangements, then the unclear situation which falls upon each child born as a result of gestational carriage arrangements is, in itself, against human rights principles.

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<sup>118</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12.

<sup>119</sup> *Marckx v Belgium* (1979) 2 ECHR 330, para 37.

<sup>120</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) <[http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf)> accessed 5 April 2013, art 8.1

<sup>121</sup> Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (Explanatory Memorandum, Revised version proposed by Nigel Lowe) CJ-FA (2010) 6 Rev. 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%202010\\_%206%20E%20Explanatory%20Report%20vs%2029%2004%202011\\_%202\\_.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%202010_%206%20E%20Explanatory%20Report%20vs%2029%2004%202011_%202_.pdf)> accessed 5 April 2013, para 27 - 28.

According to Council of Europe research,

social and legal changes, together with the newly available medical techniques, have increased the need for European States to up-date their laws so that these laws contain appropriate standards and provide greater certainty concerning legal status of all children.<sup>122</sup>

This conclusion creates an impression that the Council of Europe itself may strive to update its law.

The context of this thesis determines that, firstly, it is necessary to seek law that regards acquiring legal status of children created through untraditional methods.

Since 1980s the Council of Europe's approach to '[d]etermination of maternity' as a result of the already possible '[h]uman artificial procreation' was the following: 'The woman who gave birth to the child is considered in law as the mother'.<sup>123</sup> It means that for those born as a result of contracts for services of international commercial gestational carriage, the gestational carrier, in accordance with this approach, becomes the legal mother. In other words, it means that intended motherhood is not enforceable. This aspect and anything else included in clauses of such an agreement cannot be used against the other concluding party because Council of Europe has specified that 'Any contract or agreement between [gestational] mother and the person or couple for whom she carried the child shall be unenforceable.' It may be deduced that it was realized to fully cover commercial contracts because, recognizing that there are states who may have a more permissive approach towards intended motherhood because they take into account that gestational carrier, as opposed to the intended mother, may not actually want the carried child, Council of Europe as an exception allows permissive approach for gestational carriage arrangements<sup>124</sup> if they are altruistic<sup>125</sup> and if they are not specifically enforceable against gestational carrier contrary to her will.<sup>126</sup> Thus the law is not appropriate for

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<sup>122</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 6, para 5.

<sup>123</sup> Council of Europe Ad Hoc Committee of Experts on Bioethics, *Report on Human Artificial Procreation* (Strasbourg 1989) <http://www1.umn.edu/humanrts/instree/artificialprocreation.htm>> accessed 5 April 2013, principle 14.1.

<sup>124</sup> Council of Europe Ad Hoc Committee of Experts on Bioethics, *Report on Human Artificial Procreation* (Strasbourg 1989) <http://www1.umn.edu/humanrts/instree/artificialprocreation.htm>> accessed 5 April 2013, principle 15.4.

<sup>125</sup> Council of Europe Ad Hoc Committee of Experts on Bioethics, *Report on Human Artificial Procreation* (Strasbourg 1989) <http://www1.umn.edu/humanrts/instree/artificialprocreation.htm>> accessed 5 April 2013, principle 15.4.a.

<sup>126</sup> Council of Europe Ad Hoc Committee of Experts on Bioethics, *Report on Human Artificial Procreation* (Strasbourg 1989) <http://www1.umn.edu/humanrts/instree/artificialprocreation.htm>> accessed 5 April 2013, principle 15.4.b.

enforcement of contracts for services of international commercial gestational carriage in the European Union.

The Council of Europe has been working 'to prepare principles to be included in an international instrument ([c]onvention or [r]ecommendation) on the legal status of children' in order to update personal status achieving principles in a way that also protects the rights of those children who were created by employing the most recent scientific discoveries. However, these principles provide the aforementioned protection in the context of this thesis only as far as ensuring that each child receives a mother and, specifically for those who have it, the gestational carrier becomes the legal mother because, regarding '[t]he establishment of maternal affiliation' it still stipulates (as if there were no confusion created by scientific developments) that 'The woman who gives birth to the child shall be considered as the mother.'<sup>127</sup> Recognizing that there are states who attempt to use their law to adapt to new child creation methods, the principles mention, as an exception, the possibility of legality of gestational carriage arrangements if the states 'take into account best interests of child'.<sup>128</sup> As discussed in chapter 9.2 of this thesis, considering the best interests of child also includes contract enforcement, but Council of Europe principles still provide that 'Any contract or agreement between the [gestational] mother and the person or couple for whom she carried the child shall be unenforceable.'<sup>129</sup> Non-enforcement for contracts for services of international commercial gestational carriage in these principles is also supported by stipulations that, even if gestational carriage arrangements are allowed somewhere, they must be limited, only allowing such actions of altruistic nature<sup>130</sup> and situations where gestational carrier has the discretion over who – she or someone else – should become the legal mother.<sup>131</sup> The principles are thus not relevant for full enforcement of contracts for services of international commercial gestational carriage.

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<sup>127</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 7 principle 1.

<sup>128</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 7 – 8, para 13.

<sup>129</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 8, para 13.2.

<sup>130</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 8, para 13.4.a.

<sup>131</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 8, para 14.4.b.

'An 'instruct' is currently being drafted by the Council of Europe to cover the rights and legal status of children and parental responsibility. This will include provisions relating to legal parentage in the context of medically assisted reproduction'.<sup>132</sup> This drafted recommendation also states that the gestational carrier should become a legal mother<sup>133</sup> permitting (but not encouraging or suggesting the content of regulations) each state to apply its own measures regarding contracts for services of gestational carriage (for instance, asking to harmonize gestational carriage arrangements with another instance beforehand).<sup>134</sup> Instead of updating the choice of mother (in compliance with addressing confusion created by assisted procreation), or encouraging it or recommending the allowing of unusual reproduction it only cares about the view that choice of legal father in cases of non-traditional reproduction methods use should depend on the birth mother like in traditional procreation situations.<sup>135</sup> The contesting of legal parenthood, which includes motherhood, according to the draft recommendation, is also based on birth mother's rights.<sup>136</sup> It may be concluded that this attempt to deal with legal

<sup>132</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 14.

<sup>133</sup> Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (CJ-FA-GT3 (2010) 2 Rev. 23) <[http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20\\_2010\\_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20_2010_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf)> accessed 5 April 2013, art 7.1; Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (Explanatory Memorandum, Revised version proposed by Nigel Lowe) CJ-FA (2010) 6 Rev. 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20\\_2010\\_%206%20E%20Explanatory%20Report%20\\_vs%2029%2004%202011\\_%20\\_2\\_.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20_2010_%206%20E%20Explanatory%20Report%20_vs%2029%2004%202011_%20_2_.pdf)> accessed 5 April 2013, para 32.

<sup>134</sup> Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (CJ-FA-GT3 (2010) 2 Rev. 23) <[http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20\\_2010\\_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20_2010_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf)> accessed 5 April 2013, art 7.3; Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (Explanatory Memorandum, Revised version proposed by Nigel Lowe) CJ-FA (2010) 6 Rev. 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20\\_2010\\_%206%20E%20Explanatory%20Report%20\\_vs%2029%2004%202011\\_%20\\_2\\_.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20_2010_%206%20E%20Explanatory%20Report%20_vs%2029%2004%202011_%20_2_.pdf)> accessed 5 April 2013, para 35.

<sup>135</sup> Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (CJ-FA-GT3 (2010) 2 Rev. 23) <[http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20\\_2010\\_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20_2010_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf)> accessed 5 April 2013, arts 14.1, 14.4; Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (Explanatory Memorandum, Revised version proposed by Nigel Lowe) CJ-FA (2010) 6 Rev. 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20\\_2010\\_%206%20E%20Explanatory%20Report%20\\_vs%2029%2004%202011\\_%20\\_2\\_.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20_2010_%206%20E%20Explanatory%20Report%20_vs%2029%2004%202011_%20_2_.pdf)> accessed 5 April 2013, paras 49, 66, 67.

<sup>136</sup> Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (CJ-FA-GT3 (2010) 2 Rev. 23) <[http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20\\_2010\\_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20_2010_%202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf)> accessed 5 April 2013, art 17.2, 8.1., 7.1; Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (Explanatory Memorandum, Revised version proposed by Nigel Lowe) CJ-FA (2010) 6 Rev. 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20\\_2010\\_%206%20E%20Explanatory%20Report%20\\_vs%2029%2004%202011\\_%20\\_2\\_.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA-GT3%20_2010_%206%20E%20Explanatory%20Report%20_vs%2029%2004%202011_%20_2_.pdf)> accessed 5 April 2013, art 17.2, 8.1., 7.1;



status of children born after arrangements of international commercial gestational carriage is also not capable to reconcile the interests involved.<sup>137</sup>

One more instrument incapable to solve problems regarding enforcement of contracts for services of international commercial gestational carriage is the existing European Convention on the Legal Status of Children Born out of Wedlock. As evident from the title, it regards children born in families not traditionally legally secured, particularly those born from unmarried parents. This convention just makes establishment of parenthood as close as possible to that prescribed for children which are born to married parents. It is too narrow to cover intended motherhood and therefore does not remove the confusion which is central to this thesis, namely, regarding enforcement of intention to be a mother, since it would assign the gestational carrier as legal mother. Thus the legal instrument theoretically fulfills its purpose by ensuring that children of all people are treated equally and the determined statuses of children are respectively non-discriminatory against those born outside wedlock and those affected by state law divergences<sup>138</sup> without, at the same time, admitting that children born as a result of contracts for services of international gestational carriage need special, namely, different approach for practical securing of proper protection and non-discrimination.

This convention is, however, interesting for further consideration in the context of this thesis because, based on the fact that it is considered 'outdated and contrary to the case-law of the European Court of Human Rights, and considering the need to take account of the changing pattern of family life throughout Europe'<sup>139</sup> and 'taking into account the legal, social and medical developments during the last decades',<sup>140</sup> a new instrument was proposed that would include this but could also extend to other statuses related to family and would thus apply not only to motherhood for children born from various non-traditional relationship forms but

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GT3%20 2010 %206%20E%20Explanatory%20Report%20 vs%2029%2004%202011 %20 2 .pdf> accessed 5 April 2013, para 36.

<sup>137</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, p. 23.

<sup>138</sup> Council of Europe, *European Convention on the Legal Status of Children Born out of Wedlock* (Strasbourg, 1975) <<http://conventions.coe.int/Treaty/en/Treaties/Html/085.htm>> accessed 5 April 2013, preamble.

<sup>139</sup> Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* (CJ-FA-GT3 (2010) 2 Rev. 23) <<http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA-GT3%20 2010 %202%20Rev%203E%20-%20draft%20instrument%20October%20meeting%20LA.pdf>> accessed 5 April 2013, preamble.

<sup>140</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <<http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20 2008 %205%20E%2025%2009%2009.pdf>> accessed 5 April 2013, 42, preamble.

also to those created through non-traditional methods<sup>141</sup> which include arrangements for gestational carriage in the focus of this thesis. The proposal determines that 'The woman who gives birth to the child shall be considered the legal mother regardless of biological connection and marital status.'<sup>142</sup> This proposed norm is a little more liberal than previously the norm included in Principles Concerning the Establishment and Legal Consequences of Parentage – 'the White Paper'<sup>143</sup> which determines nothing else relevant but 'stresses that it is the fact of the birth which determines the legal maternal affiliation'.<sup>144</sup> However, even such a solution which evidently allows bestowing legal motherhood upon a mother who has used a donor oocyte does not completely support intended motherhood because it does not provide for becoming a mother exclusively or only on the basis of intention. And it does not justify the resolution of the convention's creators to establish the new norms 'recognizing that the best interests of the child shall be a paramount consideration'<sup>145</sup> because, as discussed in chapter 9 of this thesis, such an approach is not in the child's best interests.

An overview of measures employed by the Council of Europe has demonstrated that not only European Union member states but also an international institution that has addressed problems of determining legal motherhood to the large extent does not achieve a unified approach to enforcement of intention to be a mother.

Because of currently unremoved differences in states' substantial law regarding enforcement of contracts for services of commercial gestational carriage in the European Union and especially because these contracts are concluded across borders, thus making international cases, it is necessary to determine the forum of which state is competent to decide the case and which of the different potentially applicable national laws to use. This is assisted by conflict of laws rules.

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<sup>141</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 40.

<sup>142</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 45, art 9.

<sup>143</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 45, art 9.

<sup>144</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 7, principle 1, para 12.

<sup>145</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 42, preamble.

# 7. Conflict of laws rules

In the context of contracts for services of international commercial gestational carriage the main difficulties may arise in connection with recognition and enforcement of court judgements (that may also take the form of 'decrees, orders or decisions')<sup>146</sup> and authentic instruments of other institutions concerning legal motherhood in other states. It is not the contract itself whose enforcement may be disputed; instead it is 'the decisions or acts of public bodies regarding [contracts for services of international commercial gestational carriage]: either court orders on legal parenthood or birth certificates named the intended parents as legal parents'.<sup>147</sup>

The competency of determining whether legal status may be recognized in another jurisdiction is determined by conflict of laws rules. These rules do not determine whether the specific legal relationships and obligations exist,<sup>148</sup> instead they assist in choosing the most appropriate one in order to avoid such occurrences as, for instance, 'The overlapping jurisdiction to record births can be a source of different legal status in the different registers.'<sup>149</sup>

In order for judgments and authentic instrument to be made at all, it is necessary to choose from a wide variety of law the one law applicable to enforcement of contracts for services of international commercial gestational carriage. Namely, based on national private international law, the public civil status registers or courts are forced to choose applicable law to apply to determining legal motherhood.<sup>150</sup> In purely local matters it is comparatively simple to decide on applying local law because the activities of parties are united by occurring in a place governed by one law. If the international gestational carriage contract enforcement case does not feature cross-border consensus regarding which connecting factor to use for determining applicable law, the child's civil status and legal motherhood may

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<sup>146</sup> Council Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1, art 2.4.

<sup>147</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 27.

<sup>148</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 254.

<sup>149</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>> 127.

<sup>150</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>> 255, 129.

remain limping.<sup>151</sup> ('A legal relationship is limping when it is valid in one legal system but invalid in another, or when it is valid in both but has different legal effects in each.')<sup>152</sup>

However, if the applicable law is determined by conflicts of law rules and it proves to be foreign law, it is good that it is foreseeable which law it will be, in order to acquaint oneself with it in time and potentially adjust the contract terms and conditions to this law.

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<sup>151</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>> 3, 4.

<sup>152</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 500.

## 7.1. European Union regulations regarding conflicts of laws

European Union has attempted to preclude and solve conflicts of national private international laws in some areas. The European Union secondary legislation instruments chosen as optimal for this purpose are regulations which are normative acts 'binding' to the institutions, European Union member states as well as individuals and 'directly' (without putting forward the obligation to incorporate in substantive law) in all European Union member states.<sup>153</sup>

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<sup>153</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 288; European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 27 – 28.

## 7.1.1. Jurisdiction, recognition and enforcement: Brussels I and Brussels II bis

The cross-border recognition of such judgements and private documents (public and private) which are connected to civil and family law in European Union takes place basing on the mutual recognition principle<sup>154</sup> which in its essence means mutual trust and the fact that causes for nonrecognition are highly limited.<sup>155</sup> It is provided that this principle should help reach the goal of promoting 'free movement of judgements'.<sup>156</sup> Free movement in the context of justice means that the internal market activity is not being hindered with demands to perform any further activities for recognition and enforcement of judgements.<sup>157</sup> It may be relevant to examine the regulation applying this principle in connection with international gestational carriage cross-border enforcement.

The Brussels I Regulation may be relevant to consider because contracts for services of gestational carriage are civil contracts and include a commercial aspect.<sup>158</sup> This regulation, however, cannot be applied when dealing with legal motherhood cross-border enforcement problem, since, although it provides for addressing 'main' matters in civil and commercial fields,<sup>159</sup> its scope excludes 'the status or legal capacity of natural persons'.<sup>160</sup>

The Brussels II bis Regulation may be relevant regarding gestational carriage because it deals with such judgments that touch upon 'the attribution, exercise, delegation, restriction or termination of parental responsibility'<sup>161</sup> regardless of whether they are related to matrimonial litigation,<sup>162</sup> but understanding that, typically, such cases are connected and therefore should be regulated by a

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<sup>155</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, recital 21.

<sup>156</sup> Council Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1, recital 6.

<sup>157</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, recital 23.

<sup>158</sup> Council Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1, art. 1.

<sup>159</sup> Council Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1, recital 7.

<sup>160</sup> Council Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1, art 2.a.

<sup>161</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, art 1.b.

<sup>162</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, recital 5.

common instrument.<sup>163</sup> This regulation, however, cannot be applied when dealing with legal motherhood cross-borders enforcement problem,<sup>164</sup> since a mother's parental responsibilities are not the same as legal motherhood.<sup>165</sup> The regulation even explicitly excludes the determination of legal motherhood from its scope, stating that it 'shall not apply to (...) the establishment or contesting of a parent-child relationship'.<sup>166</sup> 'This [r]egulation is not intended to apply [also] to other questions linked to the status of persons'.<sup>167</sup>

The fact that Brussels I and Brussels II bis regulations exclude judgments on establishment of legal motherhood means that they also exclude authentic instruments regarding legal motherhood. Both regulations provide that cooperation, when recognizing and enforcing authentic instruments, in the European Union must take place according to the same stipulations as provided for judgments.<sup>168</sup> (Authentic instruments differ from judgments by the fact that authentic instruments possess no claim preclusion power that judgments have. Authentic instruments 'record' what is provided in civil 'contracts or legal acts of the parties with probative value' if allowed by substantive law.<sup>169</sup> Both the essence of authentic instruments (in the case of this thesis it may be contracts for services of international commercial gestational carriage) and whether the authentic instruments are valid may be subject to litigation, the result of which will accordingly be a judgment).<sup>170</sup>

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<sup>163</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, recital 6.

<sup>164</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 11.

<sup>165</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, recital 10.

<sup>166</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, art. 3.a.

<sup>167</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, recital 10.

<sup>168</sup> Council Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1, art 46; Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, art 46, recital 22.

<sup>169</sup> Council of the Notariats of the European Union, 'Comparative Study on Authentic Instruments' (Study for the European Parliament No IP/C/JURI/IC/2008-019) <<http://www.cnue-nouvelles.be/en/000/actualites/aae-etude-acte-authentique-final-25-11-2008-en.pdf>> accessed 5 April 2013, 123, 124; European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 26.

<sup>170</sup> Council of the Notariats of the European Union, 'Comparative Study on Authentic Instruments' (Study for the European Parliament No IP/C/JURI/IC/2008-019) <<http://www.cnue-nouvelles.be/en/000/actualites/aae-etude-acte-authentique-final-25-11-2008-en.pdf>> accessed 5 April 2013, 123 -124; European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 26.

Documents such as birth certificates may also be considered authentic instruments.<sup>171</sup> If they establish legal motherhood, they are accordingly outside the limits of Brussels I and Brussels II bis Regulation, and ruling on their cross-border recognition and enforcement in European Union states occurs by applying the relevant state's private international law, which at the moment of lack of harmonization can be especially problematic.<sup>172</sup>

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Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 26.

<sup>171</sup> Council of the Notariats of the European Union, 'Comparative Study on Authentic Instruments' (Study for the European Parliament No IP/C/JURI/IC/2008-019) <<http://www.cnue-nouvelles.be/en/000/actualites/aae-etude-acte-authentique-final-25-11-2008-en.pdf>> accessed 5 April 2013, 108 – 111; European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 27 – 28.

<sup>172</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 28.



## 7.1.2. Applicable law: Rome I and Rome II

In situations where conflicts of laws in civil and commercial matters occur, the law that should be applicable to contractual relationships in European Union is determined by Rome I Regulation.<sup>173</sup> It encourages predictability along with freedom of choice<sup>174</sup> (by allowing to choose not only European Union member states' rules but also rules originating from 'non-state body of law or an international convention'),<sup>175</sup> determines which law is applicable when there is absence of choice of law clause in the contract,<sup>176</sup> and allows courts to judge on whether, in case of any problems, some other law is 'most closely connected to the situation'.<sup>177</sup> According to Rome I Regulation, contract for provision of services shall be governed by the law of the country where the provider has her habitual residence,<sup>178</sup> unless the contract is manifestly more closely connected with another country.<sup>179</sup> This regulation excludes status of natural persons<sup>180</sup> as well as family relationships,<sup>181</sup> including parentage.<sup>182</sup> Therefore it cannot be applied to determining legal motherhood to children for whose creation contracts were concluded for services of international commercial gestational carriage.

Rome II Regulation shall also apply in situations where conflicts of laws in civil and commercial matters occur and the law that should be applicable needs to be determined. Rome II Regulation regards noncontractual obligations in the European Union.<sup>183</sup> The regulation supports freedom to execute choice of law before or after the event giving rise to damages occurred.<sup>184</sup> The regulation states that in the absence of choice of law in situations where intentional or negligent

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<sup>173</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, art 1.

<sup>174</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, recital 11, art. 3.

<sup>175</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, recital 13.

<sup>176</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, art 4.

<sup>177</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, recital 16, arts 4.3, 4.4.

<sup>178</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, art 4.1.b.

<sup>179</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, art 4.3.

<sup>180</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, art 1.2.a.

<sup>181</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, art 2b.

<sup>182</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, recital 8.

<sup>183</sup> European Parliament and the Council Regulation 2007/864/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 1.

<sup>184</sup> European Parliament and the Council Regulation 2007/864/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 14.

wrongful civil acts have occurred, the law to be applied is the law of that country in which damage occurs,<sup>185</sup> unless the habitual residences of parties involved in the conflict are not in the same country<sup>186</sup> or the occurrence was 'manifestly closer connected' with some other state.<sup>187</sup> The problem with applying this regulation in the cases of international commercial gestational carriage is this: gestational carriage is performed basing on arrangements that anticipate contractual obligations.

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<sup>185</sup> European Parliament and the Council Regulation 2007/864/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 14.1.

<sup>186</sup> European Parliament and the Council Regulation 2007/864/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 14.2.

<sup>187</sup> European Parliament and the Council Regulation 2007/864/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 14.3.

# 8. Other conflict of laws rules applicable in the European Union

## 8.1. International conventions

Since law of European Union origin does not serve as source of law for enforcement of contracts for services of international commercial gestational carriage, it can be a reasonable cause to consider rules of other origin as legal instruments that are in force in its territory.

European Union has acceded to the Hague Conference on Private International Law.<sup>188</sup> The Hague Conference on Private International Law operates at international level providing unified legal framework concerning conflicts of laws in the participating countries.<sup>189</sup> Although the Hague Conference on Private International Law has noticed and paid attention to the fact that the status of children born as a result of contracts for services of international gestational carriage is problematic, until now it has not created an international legal instrument that would specifically regulate gestational carriage aspects, among them private international law issues.<sup>190</sup> Similarly to European Union regulations, the Hague Conference on Private International Law provided multilateral treaties which can be considered regarding enforcement of contracts for services of international commercial gestational carriage in European Union,<sup>191</sup> because they touch upon family law and contract law cross border issues.<sup>192</sup>

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<sup>188</sup> Council Decision 2006/719/EC on the accession of the Community to the Hague Conference on Private International Law [2006] OJ L 297/1.

<sup>189</sup> 'The World Organization for Cross-border Co-operation in Civil and Commercial matters' (The Hague Conference on Private International Law) <[http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php)>, accessed 5 April 2013.

<sup>190</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 24.

<sup>191</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 5.

<sup>192</sup> 'Conventions' (The Hague Conference on Private International Law) <[http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing)> accessed 5 April 2013.

## 8.1.1. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

Since the most usual way for motherhood change is adoption,<sup>193</sup> it is worth considering the legal framework that exists in European Union for adoption.<sup>194</sup> Global law<sup>195</sup> that concerns international adoption and is in force in European Union states is the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.<sup>196</sup>

States applying the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption ensure that adoption that does not infringe the convention and is certified in one of the states where the Convention is in force shall be recognized in other states where this Convention is in force<sup>197</sup> if its status recognition does not go against the receiving state's public policy.<sup>198</sup> There is, in connection with adoption, the recognition of legal motherhood status, related status of the specific child<sup>199</sup> and termination of previously existing legal motherhood.<sup>200</sup> According to the Hague Convention on Protection of Children and Cooperation in

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<sup>193</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 21, para 55.

<sup>194</sup> This thesis deals with adoption only as a method of changing persons' civil status establishment in regards to services of commercial gestational carriage. (European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 28 – 29; Alexander M Capron, Margaret J Radin, 'Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood' (1988) 16 *Medicine and Health Care* 34, 34).

<sup>195</sup> 'Overview' (The Hague Conference on Private International Law) <[http://www.hcch.net/index\\_en.php?act=text.display&tid=26](http://www.hcch.net/index_en.php?act=text.display&tid=26)> accessed 5 April 2013.

<sup>196</sup> Another large-scale law regulating adoption and prescribed for 'providing an effective compliment' for the aforementioned law is European Convention on the Adoption of Children, but it is not primary relevant in the context of this thesis because it does not specifically address the cross borders aspect. (The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013; Council of Europe, *European Convention on the Adoption of Children* (Strasbourg, 2008) <<http://conventions.coe.int/Treaty/en/Treaties/Html/202.htm>> accessed 5 April 2013, preamble).

<sup>197</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art. 23.1.

<sup>198</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art. 24.

<sup>199</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art. 26.1.a.

<sup>200</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art. 26.1.e.

Respect of Intercountry Adoption states only undertake to ensure sound application of intercountry adoption rules when it takes place, but the states are not obliged to amend their law with particular rules that would regulate adoption as such. In other words, the Convention rather encourages adoption by protecting the involved persons than by forcing the involved states to increase its quantitative volume.<sup>201</sup> Adoption rules are not directly applicable in cases of contracts for services of commercial gestational carriage because of several important reasons.

Although a gestational carriage contract is a sort of consent that may resemble the consent essential for the commencing of adoption process and respective changes of status for the involved persons, it is not a reason for adoption rules to be appropriate for gestational carriage.<sup>202</sup> Just the opposite – it does not suit because agreement for a child's legal motherhood in contracts for services of commercial gestational carriage takes place before the child's creation.<sup>203</sup> According to the convention, birth mother's consent may only be valid if given after the child's birth.<sup>204</sup> Thus the birth mother is given an opportunity to take a more informed decision than she was previously aware of, planned and perhaps even promised, taking into account at least her new emotions. Such an approach is not compatible with the intended mother's motivation to conclude an agreement for international commercial gestational carriage, since it does not sufficiently provide her with predictability and foreseeability. Applying respective rules to gestational carriage would compel intended mothers to especially carefully select a person to make an agreement with regarding the realization of service in order to increase the possibility that the specific gestational carrier might not withdraw from the original plan in the long term.<sup>205</sup>

Another reason why the adoption rules are not suitable for determining legal motherhood in gestational carriage case is the fact that children are not given in adoption to non-examined mothers,<sup>206</sup> but the intended mother who wishes to

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<sup>201</sup> Hague Conference on Private International Law Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 10, March 2012) <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> accessed 5 April 2013, 29.

<sup>202</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 20, principle 15.

<sup>203</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art 4.c.4; Margaret F Brinig, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2377, 2379.

<sup>204</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art. 4.c.4.

<sup>205</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 54.

<sup>206</sup> Council of Europe, *European Convention on the Adoption of Children* (Strasbourg, 2008) <<http://conventions.coe.int/Treaty/en/Treaties/Html/202.htm>> accessed 5 April 2013, art 10; Margaret F

enforce her contract for service of international commercial gestational carriage is not examined. This can be reasonably explained in cases when the intended mother is the biological mother, but the practice is not as fair in cases where such is not the situation, namely, 'Traditionally, society has considered that biological tie to be sufficient indication of parental merit to let a person reproduce and rear a child without prior restraint.' More precisely, when adopting a child not genetically linked to the prospective legal mother, the control of said prospective legal mother in some respects substitutes the genetic link.<sup>207</sup>

It would be inappropriate to apply adoption rules to enforcement of contracts for services of commercial gestational carriage, since adoption arrangements cannot be enforceable if payment is involved, namely, adoption law stipulates that it is incompatible with it to pay or compensate birth mother in any kind for consent to relinquish child and for obtaining the termination of her legal motherhood (as termination is necessary before legal motherhood can be established for intended mother). In other words, payment as incentive for annulling one's legal motherhood would not be a valid reason for the transpiring of recognizable adoption process.<sup>208</sup> In order for adoption to be compatible with rules of convention, no one must profit from the adoption process, and it means that only reasonable expenses may be covered and workers who ensure the sound operation of adoption bodies may receive a salary.<sup>209</sup> The fact that money is thus involved can be explained by the reasoning that children who have reached the public realm must be provided with the opportunity to gain parents. The interests of parents are, at the most, a secondary concern. This highlights the fact that gestational carriage and adoption are not interchangeable activities because gestational carriage contracts are concluded based on the parents' wish to acquire children, and in this case children's interests, although important, are only externalities.<sup>210</sup> Moreover, the contract concluding fact and its enforcement are against the very important requirement that 'there should not be contact between prospective adopters and the child's parents' therefore it is possible to agree with the opinion that 'this is

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Brinig, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 Virginia Law Review 2377, 2379.

<sup>207</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2356.

<sup>208</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art 4.c.3; Council of Europe, *European Convention on the Adoption of Children* (Strasbourg, 2008) <<http://conventions.coe.int/Treaty/en/Treaties/Html/202.htm>> accessed 5 April 2013, art 17.

<sup>209</sup> The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art 32.

<sup>210</sup> Hague Conference on Private International Law Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 10, March 2012) <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> accessed 5 April 2013, 29.

unlikely to be workable in [gestational carriage] cases as contact will have to take place when the [gestational carriage] arrangement is entered into and when any reproduction process or treatment takes place'.<sup>211</sup>

From the minimal amount of reasons characterized in order to show that gestational carriage and adoption are too dissimilar, it follows that adoption law does not suit to determining legal motherhood status in contractual gestational carriage cases.<sup>212</sup> The Hague Conference on Private International Law has also admitted that the principles of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption are not suitable for gestational carriage and, in order to regulate private international law matters, the Hague Conference on Private International Law must work on special measures.<sup>213</sup> There have been ideas shared with both European Union and the Hague Conference on Private International Law to create cross border law for surrogacy, including gestational carriage, that would be based on the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and thus would resemble it,<sup>214</sup> which also demonstrates that, although adoption convention is one of the closest instruments for potential gestational carriage cross border law,<sup>215</sup> it still does not suit in the present form.

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<sup>211</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 10; The Hague Conference on Private International Law, *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)> accessed 5 April 2013, art 29.

<sup>212</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2367.

<sup>213</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 24.

<sup>214</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 9.

<sup>215</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 10.

## 8.1.2. The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children

When dealing with international law in the aspect of family issues, the European Union has authorized its member states to sign<sup>216</sup> the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children<sup>217</sup> (and to declare that the recognition and enforcement in pure European Union situations will depend on European Union measures)<sup>218</sup> but has kept its own competence in everything that is stipulated in Brussels IIbis Regulation.<sup>219</sup> This is because, like Brussels II bis Regulation, this convention is also applicable mainly to parental responsibilities,<sup>220</sup> which are not the same as legal motherhood, that convention excludes from its material scope by stating that it is not applicable to rule on 'the establishment or contesting of parent-child relationship'.<sup>221</sup> Therefore this convention is not relevant to further discussion on enforcement of contracts for international commercial gestational carriage in the European Union.<sup>222</sup>

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<sup>216</sup> Council Decision 2003/93/EC authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children [2003] OJ L 48/1, art 1; Council Decision 2008/431/EC authorizing certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorizing certain Member States to make a declaration on the application of the relevant internal rules of Community law - Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children [2008] OJ L 151/36, recital 3.

<sup>217</sup> Hague Conference on Private International Law, *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (1996) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=70](http://www.hcch.net/index_en.php?act=conventions.text&cid=70)> accessed 5 April 2013.

<sup>218</sup> Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 10.

<sup>219</sup> Council Decision 2003/93/EC authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children [2003] OJ L 48/1, art 2.

<sup>220</sup> Hague Conference on Private International Law, *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (1996) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=70](http://www.hcch.net/index_en.php?act=conventions.text&cid=70)> accessed 5 April 2013, art 3.

<sup>221</sup> Hague Conference on Private International Law, *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (1996) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=70](http://www.hcch.net/index_en.php?act=conventions.text&cid=70)> accessed 5 April 2013, art 4.a.

<sup>222</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 11, 12.



### 8.1.3. The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction<sup>223</sup> may seem to be relevant to consider in connection with gestational carriage because one of the involved mothers may illegally transfer the child abroad and retain there. This convention regards custody (between spouses). The goal of signatories, while respecting each other's rulings on custody, is to ensure that those with parental responsibilities cannot single-handedly abduct the child from habitual residence state and retain him or her abroad.<sup>224</sup> It does not concern establishment or change of a child's legal motherhood that is primary concern in cases of enforcement of contracts for services of international commercial gestational carriage.

The Hague Convention is considered because in cases of child abduction it is very likely that he or she will be taken away from the European Union. If the child is abducted in the European Union then Brussels II bis Regulation normally applies<sup>225</sup> which, as discussed in chapter 7.1.1 also does not solve the problems of contracts for services of international commercial gestational carriage in the context of this thesis.

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<sup>223</sup> The Hague Conference on Private International Law, *The Hague Convention on the Civil Aspects of International Child Abduction* (1980) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24)> accessed 5 April 2013, art 1.

<sup>225</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, art 10.

## 8.2.National conflict of laws rules

As discussed in previous sections of this thesis, no international law instruments of European Union or other origin provide European Union member states with unified conflict of laws aspects for determining civil status in commercial gestational carriage cases. The states involved may only apply their own domestic made conflict of laws rules.<sup>226</sup> Such necessity may be accountable for creating the danger rise of the possibility that international commercial gestational carriage may be hindered due to overlapping regulation.<sup>227</sup> It is possible because 'Each [m]ember [s]tate determines which law is applicable in a crossborder situation based on the connecting factor set out in its private international law'. If these factors were equal, it would lessen the problems, but 'The connecting factor can, in principle, be [for instance] nationality or habitual residence. The applicable law thus determined, varies considerably from one [m]ember [s]tate to another.' From this, the issue in the focus of this thesis follows, namely, that in order to take place, among other subject matters, enforcement of contracts for services of international commercial gestational carriage in the European Union 'civil status situation created in one [m]ember [s]tate is not automatically recognized in another because the result of the applicable law differs depending on the [m]ember [s]tate in question'.<sup>228</sup>

To solve the problem of legal motherhood status for children born as a result of contracts for services of international gestational carriage, there are two types of approaches.<sup>229</sup> One approach to solving the problem of legal motherhood status for children born as a result of contracts for services of international gestational carriage proposes that the receiving state's national substantive law determining establishment of legal motherhood is applied irrespective of whether the child was born in this state or abroad. This approach is typical for common law states, which in the European Union are Ireland and the United Kingdom.<sup>230</sup> The other approach to solving the problem of legal motherhood status for children born as a result of

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<sup>226</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 26, 27.

<sup>227</sup> Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008), 76.

<sup>228</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 11 – 12.

<sup>229</sup> Hague Conference on Private International Law Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 10, March 2012) <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> accessed 5 April 2013, 20 - 23.

<sup>230</sup> Hague Conference on Private International Law Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 10, March 2012) <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> accessed 5 April 2013, 23.

contracts for services of international gestational carriage proposes that the receiving state's conflicts of law rules may be applied in order to recognize judgment or authentic instrument. This approach is typical to civil legal systems, and such in European Union are the continental Europe states, for instance, Benelux states, France, Spain, Italy and Germany.<sup>231</sup>

In cases when one jurisdiction must rule on whether specific judgments made in other jurisdictions should be recognized, various circumstances may be taken into account. It is essential that judgment is rendered in appropriate process in a competent court, namely, it has possessed jurisdiction that may be connected with, for instance, domiciles or nationalities of the involved persons. As opposed to documents relating to children not created through gestational carriage, judgments affecting the status of children born through gestational carriage may be essential to view in the public policy context,<sup>232</sup> although it is predictable whether public policy will support or be against it, namely, those who seek enforcement may be able to foresee events in such detail that recognition could be problematic if the recognizable judgment is in conflict with a previously recognized judgment or the judgment of the recognizing forum itself. Such basic conditions exist in a selection of states that provide an excellent overview of diversion in European Union states and include the Netherlands, the United Kingdom, France, Germany and Sweden.<sup>233</sup>

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<sup>231</sup> Hague Conference on Private International Law Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 10, March 2012) <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> accessed 5 April 2013, 20.

<sup>232</sup> Hague Conference on Private International Law Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 10, March 2012) <<http://www.hcch.net/upload/wop/gap2012pd10en.pdf>> accessed 5 April 2013, 20 - 21.

<sup>233</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 255.

## 9. Best interests of child

After it is chosen which state's law to use, law that is applied to establishing or changing legal motherhood in cases of gestational carriage must be one that respects the best interests of the children<sup>234</sup> because 'All policies and actions with an impact on children must be designed, implemented and monitored in line with the best interests of the child.'<sup>235</sup> It is minimally clear what are the best interests for children born as a result of contracts for services of gestational carriage, especially if they have not been born yet.<sup>236</sup> When they have already been born, assuming that it is better for children to be born than not and these children have been lucky in the choice between not being born and being born in a way employing gestational carriage arrangements,<sup>237</sup> law should support enforcement of contracts for services of international commercial gestational carriage. It means that law should ensure certainty not only regarding whether gestational carriage arrangements may be legally recognized, that is, not only be valid but also how can they be enforced.<sup>238</sup> The reason for this is that it can be stated with more confidence that children's best interests include predictable establishment of their motherhood immediately after birth and permanently<sup>239</sup> in order for the children to be able to demand that the legal mother provides the satisfaction of their personal interests.<sup>240</sup> These interests are acknowledged by fundamental rights to 'respect of family life'.<sup>241</sup> Satisfying these interests in practice may include legal obtaining of familiar relationships which may take place if the state fulfils its positive obligation assigning legal mother to children who were born as a result of contracts for services of international gestational carriage because mother and child alone are

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<sup>234</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 7, 8, para 13.

<sup>235</sup> 'Rights of the Child' (European Commission) <[http://ec.europa.eu/justice/fundamental-rights/rights-child/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm)> accessed 5 April 2013.

<sup>236</sup> Farrad E Blyth, 'A., Reproductive Tourism – a Price Worth Paying for Reproductive Autonomy?' (2005) 25 *Critical Social Policy* 91, 106.

<sup>237</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 *Virginia Law Review* 2343, 2359.

<sup>238</sup> George Smith, 'The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers' (1983) 5 *Western New England Law Review* 639, 664.

Brian J Carney, 'Where do the Children Go? – Surrogate Mother Contracts and the Best Interests of the Child' (1988) 22 *Suffolk University Law Review* 1187, 1193-1194.

<sup>239</sup> Council of Europe Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage* (White Paper, Doc CJ-FA (2006) 4 e <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA\\_2006\\_4e%20Revised%20White%20Paper.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf)> accessed 5 April 2013, 6, para 9.

<sup>240</sup> Elizabeth S Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales' (2000) 8 *Health Care Analysis* 19, 21.

<sup>241</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) <[http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf)> accessed 5 April 2013, art 8.

already to be considered a family.<sup>242</sup> (Rights to ‘respect of family life’ are included not only in Convention for the Protection of Human Rights and Fundamental Freedoms<sup>243</sup> but also in the Charter of Fundamental Rights of the European Union.)<sup>244</sup> As discussed in the chapter 6 of this thesis, European Union states mostly prefer to apply traditional family law to determining this legal relationship. The children’s best interests, however, do not include legal uncertainty regarding how the traditional family law will be interpreted in connection with modern assisted procreation. It is not in their interests that due to an inadequate and ill-adjusted law in European Union the establishment of their status may be a long, complicated and ambiguous process.<sup>245</sup>

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<sup>242</sup> *Marckx v Belgium* (1979) 2 ECHR 330, para 45.

<sup>243</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) <[http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf)> accessed 5 April 2013, art 8.

<sup>244</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83/389, art 7.

<sup>245</sup> Lori B Andrews, ‘Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood’ (1995) 81 *Virginia Law Review* 2343, 2358.

## 9.1. Family law

Family law is not a proper legal instrument for determining legal motherhood in cases of contracts for services of international commercial gestational carriage. If a child's legal motherhood is determined by applying family law that is not updated following the development of assisted reproduction, without sufficient evaluation and without taking into account the intentions of those who have taken advantage of opportunities presented by assisted reproduction,<sup>246</sup> the status of legal mother is respectively granted to the birth mother who, in cases of gestational carriage arrangements, is the gestational carrier, and it is clearly against her intention. This calls into doubt whether forcing responsibility on a person who is under contractual obligation to relinquish the specific child is in his or her best interests (which should be respected especially when treating the enforcement issue as a family law matter).<sup>247</sup> It may be said that undertaking to perform a child's gestational carriage and fulfilling it is not an action that would merit receiving legal motherhood. When considering the issue reasonably, it is clear that gestational carriage 'may mark the beginning of becoming a parent, the real task of rearing begins with the birth of the child'<sup>248</sup> and there is no necessity for particular justification because anyone who has been a child at least, if not a parent, understands that rearing a child 'involves substantial resources, many years of parent's life, endless degrees of energy, patience and understanding, and ongoing financial commitments.'<sup>249</sup> And possibly, taking into account the labour-consuming upbringing, 'The reality is that, after the birth of the child, the [gestational carrier] usually does not wish to care for the child while the intended parents do.'<sup>250</sup> It is not reasonable to assign this task to someone who has not intended nor wishes to undertake it, not to mention whether she is even able to do it,<sup>251</sup> while the intended mother has made a reasoned choice incorporated in the contract's clauses instead of being subject to chance.<sup>252</sup> Respectively, in order to fulfil the best interests of children, traditional family law is not a proper legal instrument for establishment of legal motherhood in the cases of gestational carriage.

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<sup>246</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2345.

<sup>247</sup> Judith Areen, 'Baby M Reconsidered' (1988) 76 Georgetown Law Journal 1741, 1744 -1745.

<sup>248</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 52.

<sup>249</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 52.

<sup>250</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?'

<[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 5.

<sup>251</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2360.

<sup>252</sup> Karen M Sly, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee* (1982) 18 Gonzaga Law Review 539, 560; Lori B Andrews, *Between Strangers: Surrogate Mothers, Expectant Fathers, and Brave New Babies* (Harper & Row 1989), 275.

Another aspect that family law does not address even at a minimum level is the following: even when guaranteeing enforcement for the intended mother to become legal mother, it does not address the fact that gestational carrier must receive compensation for the service provided. (See chapter 9.2.1 of this thesis.) It means that contract for services of international gestational carriage through family law may only be enforced, at maximum, unilaterally or, in other words, benefiting exclusively one party - the intended mother.

This is not to criticize family law as such obviously, it is just limited as each area of law is. A field that may be more proper for enforcement of arrangements of international commercial gestational carriage is contract law, but this law may also, when trying to effectively settle matters arising from these contracts, be forced to borrow essentials from other areas.<sup>253</sup> In this context, it is important that in the European Union states non-enforcement of gestational carriage contracts is based on the opinion that establishment of legal motherhood in all cases should be performed based on legality as determined in law, it is not a contractual matter that might be enforced against, for example, family law. In other words, if a law determines that legal motherhood rights and obligations fall upon the gestational carrier and only her, the contract not in accordance with this is not to be fulfilled, and then the contract law principles on freedom as such cannot change that.<sup>254</sup>

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<sup>253</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2346.

<sup>254</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 19.

## 9.2.Contract law

Contract law may be applied for more than typical transactions in various goods and services markets.<sup>255</sup> It providing enforcement of the 'intent' may serve as an instrument for the utmost possible reconciliation of such interests of the intended mother and gestational carrier<sup>256</sup> that result from contracts of services of international commercial gestational carriage. Those are not the only interests that should be reconciled. Just as the realization of virtually any contract may, in some way, affect third parties,<sup>257</sup> in cases of contracts for services of international commercial gestational carriage those touched by 'hard' external consequences are children and their best interests.<sup>258</sup> Although considering and promoting them may be problematic while the child himself is not a contract-concluding party who may explicitly settle them and make them to be a priority<sup>259</sup> and while there exists freedom of contract,<sup>260</sup> they must still be provided regarding enforcement of contracts for services of international commercial gestational carriage because, for instance, The United Nations Convention on the Rights of the Child which is binding to European Union states as international law<sup>261</sup> stipulates that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.<sup>262</sup> It specifies that states undertake to provide 'well-being' to the child with their law, 'taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her'.<sup>263</sup> This leads to a discussion whether contracts for services of international commercial gestational carriage are in these best interests of children.

"Contract pregnancy" is not against the best interests of the children involved',<sup>264</sup> actually 'The protection of child's right presupposes the child's existence and this is

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<sup>255</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2344.

<sup>256</sup> Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Georgetown Law Journal 2249, 2280.

<sup>257</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 58.

<sup>258</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 Virginia Law Review 2305, 2325.

<sup>259</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 Virginia Law Review 2343, 2345.

<sup>260</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 58.

<sup>261</sup> United Nations *Convention on the Rights of the Child* (1989) <<http://www.crin.org/docs/resources/treaties/uncrc.asp>> accessed 5 April 2013.

<sup>262</sup> United Nations *Convention on the Rights of the Child* (1989) <<http://www.crin.org/docs/resources/treaties/uncrc.asp>> accessed 5 April 2013, art. 3.1. a.

<sup>263</sup> United Nations *Convention on the Rights of the Child* (1989) <<http://www.crin.org/docs/resources/treaties/uncrc.asp>> accessed 5 April 2013, art. 3.2.

<sup>264</sup> Hugh V McLauchlan, Kim J Swales, 'Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts' (2009) 72 Law and Contemporary Problems 91, 105.



only possible if we permit and enforce [gestational carriage] contracts.<sup>265</sup> In other words, since contracts for services of international commercial gestational carriage serve as basis for the specific children to actually receive an opportunity at life,<sup>266</sup> not acknowledging contracts for services of commercial gestational carriage as legally binding and not enforcing them is in contrary to the best interests of children. If law, even with prohibitions, cannot ensure that children are not created as a result of concluding gestational carriage contracts, then those who are created should at least be protected from harm that, as contractual externalities, may be expected to result from these arrangements.<sup>267</sup> One of those is lack of proper legal mother for children created in accordance with these contracts which may follow in non-enforcement situations not only indirectly but also directly supported by those who are searching for fundamental reasons for enforcement of contracts for services of international gestational carriage not to be permitted in principle. This does not comply with children's rights. They should be 'registered', 'acquire a nationality' and also 'be cared for' by their mother.<sup>268</sup> This should be ensured by countries 'in accordance with their national law and their obligations under the relevant international instruments in this field.'<sup>269</sup> In order to accomplish these actions, legal motherhood establishment may be important, but it cannot proceed properly if there is no instrument that would allow to enforce the intended motherhood arranged in contracts for services of international commercial gestational carriage in the European Union, but it should take place if countries 'undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations'.<sup>270</sup> The child's family relations in the focus of this thesis are with the mother, therefore the next chapters demonstrate that enforcement of contracts for services of international gestational carriage 'is not inconsistent with the proper respect for, and treatment of, children and women'.<sup>271</sup>

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<sup>265</sup> Aristides N Hatzis, "Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 429.

<sup>266</sup> Martha A Field, *Surrogate Motherhood* (Harvard University Press 1988), 54.

Richard A Posner, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood' (1989) 5 *Journal of Contemporary Health Law and Policy* 21, 23.

<sup>267</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305, 2309; Farrad E Blyth, 'A., Reproductive Tourism – a Price Worth Paying for Reproductive Autonomy?' (2005) 25 *Critical Social Policy* 91, 106.

<sup>268</sup> United Nations *Convention on the Rights of the Child* (1989) <<http://www.crin.org/docs/resources/treaties/uncrc.asp>> accessed 5 April 2013, art 7.1.

<sup>269</sup> United Nations *Convention on the Rights of the Child* (1989) <<http://www.crin.org/docs/resources/treaties/uncrc.asp>> accessed 5 April 2013, art 7.2.

<sup>270</sup> United Nations *Convention on the Rights of the Child* (1989) <<http://www.crin.org/docs/resources/treaties/uncrc.asp>> accessed 5 April 2013, art 8.1

<sup>271</sup> Hugh V McLachlan, Kym J Swales 'Babies, Child Bearers and Commodification: Anderson, Brazier et al., and the Political Economy of Commercial Surrogate Motherhood' (2000) 8 *Health Care Analysis* 1, 1.

## 9.2.1. Exploitation of gestational carriers

Opponents of enforcement of contracts for services of gestational carriage underline that one of the essential reasons for why they should not be enforceable is that gestational carriers not only may be but are actually exploited,<sup>272</sup> to create children for rich mothers,<sup>273</sup> but this should not be generalized. It can also be said that 'Such contracts would not be made unless the parties of them believed that [gestational carriage] would be mutually beneficial.'<sup>274</sup> And

that if [gestational carriage] is a form of voluntary and mutually advantageous exploitation, then there is strong presumption that [gestational carriage] contracts should be permitted and even enforceable, although that presumption may be overridden on other grounds.<sup>275</sup>

Basically there could be reason for perceiving exploitation if there was no sufficient remuneration paid for performing gestational carriage,<sup>276</sup> thus the contract would not be 'mutually binding'<sup>277</sup> and gestational carrier and intended mother would not be 'in reasonably equivalent positions of power'<sup>278</sup> instead of capable to do "voluntary exchange" without 'defects in bargaining process that could undermine the mutual gain assumption'.<sup>279</sup> Namely, ensuring remuneration for services is possible if contracts for services of commercial gestational carriage are enforceable. This consideration creates a paradox in connection with the fact that European Union features a common core that does not allow to enforce commercial arrangements for performing gestational carriage (see chapter 6 above). These arrangements where the gestational carrier does not receive any pecuniary benefit are actually exploitative.<sup>280</sup>

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<sup>272</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 287; Elizabeth S Anderson, 'Is Women's Labor a Commodity?' (1990) 19 *Philosophy & Public Affairs* 71, 71.

<sup>273</sup> Martha A Field, *Surrogate Motherhood* (Harvard University Press 1988), 140.

<sup>274</sup> Richard A Posner, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood' (1989) 5 *Journal of Contemporary Health Law and Policy* 21, 22.

<sup>275</sup> Alan Wertheimer, 'Two Questions About Surrogacy and Exploitation' (1992) 21 *Philosophy and Public Affairs* 211, 212.

<sup>276</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 286.

<sup>277</sup> Martha A Field, *Surrogate Motherhood* (Harvard University Press 1988), 104.

<sup>278</sup> Howard Hunter, 'An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse' (1978) 64 *Virginia Law Review* 1039, 1047.

<sup>279</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305, 2309.

<sup>280</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 292.

Women who offer child gestation services in their wombs should be enabled to demand remuneration just like any other service providers.<sup>281</sup> Payment clause from contract being enforceable, provision of service of gestational carriage for many women could be very convenient, comfortable and suitable work seeing as they can stay at home and, for instance, raise children to whom they are legal mothers, and at the same time receiving funds to sufficiently provide for them and herself.<sup>282</sup> There are numerous other ways to earn money, even more than can be received for realizing gestational carriage,<sup>283</sup> but gestational carriers may be under the influence of circumstances that do not allow them to be too discriminating against a source of money<sup>284</sup> and therefore it cannot be stated that there is absolutely no truth in the argument put forward by contract enforcement opponents, namely, that payment may be viewed as means of involving women from inferior financial circumstances.<sup>285</sup> (It is, however, truly questionable that a contract with a gestational carrier in a very poor financial situation would be signed by the intended mother. At the very least, the described gestational carrier would not, most probably, be able to maintain the health crucial for carrying a healthy child. It would be important to any sensible intended mother).<sup>286</sup> From this, it follows that even if the contract may be signed by the carrier solely because she is coerced to survive and escape poverty, this cannot be unequivocally viewed as proof regarding exploitation. The enforcement of payment clauses could actually serve as reconciliator in equalizing benefits for both parties, which the supporters of necessity for enforcement call upon as bilateral advantage,<sup>287</sup> namely, if such a contract may be enforced, gestational carrier receives her pecuniary benefit and it means that the intended mother who receives her offspring is not the only beneficiary from the contract.<sup>288</sup> (According to contract law – in order for the

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Karen M Sly, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee* (1982) 18 *Gonzaga Law Review* 539, 562.

<sup>281</sup> Joan H Hollinger, 'From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction' (1985) 18 *University of Michigan Journal of Law Reform* 865, 893.

<sup>282</sup> Martha A Field, *Surrogate Motherhood* (Harvard University Press 1988), 72.

Katherine Drabiak, Carole Wegner, Valita Fredland, and Paul R Helft, 'Ethics, Law, and Commercial Surrogacy: A Call for Uniformity' (2007) 35 *Journal of Law, Medicine & Ethics* 300, 304.

<sup>283</sup> Lori B Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 *Virginia Law Review* 2343, 2353.

<sup>284</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 51.

<sup>285</sup> Susan Shervin, 'Feminist Ethics and In Vitro Fertilization' (1987) 12 *Canadian Journal of Philosophy* 265, 299.

<sup>286</sup> Aristides N Hatzis, "'Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 422.

<sup>287</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 286, 293.

<sup>288</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 49; Aristides N Hatzis, "'Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 422.

contract to be enforceable, it must essentially be negotiated in such a way that both parties receive 'mutual gain'.<sup>289</sup>)

By using an enforceable gestational carriage contract, the intended mother is essentially realizing her social goal, that is, a desire for a child, but the service provider realizes her economical goal. Contract may be mutually beneficial if, by enforcing it, both parties receive what they had at the time prioritized and negotiated as necessary for the accomplishment or their respective social or economic welfare. The particular consideration respectively does not make any of the parties a loser in such a way that the benefit is valued by each of them comparatively higher.<sup>290</sup> Basically, the gestational carrier has exercised her freedom to employ her body and its parts, and by signing the gestational carriage contract, she has gained what was necessary for her.<sup>291</sup> From this, it follows that the better she is paid for the service, the less likely it is that there will be arguments regarding exploitation and economic pressure from the side of the rich, because the payment may not be sufficient for the service that includes undergoing a very personal action.<sup>292</sup> It should, however, be mentioned that this service performed by gestational carriers, although very special when compared to many others that contracts may be concluded for, is not necessarily very complicated or unpleasant to perform in order to be characterized as exploitative. In other words, it should not be generalized that they are suffering, they may even 'want'<sup>293</sup> and 'enjoy'<sup>294</sup> pregnancy very much.<sup>295</sup> It can be assumed also based on the fact that 'many women choose to become [gestational] mothers [on] more than one occasion'.<sup>296</sup>

Considering the aforementioned reasons, it may be concluded that contracts for services of commercial gestational carriage not only do not ensure exploitation of women but, just the opposite, '[their] overall right to contract might be endangered

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<sup>289</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 Virginia Law Review Review 2305, 2309; Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 48; Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 Vanderbilt Journal of Transnational Law 271, 293.

<sup>290</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 126; Aristides N Hatzis, "'Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 416-417, 424, 429.

<sup>291</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 Virginia Law Review Review 2305, 2335.

<sup>292</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 Vanderbilt Journal of Transnational Law 271, 278, 292 - 293.

<sup>293</sup> Richard A Posner, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood' (1989) 5 Journal of Contemporary Health Law and Policy 21, 28.

<sup>294</sup> Margaret F Brinig, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 Virginia Law Review 2377, 2383.

<sup>295</sup> Martha A Field, *Surrogate Motherhood* (Harvard University Press 1988), 20.

<sup>296</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 Virginia Law Review Review 2305, 2318.

if [gestational carriage] contracts, involving [their] own body, are not enforced'.<sup>297</sup> This is substantiated by the argument that, in case of mutual non-enforcement that respectively does not ensure receiving payment, each carrier is basically prohibited 'to use her body in a way that benefits (...) her'.<sup>298</sup> If only altruistic gestational carriage is to be supported, it may be considered more exploitative in this aspect because it leads to 'use [of] her body in a way that benefits [exclusively] someone else'.<sup>299</sup> In case of mutual enforcement of a commercial contract the gestational carrier receives her own gain. Respectively, 'There is no way and there is no legitimate reason to prohibit an exchange, which makes both parties [including the gestational carrier who is not exploited] better off'.<sup>300</sup> But non-enforcement of gestational carriage contracts is basically the same as prohibition.

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<sup>297</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 293.

<sup>298</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 292.

<sup>299</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 292.

<sup>300</sup> Aristides N Hatzis, "Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 429.

## 9.2.2. Commodification of children

The commercial aspect in contracts for services of gestational carriage has spawned discussions on whether it does not make the transaction similar to children's commodification<sup>301</sup> for trade<sup>302</sup> that is illegal in most countries in the world.<sup>303</sup> Specifically, popular objection of opponents to contracts for services of international commercial gestational carriage enforcement states that they 'reduce (...) people to commodities and relations to commerce'<sup>304</sup> and clarifies that contracts, in order for them to be enforceable, mustn't involve trading something that cannot be traded, including family<sup>305</sup> and its parts, namely, people who mustn't be commodified.<sup>306</sup> These should remain outside business transactions 'because to allow commodification would be inconsistent with theories of personhood or human flourishing'.<sup>307</sup> Children born as a result of contracts for services of commercial gestational carriage are also beyond trade because '[children] are not commodities. [Children] are not anyone's property. They can not be bought and sold',<sup>308</sup> they are not purchased and traded by contracts for services of international commercial gestational carriage.

A child for the carrying of which a contract is concluded is not the gestational carrier's child. She cannot sell something that does not belong to her. Since the moment of creation the embryo belongs to the intended mother, and she has no reason to buy something that already belongs to her.<sup>309</sup> (This would be more appropriate when speaking of traditional surrogacy when a woman relinquishes a

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<sup>301</sup> Scott Altman, '(Com)modifying Experience' (1991) 65 Southern California Law Review 293, 295 - 296, 299 - 304.

<sup>302</sup> Gena Corea, *The Mother Machine* (Harper and Row 1985), 219; Elizabeth S Anderson, 'Is Women's Labor a Commodity?' (1990) 19 Philosophy & Public Affairs 71, 71; Joan Mahoney, 'An Essay on Surrogacy and Feminist Thought' (1988) 16 Law Medicine and Health Care 81, 82; Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 Virginia Law Review Review 2305, 2330 - 2334; Tod M Krim, 'Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother' (1996) 5 Annals Health Law 193, 224; Kerian L Christine, 'Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children' (1997) 12 Wisconsin Women's Law Journal 113; Elizabeth S Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales' (2000) 8 Health Care Analysis 19, 19.

<sup>303</sup> Tod M Krim, 'Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother' (1996) 5 Annals Health Law 193, 224.

<sup>304</sup> Carl E Schneider, 'Surrogate Motherhood from the Perspective of Family Law' (1990) 13 Harvard Journal of Law and Public Policy 125, 128.

<sup>305</sup> Margaret J Radin, 'Market, Inalienability' (1987) 100 Harvard Law Review 1849, 1853.

<sup>306</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 Virginia Law Review Review 2305, 2309.

<sup>307</sup> Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997), 23.

<sup>308</sup> Hugh V McLachlan, Kim J Swales, 'Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts' (2009) 72 *Law and Contemporary Problems* 91, 91.

<sup>309</sup> Aristides N Hatzis, "Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 416-417.

child who is genetically hers,<sup>310</sup> namely, if a mother relinquishes her own genetical child in exchange for payment, the child may be regarded as commodified and sold). If a child is not gestational carrier's genetical offspring, the only aspect that may be considered a commodity and be sold is the service of gestation<sup>311</sup> that follows '[gestational carrier's] (...) conscious, premeditated decision to provide a home in her womb for the child of another'.<sup>312</sup>

In order for arrangements regarding the realization of gestational carriage to be sensible, there is also the necessity for suitable assigning of maternal rights, therefore it is possible that payment is considered to be payment for obtaining the legal motherhood status over the specific child (as opposed to 'voluntary donation' of maternal privilege following altruistic gestational carriage).<sup>313</sup> This statement may be disproven by the fact that, although enforcement of gestational carriage contracts may result in her legal relationship with a specific child,<sup>314</sup> the buying of mother's rights cannot actually take place because they are not the gestational carrier's property.<sup>315</sup>

The considerations described above prove that advocating the belief that children's commodification invoked in such contracts must be not only unenforceable at the very least but also illegal and void, is unjustified. This chapter together with chapter 9.2.1 discussing exploitation of women has demonstrated also that 'It is in the best interests of the potential child, infertile [intended mother], [gestational] mother, and [even] the state to allow and enforce [gestational carriage] contracts.'<sup>316</sup> (This mentions infertility but there is no basis for setting limits that enforcement of contracts for services of international gestational carriage would be in any way less in the interests of such an intended mother who has concluded it without being infertile).

In the case of non-enforcement, conclusion of contracts for services of international commercial gestational carriage, in order for procreation to take place, threaten

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<sup>310</sup> Margaret J Radin, 'Market, Inalienability' (1987) 100 Harvard Law Review 1849, 1929; Aristides N Hatzis, "'Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 420-421.

<sup>311</sup> Margaret J Radin, 'Market, Inalienability' (1987) 100 Harvard Law Review 1849, 1929.

<sup>312</sup> Karen M Sly, Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee' (1982) 18 Gonzaga Law Review 539, 549.

<sup>313</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 Virginia Law Review 2305, 2333.

<sup>314</sup> Eric Mack, 'Dominoes and the Fear of Commodification' in John Chapman and Roland J Pennock (eds), *Markets and Justice 31* (New York University Press 1989), 217.

<sup>315</sup> Aristides N Hatzis, "'Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts' in Katharina Boele-Woelki (ed), *Perspectives for the Unification or Harmonization of Family Law in Europe* (Intersentia 2003), 416-417.

<sup>316</sup> Karen M Sly, Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee' (1982) 18 Gonzaga Law Review 539, 565.

with the possibility that children born as a result of these contracts may be denied, according to these contracts, the intended motherhood of these women. Then these women's right to procreate is restricted.



## 10. Right to procreate

'There are no private international law conventions on reproductive rights'<sup>317</sup> that could assist with cross border enforcement of contracts for services of international gestational carriage thus supporting this form of procreation. However, the right to procreate using 'full procreative autonomy' with the assistance<sup>318</sup> of gestational carrier is derived from international human rights documents that, due to their broad implementation, should preclude the existence of conflict of laws and necessity for choice of law so there would be no necessity for rescue by private international law.

Right to procreate may be understood as 'exclusive' right of parents, among them the mother,<sup>319</sup> to decide on the time for creating children and their number.<sup>320</sup> This gives rise to the idea that right to procreate may derive from right to 'privacy'.<sup>321</sup> This is true, for instance, in several countries laws, among them the United States of America constitutional law. Without complying with it, 'privacy' right interpreted in the European context does not include right to procreate<sup>322</sup> because 'pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus'.<sup>323</sup> Accordingly, this right in the European Union is not relevant to supporting the intentions of those who conclude contracts for services of international commercial gestational carriage.

Interpretation of right to procreate that may be relevant in the context of contracts for services of international commercial gestational carriage states that right to procreate is subordinated to right 'to found family',<sup>324</sup> which is essential because '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the [s]tate'.<sup>325</sup> This greatly relates to intent based procreation because it is not to be interpreted as duty only for solving

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<sup>317</sup> Barbara Stark, *International family law* (Ashgate 2005), 143.

<sup>318</sup> Joan H Hollinger, 'From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction' (1985) 18 *University of Michigan Journal of Law Reform* 865, 875.

<sup>319</sup> United Nations *Declaration on Social Progress and development*, (1969) <<http://www2.ohchr.org/english/law/pdf/progress.pdf> accessed 5 April 2013>, Art 4.

<sup>320</sup> United Nations *Report on the Fourth World Conference on Women* (U.N. Doc/A/CONF 177/20 35 ILM 401, 1995), 424; Barbara Stark, *International family law* (Ashgate 2005), 137.

<sup>321</sup> United Nations *International Covenant on Civil and Political Rights* (1966) <<http://www2.ohchr.org/english/law/ccpr.htm>> accessed 5 April 2013, art 17.1.

<sup>322</sup> Barbara Stark, *International family law* (Ashgate 2005), 143, Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) <[http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf)> accessed 5 April 2013, art 8.1.

<sup>323</sup> *Brüggeman and Scheuten v Germany* (1981) 3 EHRR 244, para 59; United Nations *International Covenant on Civil and Political Rights* (1966) <<http://www2.ohchr.org/english/law/ccpr.htm>> accessed 5 April 2013, art 23.2.

<sup>325</sup> United Nations *International Covenant on Civil and Political Rights* (1966) <<http://www2.ohchr.org/english/law/ccpr.htm>> accessed 5 April 2013, art 23.1.

demographical problems; it is also family planning right not only in equal measure with men<sup>326</sup> but also by receiving special services only for women related to child carriage.<sup>327</sup> (It is not discriminatory that care for carriage only aims at care about women, because men are incapable of performing it either way,<sup>328</sup> there can be no demand for service of gestational carriage from the side of men because it can only substitute a woman's contribution in child carriage). Namely, it may be stated that 'family rights' definitely include the right to procreate if 'right to health' is also acknowledged because without these both rights a mother cannot realize her right to decide on the time of child creation and their number.<sup>329</sup> The Charter of Fundamental Rights of the European Union explicitly includes the fact that it acknowledges care for family making<sup>330</sup> and health.<sup>331</sup>

Although right to family may also derive from right to marriage,<sup>332</sup> women and their intentions for independence in the context of procreation are also supported by the fact that family making may not be related to marriage as has traditionally been the case. Thus children as well, in order for them to be a lawful part of family in modern understanding, must not be the genetical offsprings of parents created by themselves while being married to each other.<sup>333</sup> 'The [single model of] family becomes "families" and "families" become inclusive rather than exclusive'. Family relationships may be created on social background instead of only genetic origin.<sup>334</sup> Namely, family may also be created by a person with a child born in the process of assisted reproduction, for instance, by using donated (male) gametes,<sup>335</sup> or if a child is carried by a woman outside family<sup>336</sup> which also takes place in connection with contracts for services of international commercial gestational carriage that are concluded with the intention to procreate.

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<sup>326</sup> United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* (1980) <[http://www.childinfo.org/files/fgmc\\_cedaw.pdf](http://www.childinfo.org/files/fgmc_cedaw.pdf)> accessed 5 April 2013, art 12.1.

<sup>327</sup> United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* (1980) <[http://www.childinfo.org/files/fgmc\\_cedaw.pdf](http://www.childinfo.org/files/fgmc_cedaw.pdf)> accessed 5 April 2013, art 12.2.

<sup>328</sup> Karen De Crow, *Sexist Justice* (Vintage Books 1975), 312.

<sup>329</sup> Barbara Stark, *International family law* (Ashgate 2005), 14; United Nations *International Covenant on Economic, Social and Cultural Rights* (1967) <<http://www.unhcr.org/refworld/docid/3ae6b36c0.html>> accessed 5 April 2013, arts 10, 12.

<sup>330</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83/389, art 9.

<sup>331</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83/389, art 35.

<sup>332</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) <[http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf)> accessed 5 April 2013, art 12.

<sup>333</sup> Darren Langridge, Eric Blyth, 'Regulation of Assisted Conception Services in Europe: Implications of the New Reproductive Technologies for 'the Family'' (2001) 23 *Journal of Social Welfare and Family Law* 45, 55; Shazia Choudhry, Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010), 170.

<sup>334</sup> *K and T v Finland* (2003) 31 HER 18, para 150.

<sup>335</sup> *X, Y and Z v the United Kingdom* (1997) 24 EHRR 143.

<sup>336</sup> Shazia Choudhry, Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010), 177.

'A woman's right to serve as a gestational [carrier] derives from her right to decide whether to procreate'.<sup>337</sup> She assists the intended mother in her striving to exercise her right to procreate. This may occur because family planning can be realized by any lawful methods connected to fertility by choice of planners.<sup>338</sup> From this, it may be concluded that, while taking into account the availability of modern assisted reproduction services, it is clear that this includes the now-available alternative procreation methods that make procreation much more possible. 'No one thinks that [gestational carriage] arrangements are a first choice'<sup>339</sup> but they can also, in the form of contracts for services of international gestational carriage, be one of the methods of family planning, thus creating the opportunity of carriage being substituted by another woman's service.<sup>340</sup> European Union states, when obeying their obligations imposed by human rights,

should not impede legitimate attempts to found a family, [for example] by legislating against their use of [gestational carriers], or by declining to provide assistance with procreation to some groups or individuals where such assistance is available to others (...) without restriction.

There is an opinion that these rights to procreate should be limited with approval only for the sake of protecting other persons, specifically children.<sup>341</sup> But, as discussed in chapter 9.2.2, gestational carriage as a form of assisted reproduction and enforcement of contracts concluded for its realization are not only not against children's rights but are even in their best interests.

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<sup>337</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 297.

<sup>338</sup> United Nations *Report on the Fourth World Conference on Women* (U.N. Doc/A/CONF 177/20 35 ILM 401, 1995), 423.

<sup>339</sup> Richard Epstein, 'Surrogacy: The case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305, 2319.

<sup>340</sup> Angie Godwin McEwen, 'So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy' (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 298.

<sup>341</sup> Darren Langridge, Eric Blyth, 'Regulation of Assisted Conception Services in Europe: Implications of the New Reproductive Technologies for 'the Family'' (2001) 23 *Journal of Social Welfare and Family Law* 45, 60.

# 11. Free movement and freedom to receive services

Intended mothers willing to use their fundamental right to procreate conclude contracts for services of international commercial gestational carriage in the European Union. Their choice to conclude international contracts along with their own personal wish may also be based on the fact that the respective procreation assistance is not, for some reason, to be considered available inside the borders of one country,<sup>342</sup> because there are legal circumstances (as for instance ‘individual countries may prohibit a specific service for religious or ethical reason’)<sup>343</sup> or other reasons (as, for instance, access to something necessary for performing the service, including the carrier, technologies, donor gametes (of the desired origin), embryos, professionals<sup>344</sup> or comfort, including expenses, time, remoteness as well as quality of service in order for one try to be enough and successful).<sup>345</sup> Consequently, to receive the desired ‘reproductive care’, women who conclude contracts are involving themselves in ‘procreative (reproductive)’ tourism.<sup>346</sup> Since many other factors are also frequently dependent on them, rules can be one of the most important and popular reasons for performing such trips across borders.<sup>347</sup> Rules will also continue to be an essential reason as long as there will be no united European Union approach specifically regarding principles for assisted reproduction including legal carriage, which is complicated to realize even while intending to incorporate in them a single understanding of what is right and what is wrong in all diverse member states.<sup>348</sup>

The reason for choosing to conclude this contract in the context of European Union is based on their reliance that in the European Union they possess the right of free movement<sup>349</sup> that allows each gestational carrier as a European Union citizen to

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<sup>342</sup> Tamara Harvey, ‘Buy Baby: The European Union and Regulation of Human Reproduction’ (1998) 18 Oxford Journal of Legal Studies 207, 214; Ruby L Lee, ‘New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation’ (2009) 20 Hastings Women’s Law Journal 275, 284.

<sup>343</sup> Farrad E Blyth, ‘A., Reproductive Tourism – a Price Worth Paying for Reproductive Autonomy?’ (2005) 25 Critical Social Policy 91, 96.

<sup>344</sup> Farrad E Blyth, ‘A., Reproductive Tourism – a Price Worth Paying for Reproductive Autonomy?’ (2005) 25 Critical Social Policy 91, 97.

<sup>345</sup> Francoise Shenfield, Jacques de Mouzon, Guido Pennings, Anna P Ferraretti, Nyboe A Andersen, ‘Cross Border Reproductive Care in Six European Countries’ (2010) 25 Human Reproduction 1361, 1362, 1363.

<sup>346</sup> Kees Jan Saarloos, ‘European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage’ (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 11.

<sup>347</sup> Guido Pennings, ‘Reproductive Tourism as Moral Pluralism in Motion’ (2002) 28 Journal of Medical Ethics 337, 338, 337; Francoise Shenfield, Jacques de Mouzon, Guido Pennings, Anna P Ferraretti, Nyboe A Andersen, ‘Cross Border Reproductive Care in Six European Countries’ (2010) 25 Human Reproduction 1361, 1366.

<sup>348</sup> Guido Pennings, ‘Legal Harmonization and Reproductive Tourism in Europe’ (2005) 13 Reproductive Health Matters 120, 120.

<sup>349</sup> Treaty on European Union [2010] OJ C 83/13, art 3.2.

provide this cross member state border service<sup>350</sup> and allows each intended mother as European Union citizen to receive it.<sup>351</sup> Basically it means that, in order for legal gestational carriage service to materialize,

[gestational carrier] may go to the [m]ember [s]tate where the [intended mother] is established or else the [intended mother] may go to the [s]tate in which the [gestational carrier] providing the service [of gestational carriage] is established,<sup>352</sup>

if for no other reason that because they, at the very least, for a personal reason condemn performing it inside single state borders and wish to connect the specific service with another place instead of avoiding some limitations. In this case it may also be in the scope of European Union law.<sup>353</sup>

Free movement of gestational carriage service may be analyzed in light of European Court of Justice interpretations regarding provision of services. Preliminary references on receiving of that service have not been as many.<sup>354</sup> Still, it is clear that receiving of services is a 'corollary',<sup>355</sup> for the realizing of advantageous provision of service activity, then principles from cases judged by European Court of Justice regarding free provision of services should be applicable to receiving them by using the analogy method.<sup>356</sup> Service of international commercial gestational carriage qualifies as service for applying European Union law on free movement of services because it is, firstly, not about free movement of persons or goods, or capital.<sup>357</sup> Norms regulating these services should, however, be distinguished from those that regard establishment<sup>358</sup> as defined in European

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<sup>350</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 56.

<sup>351</sup> Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR I-377, para 16; Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803, para 13.

<sup>352</sup> Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR I-377, para 10.

<sup>353</sup> Richard F Storrow, 'The Pluralism Problem in Cross-Boarder Reproductive Care' (2010) 0 Human Reproduction 1, 1.

<sup>354</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 Oxford Journal of Legal Studies 207, 213.

<sup>355</sup> Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR I-377, para 10; Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 Oxford Journal of Legal Studies 207, 220.

<sup>356</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 Oxford Journal of Legal Studies 207, 220.

<sup>357</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 57; Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para 30, 25.

<sup>358</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 Oxford Journal of Legal Studies 207, 217.

Union law<sup>359</sup> because those norms that regard services cannot be applied in case of applying those that address establishment.<sup>360</sup>

Not all activities connected to medicine are services in European Union law scope.<sup>361</sup> One aspect that allows activities concerning the concluding of contracts for services of international commercial gestational carriage to qualify as services in the understanding of European Union law of free movement of services is the fact that those activities cross borders<sup>362</sup> or are 'transfrontier'<sup>363</sup> that basically means that gestational carrier is 'established in a [m]ember [s]tate other than that of the [intended mother]'.<sup>364</sup> In order for the activity of gestational carriage provided for in the contract to realize, they may travel to one another<sup>365</sup> but it is not compulsory, namely, something else may travel instead.<sup>366</sup> The intended mother may not only take the genetic material with her,<sup>367</sup> the modern service may also be provided when only gametes and frozen embryos are sent across borders.<sup>368</sup> Although the possibility of such services where borders are not crossed by provider or receiver himself was not typical at the time of forming the European Union,<sup>369</sup> European Court of Justice has acknowledged that the law of free movement of services in European Union territory is also to be applied to such activities.<sup>370</sup> It may happen in case of actually finding 'connecting factor' with 'community law'.<sup>371</sup> The matter of contract being local or international is the issue of determination in each separate case,<sup>372</sup> but this thesis does not focus on such contracts for services of commercial gestational carriage in the European Union 'activities all of whose relevant elements are confined within a single [m]ember [s]tate'<sup>373</sup> and to whom,

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<sup>359</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 57, 49; Case C-221/89 *Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905, para 20.

<sup>360</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 22.

<sup>361</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *Oxford Journal of Legal Studies* 207, 214.

<sup>362</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 56.

<sup>363</sup> Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2085, para 15.

<sup>364</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 56.

<sup>365</sup> Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR I-377, para 10.

<sup>366</sup> Wouter Gekiere, Rita Baeten, Willy Palm, 'Free Movement of Services in the EU and Health Care' <[http://www.euro.who.int/data/assets/pdf\\_file/0003/138180/E94886\\_ch11.pdf](http://www.euro.who.int/data/assets/pdf_file/0003/138180/E94886_ch11.pdf)> accessed 5 April 2013, 464.

<sup>367</sup> *R v HFEA ex parte Diane Blood* (1997) 2 All ER 687 (CA).

<sup>368</sup> Linda Nielsen, 'Procreative Tourism, Genetic Testing and The Law' in Nigel V. Lowe, Gillian Douglas, *Families across frontiers* (Nijhoff 1996), 831; Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *Oxford Journal of Legal Studies* 207, 227.

<sup>369</sup> David Edward, 'Introduction' in Mads Andenas, Rothe Wulf-Henning (eds), *Services and Free Movement in EU Law* (Oxford University Press 2002), ix.

<sup>370</sup> Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 22.

<sup>371</sup> Case C-60/91 *Criminal proceedings against José António Batista Morais* [1992] ECR I-2085, para 9.

<sup>372</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, para 37; Case C-23/93 *TV 10 v Commissariaat voor de Media* [1994] ECR I-4795, para 14; Case C-3/95 *Reisebüro Broede v Gerd Sandker* [1996] ECR I-6511, para 14.

<sup>373</sup> Case C-60/91 *Criminal proceedings against José António Batista Morais* [1992] ECR I-2085, para 7; Case C-3/95 *Reisebüro Broede v Gerd Sandker* [1996] ECR I-6511, para 14.

respectively, as 'purely internal situations' European Union law norms regarding free movement of services could not be applied.<sup>374</sup>

Another aspect that includes services of international commercial gestational carriage in the scope of European Union law regarding free movement of services is the fact that gestational carriage activities are 'temporarily'<sup>375</sup> or '[t]he provider's activity is precarious and episodic' and not regular.<sup>376</sup> European Court of Justice has explained that, when evaluating this aspect, it is possible to consider more than duration that in case of successful gestational carriage may reach approximately forty weeks and will not continue later. The determinant factor for gestational carriage to be incorporated in the service category may be the following: how hard is it to predict and that it does not need to have a special place where it is grounded.<sup>377</sup>

'[T]he service of surrogate motherhood [in this thesis called more precisely - gestational carriage], if remunerated, could also fall within E[uropean] U[nion] law'.<sup>378</sup> The reason behind this is the fact that the third essential requirement for qualifying as service under European Union law is whether services 'are normally provided for remuneration'.<sup>379</sup> If contracts for services of international gestational carriage are commercial, it means that they include consideration that may ensure 'economic or financial link between the [gestational carrier] and the [intended mother]' necessary in the understanding of European Union law of free movement of services.<sup>380</sup> Here it is especially important that this is only true if a contract may be enforced from the side of gestational carrier because, in case the opposite is true, the set price for service may only stay on paper.

Contracts for services of international commercial gestational carriage are obviously compliant with the discussed criteria<sup>381</sup> and evidently concern services in the understanding of European Union law regarding freedom to provide services. From this, it follows that citizens' rights to perform cross borders activities, in order for them to be enabled, mustn't be restricted.<sup>382</sup> The prohibition to prevent provision

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<sup>374</sup> Case C-17/94 *Criminal proceedings against Denis Gervais, Jean-Louis Nougailon, Christian Carrard and Bernard Horgue* [1995] ECR I-4353, para 24.

<sup>375</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 57.

<sup>376</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, Opinion of AG Leger, para 36.

<sup>377</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, Opinion of AG Leger, para 39.

<sup>378</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *Oxford Journal of Legal Studies* 207, 217.

<sup>379</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 57.

<sup>380</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *Oxford Journal of Legal Studies* 207, 215.

<sup>381</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 57.

<sup>382</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 56.

of services 'covers not only restrictions laid down by the state of destination but also those laid down by the state of origin'.<sup>383</sup> If services of gestational carriage offered in exchange for remuneration are legal in one state, the prohibiting states cannot prohibit or, even further, punish the realized free movement to receive services, including reproductive ones, to a state where it is allowed, in other words,<sup>384</sup> 'where some [m]ember [s]tates permit an economic activity, and others do not, those national prohibitions do not have the effect of removing the services from the scope of European Union law',<sup>385</sup> which determines freedom to cross borders in order for them to be enabled, while their occurrence itself would be subject to legislation of the host Member State. ('It seems clear that activities which are prohibited in every member state (...) do not fall within the provisions of European [Union] law.')<sup>386</sup> This may be explained by examples with other services related to reproduction. If in the case of United Kingdom hindering in vitro fertilization in United Kingdom with a deceased husband's gametes without his consent, it cannot prohibit the widow from traveling to Belgium, where it is possible, with the intention of performing it there.<sup>387</sup> If Ireland has prohibited abortions and they are even considered 'criminal offense[s]',<sup>388</sup> it cannot prevent women from going to United Kingdom and undergo the procedure there.<sup>389</sup> Such European Union law approach does not make it mandatory for any country to make the discontinuation of pregnancy legal in its territory, but it underlines the fact that 'where legally available, it does qualify as a service [in European Union law understanding]'. If, however, in such cases European Court of Justice would declare that the specific activity is not a service in European Union law understanding, it would be determined for all European Union member states, even those where the specific activity is legal, and European Union nationals would lose their European Union law rights<sup>390</sup> and could not take advantage from divergences in European Union member states.

In order for European Union member states not to be able to prohibit other European Union member states' citizens from using services legally available in their own territory, there is, inside the European Union, a general prohibition to

<sup>383</sup> Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 30.

<sup>384</sup> Richard F Storrow, 'The Pluralism Problem in Cross-Boarder Reproductive Care' (2010) 0 Human Reproduction 1, 1.

<sup>385</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 Oxford Journal of Legal Studies 207, 216.

<sup>386</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 Oxford Journal of Legal Studies 207, 216.

<sup>387</sup> *R v HFEA ex parte Diane Blood* (1997) 2 All ER 687 (CA).

<sup>388</sup> Rick Lawson, 'The Irish Abortion Cases: European Limits to national Sovereignty?' (1994) 1 European Journal of Health Law 167, 168.

<sup>389</sup> Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685, para 20; *Attorney General v X and others* (1992) ILRM 401.

<sup>390</sup> Rick Lawson, 'The Irish Abortion Cases: European Limits to national Sovereignty?' (1994) 1 European Journal of Health Law 167, 174.



discriminate<sup>391</sup> also regarding service provision 'between nationals of other [m]ember [s]tates and nationals of the host country'.<sup>392</sup> Barriers for free movement of services cannot be more than necessary, and they mustn't be disproportional to the aim a specific state is trying to achieve.<sup>393</sup> Discrimination may be avoided if 'law affect all persons subject to them, in accordance with objective criteria and without regard to their nationality'.<sup>394</sup> Nondiscriminatory rules apply to all activities that are qualified as services 'identically'. They do not discern by 'origin or the nationality or place of establishment of the persons providing them'.<sup>395</sup> Applying this concept to this thesis, gestational carrier may perform carriage service complying with 'the same conditions as are imposed by that state on its own nationals'.<sup>396</sup> This includes 'all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result'<sup>397</sup> in discrimination of the person concluding a contract for services of international gestational carriage in the European Union.

European Court of Justice has judged that discriminatory or even simply 'indistinctly applicable or indirectly discriminatory' restrictions are not to be allowed.<sup>398</sup> It has ruled that even 'any restrictions', that may in any way 'impede' lawful provision of services outside their own state<sup>399</sup> and are 'liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty'<sup>400</sup> and 'render [them] less advantageous', are not compatible with European Union law of freedom to provide services.<sup>401</sup> Simply put,

freedom [to provide services] likewise precludes the application of any national legislation which has the effect of making provision of

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<sup>391</sup>Treaty on Functioning of the European Union [2010] OJ C 115/47, art 18.

<sup>392</sup> Joined Cases C-330/90 and 331/90 *Criminal proceedings against Angel Lopez Brea and M. Carlos Hidalgo Palacios* [1992] ECR I-323, para 13.

<sup>393</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

<sup>394</sup> Joined Cases C-92/92 and 326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECR I-5145, para 30.

<sup>395</sup> Case C-52/79 *Procureur du Roi v Marc J.V.C. Debauxe and others* [1980] ECR 833, para 13.

<sup>396</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 57; Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, para 20.

<sup>397</sup> Joined Cases 62/81 and 63/81 *Seco SA and Another v EVI* [1982] ECR 223, para 8.

<sup>398</sup> Wouter Gekiere, Rita Baeten, Willy Palm, 'Free Movement of Services in the EU and Health Care' <[http://www.euro.who.int/\\_data/assets/pdf\\_file/0003/138180/E94886\\_ch11.pdf](http://www.euro.who.int/_data/assets/pdf_file/0003/138180/E94886_ch11.pdf)> accessed 5 April 2013, 472.

<sup>399</sup> Case C-76/90 *Manfred Säger v Dennemeyer & Co Ltd* [1991] ECR I-4221, para 12.

<sup>400</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

<sup>401</sup> Case C-272/94 *Criminal proceedings against Michel Guiot and Climatec SA* [1996] ECR I-1905, para 10; Case C-3/95 *Reisebüro Broede v Gerd Sandker* [1996] ECR I-6511, para 25.

services between [m]ember [s]tates more difficult than the provision of services purely within one [m]ember [s]tate.<sup>402</sup>

Due to this case law development nearly all 'regulatory or institutional' matters of receiving of medical services now 'can be challenged as potential obstacle to free movement'.<sup>403</sup> When applying this to contract of services of international gestational carriage, such a circumstance may be seen in non-enforcement of that contract.

The aforementioned circumstances show that member states have ways to achieve that provision of services in European Union territory is not completely free<sup>404</sup> and may accordingly try to limit international gestational carriage. This may happen if, alongside compliance with the aforementioned circumstances, the state justifies its own conditions by reasoning that they are in 'general interest'<sup>405</sup> in other words 'public interest' scope. 'Overriding reason relating to public interest' that may be invoked relating to gestational carriage is 'public policy'<sup>406</sup> which instead of some relatively easy to measure financial targets,<sup>407</sup> includes 'protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults'.<sup>408</sup> It is not necessary to further consider if the limits imposed by the states are proportionate or if they exceed necessities for reaching the target and if that target could be reached by not so strict limits, if the public policy does not legitimize hindrances of free movement.<sup>409</sup> It does not legitimize such hindrances because in the context of gestational carriage it is not necessary 'to guarantee the protection of the recipient of services'<sup>410</sup> from foreign providers, among other reasons, because they specially seek for foreign providers of services due to various advantages. Moreover, (as

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<sup>402</sup> Case C-381/93 *Commission of the European Communities v French Republic* [1994] ECR I-5145, para 17.

<sup>403</sup> Wouter Gekiere, Rita Baeten, Willy Palm, 'Free Movement of Services in the EU and Health Care' <[http://www.euro.who.int/\\_data/assets/pdf\\_file/0003/138180/E94886\\_ch11.pdf](http://www.euro.who.int/_data/assets/pdf_file/0003/138180/E94886_ch11.pdf)> accessed 5 April 2013, 478.

<sup>404</sup> Tamara Harvey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *Oxford Journal of Legal Studies* 207, 221.

<sup>405</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

<sup>406</sup> European Parliament and Council Directive EC/123/2006 on services in the internal market [2006] (OJ L 376/36), recital 40.

<sup>407</sup> Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2085, para 34; Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007, 11; Case C-484/93 *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, para 15.

<sup>408</sup> European Parliament and Council Directive EC/123/2006 on services in the internal market [2006] (OJ L 376/36), recital 41.

<sup>409</sup> Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007, para 15; Case C-272/94 *Criminal proceedings against Michel Guiot and Climatec SA* [1996] ECR I-1905, para 13.

<sup>410</sup> Case C-76/90 *Manfred Säger v Dennemeyer & Co Ltd* [1991] ECR I-4221, para 15.

discussed in chapters 9.2.1 and 9.2.2 of this thesis) it cannot be assumed that abuse of the gestational carrier or children created as a result of a contract takes place while realizing the intended mother's fundamental right to procreate (as discussed in chapter 10 of this thesis) although European Union law with this justification of non-enforcement of contracts for services of international commercial gestational carriage in the European Union is basically allowing the limiting of procreation right in those states which seek protection. Such European Union law approach demonstrates that European Union features a wide variety of cultural backgrounds and no harmonized values. It is not fundamentally condemned but is cherished instead.<sup>411</sup> The European Union also does not perform comparison and thus 'the fact that one [m]ember [s]tate imposes less strict rules than another [m]ember [s]tate does not mean that the latter's rules are disproportionate and hence incompatible with [European Union] law'.<sup>412</sup> The approach, to great extent, reaches the goal of respecting divergences in society's divergent view to morality which comes from states with multiple cultures. At the same time, the practice of this divergence overriding 'fundamental freedom' to provide services<sup>413</sup> succeeds in making the intention to be mother hard to enforce.

The competency maintained by European Union member states regarding the judging on legal motherhood according to their traditions in the interests of free movement exercisers must be coordinated. European Union is competent to coordinate international law connected to statuses that regard family relationships. These may include assistance in the sphere of jurisdiction, applicable law and recognition<sup>414</sup> because, if a member state does not view a case on enforcement of contracts for services of international commercial gestational carriage as an internal matter and does not bestow legal motherhood according to its own substantive rules, it will address the conflicts of law rules. Compatible conflicts of law rules (for the purpose of compatibility, it has harmonized, for instance, law of determining competent forums for matrimonial matters and matters of parental responsibility<sup>415</sup> which deals with typical consequences of cross border family relations arising from free movement which, as discussed in chapter 7.1.1, does not apply to contracts in the context of this thesis as proper law that would assist

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<sup>411</sup> Guido Pennings, 'Legal Harmonization and Reproductive Tourism in Europe' (2005) 13 *Reproductive Health Matters* 120, 126.

<sup>412</sup> Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 51.

<sup>413</sup> Siofra O'Leary, Jose Fernandez-Martin, 'Judicially-Created Exceptions to the Free Provision of Services' in Mads Andenas, Rothe Wulf-Henning (eds), *Services and Free Movement in EU Law* (Oxford University Press 2002), 163.

<sup>414</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 81;

Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 100.

<sup>415</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, art 1.

enforcement of intention to be a mother following contracts for services of international gestational carriage) are seen as essentials for the realization of 'judicial cooperation' when addressing civil matters, for example, free movement of judgments and their mutual recognition that is necessary for free movement of persons for them to perform activities in common market<sup>416</sup> by developing the market without complicating their movement.<sup>417</sup> In other words, private international law aspects are one of the foundation 'stones' of free movement, and, with the understanding that free movement gives rise to private international law issues and the realizing of cross borders activities is, therefore, dependent on private international law, European Union approach to guaranteeing free movement, among other things, of services, includes ensuring that its territory features compatible private international law in divergent member states.<sup>418</sup> This is, among other reasons, because conflicts of various state laws related to such civil statuses that are connected with family are not typical facilitators of free movement of people,<sup>419</sup> in any case, 'when a person moves to another country he does not primarily do so in order to change his status' it is not done to receive the uncertainty-provoked 'surprise',<sup>420</sup> that their status is 'limping' and therefore they cannot rely on the legality of their family relationships, namely, that their statuses may not exist in other states. In case of such a 'loss of legal positions' that is established in other states it is not possible to ensure free movement<sup>421</sup> and European Union to be as 'a common enterprise in which all the citizens of Europe are able to participate as individuals',<sup>422</sup> for instance, by realizing enforcement of contracts for services of international gestational carriage in the context of this thesis.

Just as already discussed in direct relation to receiving reproductive services, in order to achieve convenient cross borders movement, the demand exists not to

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<sup>416</sup> Council Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1, recitals 1, 2; Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, recital 1; European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, recital 1; Treaty on Functioning of the European Union [2010] OJ C 115/47, arts 81.1, 81.2.

<sup>417</sup> Clare McGlynn, *Families and the European Union* (Cambridge University Press 2006), 163.

<sup>418</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 287 – 288.

<sup>419</sup> Mario Tenreiro, Monika Ekström, 'Unification of Private International Law in Family Law Matters within the European Union' in Boele-Woelki, K., *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003) 187.

<sup>420</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 96.

<sup>421</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 109.

<sup>422</sup> Francis Geoffrey Jacobs, 'Introduction' in Guild Elspeth (ed), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer 1998), 3 - 4.

discriminate European Union citizens because of their nationality.<sup>423</sup> This obligation to guarantee equal treatment takes precedence over member states' cross borders migration rules.<sup>424</sup> It also implies that European Union member states cannot determine civil statuses by applying rules that are discriminatory against other European Union member states' nationals, which cannot accordingly be substantive rules or their national private international law. Discrimination is not the only problem undesirable in the European Union. Non-discriminatory barriers may also be subject to restrictions as obstacles to free movement.<sup>425</sup> Thus, while European Union features divergent laws of member states, they may settle the choice of mutually incompatible laws according to their own opinions unless they discriminate or otherwise limit freedom to move.<sup>426</sup>

Limitations that are not discriminations may be topical for discussions related to legal motherhood that has been assigned to a child born as a result of contracts for services of international commercial gestational carriage. In this case European Union Law principally does not only consider 'whether an European Union citizen is discriminated against in the exercise of his right of free movement,' but also and even more importantly 'whether national law restricts the exercise of his right of free movement'.<sup>427</sup> Such a restriction, even if not discriminatory, can be private international law. On the one hand it is necessary for assisting to determine civil statuses after cross border family making arrangements such as contracts for services of international commercial gestational carriage but on the other hand it can also be an obstacle to free movement if not concerted in European Union,<sup>428</sup> as it is in relation to enforcement of intention to be a mother after realizing international commercial gestational carriage arrangements.

Since 'E[uropean] U[nion] citizens must be able to move about by carrying their civil status with them, without being wholly or partly stripped of this when they cross a boarder'<sup>429</sup> specifically, in the context of subject matter of this thesis movement

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<sup>423</sup> Francis Geoffrey Jacobs, 'Introduction' in Guild Elspeth (ed), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer 1998), 3 - 4.

<sup>424</sup> Francis Geoffrey Jacobs, 'Introduction' in Guild Elspeth (ed), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer 1998), 3.

<sup>425</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 287.

<sup>426</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 297.

<sup>427</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 286.

<sup>428</sup> Johan Meeusen, 'What Has It Got to do Necessarily With the European Union?: International Family Law and European (Economic) Integration (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 329, 341, 342.

<sup>429</sup> European Parliament, 'Recognition and Registration of Civil Status Documents in Cross-border Cases,' (Directorate –General for International Policies of the Union, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde)

may be hindered by the fact that motherhood established in one state is problematically recognizable in others<sup>430</sup> because civil status nonrecognition in various European Union states may cause ‘inconvenience’ and ‘difficulties in benefitting’ for each status owner<sup>431</sup> in various, even very mundane situations when the necessity arises to present documents confirming civil status.<sup>432</sup> If, in cross borders activities, civil status is limping, then it does not promote free movement. Furthermore, European Court of Justice has recently given judgments concerning such civil status as name. It has concluded that limping surname is not compatible with European Union law and restricts the right of free movement.<sup>433</sup> (For instance, it has said that

the right is hampered if a child is obliged to use a surname in one [m]ember [s]tate (...), of which the child and the parents are national, that is different from the (...) surname conferred upon the child and registered in another [m]ember [s]tate (...), where he was born).<sup>434</sup>

The European Court of Justice has ruled in both situations as such that create obstacle for freedom to move, namely, in the situation where non-recognition of a name is discrimination on basis of nationality,<sup>435</sup> and where non-recognition of a name is not discrimination on basis of nationality.<sup>436</sup> It is important in the context of legal motherhood status not only because the name may be dependent on it,<sup>437</sup> but more so because after recent cases on person names there have been discussions that principles applied in them could be applicable to other civil statuses as well, among them the legal motherhood important in the context of this thesis which can be directly related to the acquiring of a name. However, the supposition that they may be applied relating to legal motherhood is too careful and

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<[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 7.

<sup>430</sup>Theodorus M de Boer, ‘Unwelcome Foreign Law’ (Amsterdam University Digital Academic Repository) <<http://dare.uva.nl/document/118208>> accessed 5 April 2013, 20 – 21.

<sup>431</sup>Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613, para 36;

Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll* [2008] ECR I-7639, para 23.

<sup>432</sup>Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll* [2008] ECR I-7639, para 25.

<sup>433</sup>Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613, paras 42, 45; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll* [2008] ECR I-7639, para 29; Kees Jan Saarloos, ‘European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage’ (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 286 – 287, 289, 359.

<sup>434</sup>Daniel Gruenbaum, ‘Foreign Surrogate Motherhood: Mater Semper Certa Erat’ 2012 60 *American Journal of Comparative Law* 475; 492.

<sup>435</sup>Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613, paras 27 – 45.

<sup>436</sup>Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll* [2008] ECR I-7639, para 22.

<sup>437</sup>Kees Jan Saarloos, ‘European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage’ (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 290.

modest. Legal motherhood 'nonrecognition' may be a much higher barrier for freedom to move than a person's surname that is 'limping'.<sup>438</sup> Consequently it may be concluded that 'it would come as no surprise if the [European Court of Justice] decided that the non-recognition of the status of a child as the [child] of the [intended mother] amounts to a violation of the right to freedom of movement' because

the non-recognition in one of [m]ember [s]tate of motherhood conferred by another creates the 'serious inconvenience' (to use the [European] [C]ourt's of [Justice] language) that the child will have not only different surnames, but also different legal mothers in each of the involved countries.<sup>439</sup>

Therefore it must be concluded that if European Union law recent developments allow traveling under a person's original name, it should also be possible when maintaining other civil statuses<sup>440</sup> including those which are discussed in the context of this thesis. While this is not true, intention to be a mother is not enforceable and the status gained as the result is not mutually recognized throughout European Union, it shall also be considered as an obstacle to freedom to receive services in European Union, with the exception of adequate justifications found for some hindrances.<sup>441</sup>

Since the European Union includes states that are largely supporting gestational carriage arrangements (as discussed in chapter 6 of this thesis) and best interests of children born as a result of these arrangements (as discussed in chapter 9 of this thesis), other European countries may be forced to search for significant reasons for nonrecognition of personal statuses that originate from actions performed in such relative permissive states. Specifically,

[t]here are currently problems with (...) parentage (recognition of the birth certificate of a birth certificate of a child born to a [gestational carrier] in Greece or the United Kingdom, for example, and who has as the mother's name that of the woman who requested the child.

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<sup>438</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 289.

<sup>439</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 *American Journal of Comparative Law* 475, 493.

<sup>440</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 290.

<sup>441</sup> Kees Jan Saarloos, 'European private international law on legal parentage? Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage' (Dissertation to obtain the degree of Doctor) <<http://arno.unimaas.nl/show.cgi?fid=19540>>, 289.

It is because these European Union states, as demonstrated in chapter 6 of this thesis, have reacted faster and in a more liberal way to the necessity to update law regarding consequences of employing nontraditional procreation methods.

The fact that these situations, which validly arise in one [m]ember [s]tate according to its law, are not recognized in all the other [m]ember [s]tates is clearly an infringement of the free movement of [European] Union citizens.

This is already discussed throughout this chapter. This has many reasons that do not comply with the legal privileges of those carrying the European Union citizenship status, 'as it prevents them, for example, from settling or even staying in those [m]ember [s]tates that refuse to recognise their situation'.<sup>442</sup>

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<sup>442</sup> European Parliament, 'Recognition and Registration of Civil Status Documents in Cross-border Cases,' (Directorate –General for International Policies of the Union, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde) <[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 16.



# 11.1. European Union citizenship

The right of free movement is dependent on European Union citizenship. Anyone who acquires nationality of some European Union member state also receives European Union citizenship.<sup>443</sup> This status 'entails freedom of movement'<sup>444</sup> and residence in European Union.<sup>445</sup> Thus the right of free movement is firstly dependent on nationality and laws determining it in each member state.<sup>446</sup>

One aspect of European Union citizenship is the fact that free movement right given to persons by citizenship also includes freedom to receive services, including services of international gestational carriage in its territory (as discussed mainly in chapter 11). Namely, in order to involve oneself in free movement, it is necessary to comply with rules of citizenship. Further discussion of this fact in the scope of this thesis is not essential.

Another aspect of European Union citizenship relevant in the context of enforcement of contracts for services of international commercial gestational carriage is European Union citizenship as such, because persons, including the intended mother, may for various reasons have some special preferences regarding which citizenship their children should have. Although opinion on the most appropriate citizenship may differ, each child, including those who were born as a result of gestational carriage arrangements, besides legal motherhood should also have 'legal bond' with some specific state.<sup>447</sup> Details may differ, but, taking into account that '[e]veryone has right to a nationality'<sup>448</sup> and '[s]tatelessness shall be avoided',<sup>449</sup> nationality must be determined and, in order to determine such an important legal link to a state, several connecting factors are taken into account. These may be the mother's nationality or child's place of birth.<sup>450</sup> In the context of contracts for services of international commercial gestational carriage in the

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<sup>443</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, 20.1.

<sup>444</sup> Massimo Condinazi, Lang Alessandra, Nascimbene Bruno, *Citizenship of the Union and Free Movement of Persons* (Martinus Nijhoff Publishers 2008), x.

<sup>445</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 20.2.a, 21.1.

<sup>446</sup> Council of Europe, *European Convention on Nationality* (Strasbourg, 1997) <<http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>> accessed 5 April 2013, art 3; Massimo Condinazi, Lang Alessandra, Nascimbene Bruno, *Citizenship of the Union and Free Movement of Persons* (Martinus Nijhoff Publishers 2008), 4 – 5.

<sup>447</sup> Council of Europe, *European Convention on Nationality* (Strasbourg, 1997) <<http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>> accessed 5 April 2013, art 2a.

<sup>448</sup> Council of Europe, *European Convention on Nationality* (Strasbourg, 1997) <<http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>> accessed 5 April 2013, art 4a.

<sup>449</sup> Council of Europe, *European Convention on Nationality* (Strasbourg, 1997) <<http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>> accessed 5 April 2013, art 4b.

<sup>450</sup> Council of Europe Committee of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital, Non-marital Partnerships and Cohabitation* (CJ-FA (2008) 5) <[http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2008\\_%205%20E%2025%2009%2009.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf)> accessed 5 April 2013, 21 – 22.

European Union it is important that a specific state's nationality may be granted because of the mother's (in the context of this thesis it is important which mother's, namely, gestational or intended) nationality at the time of child's birth. In relation to this thesis a factor for discussion even more important than the mother's nationality is the connecting factor which theoretically is an exception, namely, place of birth if the child is born as a result of international arrangements or practically abroad. If the motherhood of a child born as a result of such cross borders arrangements is recognized as that which was established abroad, then nationality can also be determined by following it with the recognizing state's law application.<sup>451</sup> In the context of contracts for services of international commercial gestational carriage it would be most convenient if the child born as a result of it could without delay 'acquire the nationality of the receiving state' or acquire intended mother's nationality if she herself was not the receiving state's national. In any case, the receiving state should take steps for the child to acquire intended mother's nationality as remedy for the child to simply have one nationality.<sup>452</sup> Therefore the enforcement of contracts for service of international commercial gestational carriage is important, namely, if they achieve the result that intention to be a legal mother gives rise to establishment of that legal motherhood, then they may practically achieve a respective citizenship as opposed to the possibility that motherlessness may result in lack of legal bond with any state.<sup>453</sup> A child's nationality, if it belongs to a European Union member state, may respectively present a person with various advantages, of which, for instance, it may be mentioned and discussed about residence rights in other member states<sup>454</sup> if they comply with European Union law rules on insurance and being able to afford living in them.<sup>455</sup> In the context of enforcement of contracts for services on international commercial gestational carriage in the European Union, the desire of third states' nationals to acquire rights available to residents in European Union may become real following various scenarios.

If a child is born in the European Union as a result of gestational carriage, he or she may acquire European Union citizenship due to place of birth even if the mother whose citizenship he or she may lay claim to is a third country national. The

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<sup>451</sup> Council of Europe, *European Convention on Nationality* (Strasbourg, 1997) <<http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>> accessed 5 April 2013, art 6.a.

<sup>452</sup> Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 646.

<sup>453</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 27.

<sup>454</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, arts 20.2.a, 21.1.

<sup>455</sup> Council Directive EEC/364/1990 on the right of residence [1990] (OJ L 180/26), art 1.1.

child in this situation has ‘an independent right of admission to the territory of European Union members states’ regardless of his family members’ nationalities. Even if his intended mother has no other legal reason to reside in the European Union she may derive it from the child’s rights.<sup>456</sup> European Court of Justice case law demonstrates that, in the situations when non-Europeans (for example, because their right to procreate is limited in their own country) deliver a child in a European state, then in accordance with its law the child may acquire this state’s nationality, and the legal mother – right to reside.

According to European Union law, child or ‘descendant’ may be the legal mother’s ‘dependant’,<sup>457</sup> if she supports him materially (not in another way)<sup>458</sup>, thus making it a dependant.<sup>459</sup> And therefore the child may have right to residence that depends on the supporter’s European Union citizenship because European Union law grants right to residence for dependants of citizens.<sup>460</sup> However, the situation relevant to consider in the context of enforcement of contracts for services of international gestational carriage in the European Union may also be reversed, namely, third country national mother may seek residence right in the European Union based on the fact that her child, a European Union citizen, is her – 3<sup>rd</sup> country national’s - dependant.<sup>461</sup> European Court of Justice has ruled that, if the legal mother (it is not even necessarily important whether she is a European Union citizen or third country national) whose dependant possesses the right to reside in European Union member state is not allowed to accompany the child, it ‘would deprive the child’s right of residence of any useful effect’.<sup>462</sup> According to recent developments of European Union secondary law, this is family right and the aforementioned dependants are defined more precisely as ‘direct’ dependants.<sup>463</sup> Since European Union law traditionally has an understanding of family that does

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<sup>456</sup> Nicholas QC Blake ‘Family Life in Community Law: The Limits of Freedom and Dignity’ in Guild Elspeth (ed), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer 1998), 8.

<sup>457</sup> Council Directive EEC/364/1990 on the right of residence [1990] (OJ L 180/26), art 2.1.a.

<sup>458</sup> Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] 3 CMLR 48, para 43; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925, Opinion of AG Tizzano, paras 84-85.

<sup>459</sup> Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] 3 CMLR 48, para 43.

<sup>460</sup> Council Directive EEC/364/1990 on the right of residence [1990] (OJ L 180/26), art 1.2.a; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] 3 CMLR 48, para 43.

<sup>461</sup> Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] 3 CMLR 48, paras 42, 44.

<sup>462</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 75; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] 3 CMLR 48, para 45.

<sup>463</sup> European Parliament and Council Directive EC/38/2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] (OJ L 158/77), art 2.2.c.

not change rapidly, this gives reason for a discussion on whether children who have arrived in the family in a non-traditional way, including those created by way of contracts for services of international commercial gestational carriage, are in the scope of rights connected with the direct dependency. It is most likely not intended to exclude those who are genetically linked to the legal mother, and in the context of this thesis it leaves room for doubt only of those children whose legal mother is not the woman who contributed oocyte to the child's creation. It may be clarified with case by case assessment regarding dependency.<sup>464</sup>

Such scenarios highlight how essential it is whether and how contracts for services of international commercial gestational carriage are enforced, whether they provide legal motherhood and its following bunch of rights to the intended mother or limit them to gestational carrier. Outside the scope of this thesis scope it is possible to argue that these rights for some reason may be presented to someone else. Another excluded discussion regards the issue of whether service provider's (gestational carrier's) family can use free movement in the European Union right (because she is a citizen). But, firstly, it is not an especially relevant concern in the context of this thesis, and, secondly, there is no case law regarding the necessary volume of such service for the relevant rights to come into existence.

Taking as basis the discussed rights of European Union citizens to exercise their right to free movement and freedom to receive services, in order to realize their right to procreate, the remaining part of thesis discusses what can be done in order for enforcement of their intention to be a mother, expressed in the contract for services of international commercial gestational carriage, would not create issues thus preventing freedom to move for European Union citizens, because 'recognition of the legal situation established in the Member State (...) should not act as a disincentive or constitute an obstacle preventing the exercise of European [Union c]itizen's rights'. Since any state may feature some extra cherished values, the ensuring of free movement is only intended as far as it does not overstep some particular general interest tolerance.<sup>465</sup> Although states can prohibit specific arrangements in their territory, they cannot limit freedom of receiving corresponding services in other European Union states. A full option of realizing a child's best interests would be allowing that his legal mother may be the intended mother and such an arrangement is enforceable in the whole Europe without taking into account general interest exclusion justifications of separate states. It would fall

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<sup>464</sup> Clare McGlynn, *Families and the European Union* (Cambridge University Press 2006), 47, 48, 49.

<sup>465</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 13.

in line with the fact that 'fundamental rights or values have an increasingly important (but not entirely new) role in shaping the contours of public policy' and, among other matters, also for enforcement of contracts for services of international gestational carriage in the European Union 'It would be methodologically appropriate to rely on for example, the best interest of the child or the right to family life to delimit the public policy exception.'<sup>466</sup>

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<sup>466</sup> Daniel Gruenbaum, 'Foreign Surrogate Motherhood: Mater Semper Certa Erat' 2012 60 American Journal of Comparative Law 475, 503.

# 12. Prospective facilitation for enforcement of contracts for services of international commercial gestational carriage

There are various 'policy options' which could be used in order to facilitate enforcement of contracts for services of international commercial gestational carriage. One of those could be trying to help the involved states' institutions in solving specific issues,<sup>467</sup> but, as evidenced by chapters 6 and 11 of this thesis among others, action on the level of member states is not likely to be the most appropriate solver of an international problem, even if it means facilitating the option of separate institutions to 'cooperate more effectively'.<sup>468</sup> More optimal possibility for facilitation for enforcement of gestational carriage arrangements could be 'automatic recognition'<sup>469</sup> that would ensure that, when free cross border service arrangements are employed in the European Union, the involved parties would have constant rights. For achieving this, there would be no need 'to change its substantive law or modify its legal system', namely, it 'would not involve the harmonization of existing rules and would leave [m]ember [s]tates' legal systems unchanged. This would mean that each [m]ember [s]tate would accept and recognize, on the basis of mutual trust'.<sup>470</sup> Then, among other statuses important in different ways, such civil status as legal motherhood which is important in the context of this thesis 'should be recognized (...) even if the application of [another] states law would have resulted in a different solution'. Such an approach, naturally, 'would involve a number of advantages for European [Union] citizens'<sup>471</sup> and therefore it is worth promoting the growth of mutual trust. Mutual trust necessary for

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<sup>467</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12.

<sup>468</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 13.

<sup>469</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12 - 13.

<sup>470</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 13.

<sup>471</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 13.

the existence of such recognition may be promoted by well compatible private international law. 'Recognition based on the harmonization of conflict-of law rules' is thus the third prospective most suitable approach for facilitation of cross-border enforcement of gestational carriage arrangements.<sup>472</sup> To simplify, the enforcement of interests involved may be optimally reconciled by harmonizing private international law measures at European Union level. This chapter will further demonstrate the basis of policy option that, in order for this to take place, European Union should and could limit non-enforcement including enforcement of contracts for services of international commercial gestational carriage in its area of freedom security and justice.

Previous chapters of this thesis have identified the issue, namely, that various rules regarding the enforcement of contracts for services of international commercial gestational carriage may create and actually do create chaos in the field of personal status. Statuses necessary after arrangements of international commercial gestational carriage may not exist at all and, even if they exist in one state, they may not be recognized in another state which can consequently assign a different status based on its relevant conditions. Without ensuring the adherence to the same principle in international movement cases any unclear status may be followed by various unclear obligations and unprotected rights. This may have implications regarding European Union citizenship and free movement, besides many important related implications outside of this thesis scope such as, for instance, social benefits from states or taxpaying to the states.<sup>473</sup>

While European Union not only provides these rights but even strives to enlarge freedom (of services among others), differences in the member states' laws substance regarding 'sensitive issues', which include the enforcement of contracts for services of international commercial gestational carriage, the missing elements of its law may, on the other hand, prevent the effective ensuring and employing of movement concept. While national laws that regulate the subject matter of this thesis are not harmonized, the fact that more people are using freedoms including free movement of services will lead to private international law becoming ever more important.<sup>474</sup> (In other words, this originates and will largely continue to follow from the fact that obtaining legal motherhood in general and particularly after

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<sup>472</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 14.

<sup>473</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 44 - 47, 50.

<sup>474</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 297 – 298.

employing gestational carriage arrangements in the European Union vary, and 'it does not seem possible in the short term to harmonise the organisation of civil status at the E[uropean] U[nion] level, as this is linked to the history of each [m]ember [s]tate and its administrative organization'<sup>475</sup> as discussed in more detail in chapter 6.1 of this thesis demonstrating that even attempts to do something related are not suitable for reconciliation of involved interests in arrangements for services of international gestational carriage in the European Union).

Since in the European Union free movement of services cannot work sound if there is not ensured 'predictability of the outcome of litigation, certainty as to the law applicable, and the free movement of judgements',<sup>476</sup> private international law may be employed as assistant to reconcile the situation because, when concluding cross border contracts, parties must come to terms with the fact that enforcement is dependent not only on their wishes but also on rules in force<sup>477</sup> and they create the situation where enforcement of modern assisted reproduction arrangements is 'influenced predominantly by moral and ethical convictions, which differ substantially from country to country' and which, unlike laws made regarding more common methods of family expanding, does not reflect 'the given social reality',<sup>478</sup> which in the case of this thesis, in simplistic terms, is this: no matter how – as a result of legal or illegal arrangements – children are born, and they are in necessity of legal motherhood. Intended mothers strive to arrange this with the aid of contracts, but arrangements regarding the establishing of respective families' relationships are still not universally surrendered to private parties, thus limiting motherhood assignment options.<sup>479</sup> Although European Union member states strive to discover various reasons based on substantive law for not allowing the situation where legal motherhood may be dependent on contractual arrangements,<sup>480</sup> still 'The time has come for legislatures and courts to recognize a new category of parent - the intended parent. Especially when a child results from the use of assisted reproductive technologies, the best interests of child requires

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<sup>475</sup> European Parliament, 'Recognition and Registration of Civil Status Documents in Cross-border Cases,' (Directorate – General for International Policies of the Union, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde) <[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 18.

<sup>476</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, recital 6.

<sup>477</sup> Matteo Bonini-Baraldi, 'Variations of the Theme of Status, Contract and Sexuality: and Italian Perspective on the Circulation of Models' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 302.

<sup>478</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 63.

<sup>479</sup> Marie-Therese Meulders-Klein, 'Towards a European Civil Code on Family Law' in Katharina Boele-Woelki (ed) *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 108.

<sup>480</sup> Linda D. Elrod, 'A Child's Perspective of Defining a Parent: The Case for Intended Parenthood' <[http://www.law2.byu.edu/jpl/papers/v25n2\\_Linda\\_Elrod.pdf](http://www.law2.byu.edu/jpl/papers/v25n2_Linda_Elrod.pdf)> accessed 5 April 2013, 268.



the law to create nonmodifiable parental rights'.<sup>481</sup> They must be mutually recognized throughout European Union because otherwise, while substantive law in some states may ensure 'havens' for receiving procreation services,<sup>482</sup> it may not expand to cover international service cases. Here private international law can come into play. Each state which has 'developed legal system' that European Union member states feature for certain, already has private international law and, if they do not point to the same substantive laws, then 'differences tend to undermine purpose of the rules'<sup>483</sup> because they create conflicts instead of preventing them if these rules are not harmonized or, in other words, if they are not turned into European Union private international law rules.

In the context of this thesis the best policy option is that European Union private international law may reconcile free movement (including services) and European Union member states' national laws variety concerning enforcement of intended motherhood arrangements. Private international law harmonization can be very advantageous<sup>484</sup> by creating judicial framework where substantive differences remain while concerned persons may foresee competent place of resolution and the origin of applicable rules for the subject matter and by thusly providing them with the comfort at least of certainty regarding available protection of their rights.<sup>485</sup>

The coordination of these private international law aspects may serve as basis for ensuring the mutual trust of member states to legal systems of others, which is crucial, because the following 'Mutual recognition of decisions is an effective means of protecting citizens' rights and securing the enforcement of such rights across European borders.'<sup>486</sup> By applying this principle to civil matters, which are the issue of this thesis, European Union can seek to 'facilitate access to justice'<sup>487</sup> and other fundamental rights, which all states, no matter how different, strive to

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<sup>481</sup> Linda D. Elrod, 'A Child's Perspective of Defining a Parent: The Case for Intended Parenthood' <[http://www.law2.byu.edu/jpl/papers/v25n2\\_Linda\\_Elrod.pdf](http://www.law2.byu.edu/jpl/papers/v25n2_Linda_Elrod.pdf)> accessed 5 April 2013, 249.

<sup>482</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 63.

<sup>483</sup> Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 3.

<sup>484</sup> Maria R Marella, 'The Non-Subversive Function of European Private Law: The Case of Harmonization of Family Law' (2006) 12 *European Law Journal* 78, 105.

<sup>485</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 304; Gerhard-Rene de Groot, Jan-Jaap Kuipers 'The New Provisions on Private International Law in the Treaty of Lisbon' (2008) 15 *Maastricht Journal of European and Comparative Law* 109, 110; Jurgen Basedow, 'The Communitarisation of Private International Law' (2009) 73 *The Rabel Journal of Comparative and International Private Law* 455, 458.

<sup>486</sup> Council Programme, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' [2004] OJ C 53/1, art 3.4.2.

<sup>487</sup> Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 4.

respect according to measures binding to them.<sup>488</sup> It is recommendable and possible to base reconciliation on human rights.

Enforcement of contracts for services of international commercial gestational carriage to great extent involves aspects of human rights (as discussed in chapters 9 and 10) and the human rights element is the reason why, while there exist highly different substantive laws but private international laws do not assist cross-borders enforcement in such a sensitive matter, they are without doubt to be qualified as obstacle to free movement of services.<sup>489</sup> The fact that national law prevents enjoying European Union law rights is not compatible with the statement that in European Union there 'is no difference between national and European values and interests where human rights and fundamental freedoms are concerned' as far as they are applied from common sources.<sup>490</sup> In other words, there is a fundament for integration in this area, there is a basis for European Union law even without breaking off national background. This is usually the reason for European Union action to transpire, namely, 'any legislation in the field of private international law is based on specific substantive approach'. Even if national private international law harmonization takes place instead of substantive law harmonization, it would not be possible if the situation was reverse, namely, if 'substantive values are not shared'. With the existence of circumstances which have nothing in common, there would rise the question of what to harmonize.<sup>491</sup> The creation of such European Union private international law that would be 'blind to substantive values' could only achieve 'nonpolitical value free results'.<sup>492</sup>

As discussed more in chapter 13.1.1 of this thesis, the implementation of harmonized private international law for enforcement of contracts for services of international commercial gestational carriage would mean that this field is within the 'area of freedom, security and justice'<sup>493</sup> which demands 'respect for fundamental rights and the different legal systems and traditions of the [m]ember

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<sup>488</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) <[http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf)> accessed 5 April 2013; Treaty on European Union [2010] OJ C 83/13, art 6; Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

<sup>489</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 298.

<sup>490</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) <[http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf)> accessed 5 April 2013; Treaty on European Union [2010] OJ C 83/13, art 6; Charter of Fundamental Rights of the European Union [2010] OJ C 83/389; Theodorus M de Boer, 'Unwelcome Foreign Law' (Amsterdam University Digital Academic Repository) <<http://dare.uva.nl/document/118208>> accessed 5 April 2013, 15.

<sup>491</sup> Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going Too Far?' (2008) 22 *International Journal of Law, Policy and the Family* 178, 193.

<sup>492</sup> Theodorus M de Boer, 'The Purpose of Uniform Choice of law rules: the Rome II Regulation' (2009) 56 *Netherlands International Law Review* 295, 332.

<sup>493</sup> Theodorus M de Boer, 'Unwelcome Foreign Law' (Amsterdam University Digital Academic Repository) <<http://dare.uva.nl/document/118208>> accessed 5 April 2013, 22.

[s]tates'.<sup>494</sup> Harmonization of private international law would achieve just that, namely, it would ensure the adhering to human rights in free movement and right to receive procreation services, at the same time preserving diversity of substantive rules.

Such an approach is consistent with European Union policy. When starting this millenium, the European Union development was supposed to include 'common judicial area' matters. One of the primary fields for improvement was family law. European Union has planned freedom for cross border enforcement based on mutual trust within the scope of resolutions accepted in other European Union member states.<sup>495</sup> The aim was to strive for improvements in mutual recognition, and it was supposed to be promoted by harmonization of relevant legislation.<sup>496</sup> This was intended to take place without disturbing European Union member states' legal traditions, instead assisting them in their endeavours to cooperate for mutual recognition to be as effective as possible.<sup>497</sup> There were plans that 'borders between [m]ember [s]tates should not constitute an obstacle either to the settlement of civil matters or to initiation court proceedings or to the enforcement of decisions in civil matters'.<sup>498</sup>

Actions in the planned direction have been successful and European Union may now use the tested grounds as basis for further development.<sup>499</sup> 'Policy priorities' include caring for those who possess European Union citizenship, ensuring their fundamental rights, freedoms and security in international actions. Specifically in the context of this thesis it is important that 'The achievement of a European [Union] area of justice must be consolidated so as to move beyond the current fragmentation.' This refers to international law because it is provided that 'Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the [European] Union.' In the context of this thesis it is especially important that 'resources should be mobilised to eliminate barriers to the recognition of legal decisions in other [m]ember [s]tates'<sup>500</sup> and it is planned to be achieved by using instruments ensuring that legal systems are mutually

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<sup>494</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 67. 1.

<sup>495</sup> Mario Tenreiro, Monika Ekström, 'Unification of Private International Law in Family Law Matters within the European Union' in Boele-Woelki, K., *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 187 – 188.

<sup>496</sup> Council Programme, 'Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters' [2001] OJ C 12, introduction.

<sup>497</sup> Council Programme, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' [2004] OJ C 53/1, arts III.3.2, II.1.

<sup>498</sup> Council Programme, 'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ 115/1, art 3.3.2.

<sup>499</sup> Council Programme, 'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ 115/1, art 1.

<sup>500</sup> Council Programme, 'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ 115/1, art 1.1.

reliable<sup>501</sup> beginning with the striving to achieve ‘the full and effective implementation, enforcement and evaluation of existing instruments’.<sup>502</sup> The overview of possibly relevant measures for the enforcement of contracts for services of international commercial gestational carriage in the chapters 6 - 8.2 of this thesis demonstrates that this area does not yet feature specific laws reconciling its issues. The creation of such would not be unprecedented because European Union has already performed the harmonization of various conflicts of laws thus ensuring ‘unilateral’ determination for how to enforce various legal obligations.<sup>503</sup> The aspects of conflicts of law regarding status to be gained after arrangements of gestational carriage would also not be something completely new in the European Union operation because coordinating private international law regarding civil status is one of the issues already put on its to-do list<sup>504</sup> and ‘civil status’ has until now been touched upon with its rules in other fields.<sup>505</sup> Additionally, the goal of only attending to conflicts of laws aspects of intended motherhood contracts would be just in line with the fact that European Union has aimed to act with private international law in other family matters, with the approach that there is no need to strive for ‘harmonized concepts of “family”, “marriage”, or other’,<sup>506</sup> but, for instance, ‘A divorce judgement given in a member State shall be automatically recognized in other [m]ember [s]tates unless there are grounds for non-recognition, which are limited.’<sup>507</sup> Specifically Brussels II bis Regulation stipulates that ‘no special procedure shall be required for updating the civil-status records of a [m]ember [s]tate on a basis of a judgement relating to

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<sup>501</sup> Council Programme, ‘The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens’ [2010] OJ 115/1, art 1.2.

<sup>502</sup> Council Programme, ‘The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens’ [2010] OJ 115/1, art 1.2.2.

<sup>503</sup> European Parliament and the Council Regulation 2007/864/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, recital 6; Eleanor C Ritaine, ‘Harmonizing Private International Law: A Replay of Hannibal’s Crossing of the Alps?’ (2006) 34 International Journal of Legal Information 419, 420 – 421.

<sup>504</sup> European Commission, ‘Communication from the Commission to the Council and the European Parliament establishing for the period 2007–2013 a framework programme on Fundamental Rights and Justice’ COM (2005) 122 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0122:FIN:EN:PDF>> Accessed 5 April 2013, 67.

<sup>505</sup> European Commission, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12.

<sup>506</sup> Council Programme, ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’ [2004] OJ C 53/1, art. 3.4.2.

<sup>507</sup> European Parliament, ‘Recognition and Registration of Civil Status Documents in Cross-border Cases,’ (Directorate – General for International Policies of the Union, Policy Department C: Citizens’ Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde) <[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 16.

divorce, legal separation or marriage annulment given in another [m]ember [s]tate'.<sup>508</sup>

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<sup>508</sup> Council Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) [2003] OJ L 388/1, art 21.2.

## 12.1. Accepting forms of documents

Delivering the discussed political aims might assist in facilitation of the possibility to recognize and enforce contents of various documents. It means that, if the European Union wishes to strive for its established goal 'to ensure full exercise of the right to freedom of movement'<sup>509</sup> then 'Progress in the area of freedom, security and justice requires successful implementation of these political priorities.'<sup>510</sup>

Regarding civil statuses, among them legal motherhood, the European Union has already planned 'concrete actions with a clear timetable for adoption and implementation'.<sup>511</sup> Planned for the end of year 2013, these are 'Legislative proposal on mutual recognition of the effects of certain civil status documents (e.g. relating to birth, affiliation, adoption, name' and 'Legislative proposal for dispensing with the formalities for the legislation of documents between the Member States'.<sup>512</sup> By accepting the legal instruments following from these proposals, European Union plans to deal with recognition of civil statuses solving not only the 'effects'<sup>513</sup> issue but also the 'formalities'<sup>514</sup> issue. Both have been discussed simultaneously<sup>515</sup> in Green paper with the essence-explaining title 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records'.<sup>516</sup> It is employed to facilitate consideration and collect 'opinions from the players concerned on ways of improving the lives of citizens in terms of

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<sup>509</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, background.

<sup>510</sup> European Commission, 'Delivering an area of freedom, security and justice for Europe's citizens' (Action Plan Implementing the Stockholm Programme) COM (2010) 171 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>> Accessed 5 April 2013, 8.

<sup>511</sup> European Commission, 'Delivering an area of freedom, security and justice for Europe's citizens' (Action Plan Implementing the Stockholm Programme) COM (2010) 171 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>> Accessed 5 April 2013, 8.

<sup>512</sup> European Commission, 'Delivering an area of freedom, security and justice for Europe's citizens' (Action Plan Implementing the Stockholm Programme) COM (2010) 171 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>> Accessed 5 April 2013, 24

<sup>513</sup> --'Roadmap [for] Legislative proposal on mutual recognition of the effects of certain civil status documents'

<[http://ec.europa.eu/governance/impact/planned\\_ia/docs/2013\\_just\\_001\\_mutual\\_recognition\\_effects\\_civil\\_status\\_doc\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_001_mutual_recognition_effects_civil_status_doc_en.pdf)> accessed 5 April 2013, 1.

<sup>514</sup> 'Roadmap [for] Legislative proposal for dispensing with the formalities for the legalization of documents between the Member States'

<[http://ec.europa.eu/governance/impact/planned\\_ia/docs/2013\\_just\\_002\\_formalities\\_legalisation\\_doc\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_002_formalities_legalisation_doc_en.pdf)> accessed 5 April 2013, 1.

<sup>515</sup> 'Roadmap [for] Legislative proposal on mutual recognition of the effects of certain civil status documents'

<[http://ec.europa.eu/governance/impact/planned\\_ia/docs/2013\\_just\\_001\\_mutual\\_recognition\\_effects\\_civil\\_status\\_doc\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_001_mutual_recognition_effects_civil_status_doc_en.pdf)> accessed 5 April 2013, 1.

<sup>516</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013.

the movement of public documents and the application of the principle of mutual recognition in relation to civil status.<sup>517</sup> The effort to convert ideas not only in effects but also in formalities in a legal tool is based on the fact that documenting civil statuses in European Union member states differs and formal requirements differ as well. Therefore, in order to facilitate the enforcement of civil statuses itself, European Union attempts to simplify the execution of formal requirements for documenting cross border situations, which is, at the moment, 'fragmented'. This is (just as illustrated throughout in the context of this thesis related to enforcement of contracts for services of international gestational carriage) 'because it is based on several sources: national laws that differ considerably from one another; a number of international, multilateral and bilateral conventions which have been ratified by a varied and limited number of countries' and, as already discussed throughout this thesis in the context of cross border gestational carriage service provision 'which are unsuitable when it comes to providing the solutions needed to ensure the free movement of Europeans.'<sup>518</sup> Just as the non-recognition of document content is an obstacle to free movement in the European Union, the 'formalities make freedom of movement less attractive for European citizens and can even prevent them from exercising their right fully'<sup>519</sup> because it is not likely that a document's content will be recognized and enforced if the form is unacceptable, most probably the content review will never take place. Namely, it may be concluded that formalities are a prerequisite for effectiveness, but it has no real value if a document is, in every meaning, ideal for being internationally accepted but its content is neither recognizable nor enforceable. It may be ironically said that effort and resources were not wasted in ensuring the recognition of document formats while it is impossible in the whole European Union to enforce contracts for services of international commercial gestational carriage. The reason for this is the following: the new and hopeful instruments of European Union regarding effects and formalities promoting their recognition will not solve the issues following directly from contracts for services of international commercial gestational carriage because, although the Green paper does not explicitly exclude them, it does not address bureaucracy and movement of documents related to contracts for services of international commercial gestational carriage.

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<sup>517</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 14.

<sup>518</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 5.

<sup>519</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 5.

It may be considered that, although European Union carries on the analysis of how to better solve the circulation of documents by solving the format issues and this may, incidentally, facilitate enforcement of legal motherhood across European Union states' borders, they are still not proposals for rules that regard enforcement of contracts for services of international commercial gestational carriage by providing for cross borders enforceable intention to be a mother. Changes are not, however, ruled out in the future because '[r]esearch papers have suggested that the work should extend to [gestational carriage] arrangements' and it may follow that abolished formalities for documents assist in creating 'a mechanism for the effective recognition of the rights of parents involved in [gestational carriage] arrangements'.<sup>520</sup> This may be stated because, for instance, recognition of document format as a part of bureaucracy, whether it takes place on the basis of some main requirements' compliance or it is even ensured that specific information is processed throughout European Union in documents of unified form, may, of course, on various levels facilitate recognition and enforcement of their content. This regards facilitation specifically instead of an independent meaning because formalities in general as well as in the context of this thesis are not equally essential with the recognition of contents because, as already mentioned, there is no point in accepting a document if no further action is possible regarding its contents. This may be substantiated by, for example, European Court of Justice preliminary ruling which has 'admitted the obligation to accept documents'<sup>521</sup> (such as 'certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States')<sup>522</sup> for 'administrative and judicial authorities'.<sup>523</sup> They 'on basis of the fundamental freedoms, civil status records from other [m]ember [s]tates must, in principle, be accepted'<sup>524</sup> and member states should not seek problems in others' design 'unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question'.<sup>525</sup> It may be concluded that this mainly regards not facilitation of

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<sup>520</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 14.

<sup>521</sup> Academic Advisory Committee of the Federal Association of German Registrars, 'Free Movement of Public Documents and Mutual Recognition of the Effects of Civil Status Records in the European Union, Observations on the European Commission Green Paper "Less bureaucracy for citizens"' <[http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de\\_bds\\_bundesverband\\_der\\_deutschen\\_standesbeamtinnen\\_und\\_standesbeamten\\_en.pdf](http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de_bds_bundesverband_der_deutschen_standesbeamtinnen_und_standesbeamten_en.pdf)> accessed 5 April 2013, 5.

<sup>522</sup> Case C-336/94 *Eftalia Dafeki v Landesversicherungsanstalt Württemberg* [1997] ECR I-06761, para 19.

<sup>523</sup> Case C-336/94 *Eftalia Dafeki v Landesversicherungsanstalt Württemberg* [1997] ECR I-06761, 18.

<sup>524</sup> Academic Advisory Committee of the Federal Association of German Registrars, 'Free Movement of Public Documents and Mutual Recognition of the Effects of Civil Status Records in the European Union, Observations on the European Commission Green Paper "Less bureaucracy for citizens"' <[http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de\\_bds\\_bundesverband\\_der\\_deutschen\\_standesbeamtinnen\\_und\\_standesbeamten\\_en.pdf](http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de_bds_bundesverband_der_deutschen_standesbeamtinnen_und_standesbeamten_en.pdf)> accessed 5 April 2013, 5.

<sup>525</sup> Case C-336/94 *Eftalia Dafeki v Landesversicherungsanstalt Württemberg* [1997] ECR I-06761, para 19.



recognition of contents of documents and their effects in preventing enforcement that arise due to divergences among states but on preventing dishonest human behaviour because 'This judgment clearly shows the contradiction between the affirmed desire of the [European] Union to eliminate all obstacles to the free movement of citizens, where these are linked to civil status, and the desire to combat fraud.'<sup>526</sup> It is, of course, very important not to allow that something is enforced which should not be enforced because something like fraud mentioned in the ruling has taken place, but in the context of this thesis it is only topical if enforcement of contracts for services of international commercial gestational carriage in the European Union is enabled by ensuring sound coordination of private international law, which it is not at the moment. The fact that European Union citizens employ gestational carriage services internationally in the European Union territory cannot be considered a malevolent evading of laws in order to take advantage of specific states' beneficial attitude towards enforcement of the relevant contracts; on the contrary, it is European Union citizens' right as discussed in chapters 11 -11.1 of this thesis.

Although the recognition of documents themselves is obviously of secondary importance in this thesis, an overview of international legal instruments facilitating it may serve as a useful illustration of the fact that even in this aspect, enforcement of contracts for services of international gestational carriage in the European Union has not been of any major concern even before putting forward the policy goals topical at the moment, which is evidenced by the fact that even such attempts have not resulted in adjusting European Union extent. For instance, there was an attempt to regulate the formal 'legalization' aspects by the Hague Convention Abolishing the Requirements of Legalisation for foreign Documents<sup>527</sup> but it is not a proper source for European Union extent solution because only a part of European Union member states have implemented the convention<sup>528</sup> and also it does not

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<sup>526</sup> European Parliament, 'Recognition and Registration of Civil Status Documents in Cross-border Cases,' (Directorate – General for International Policies of the Union, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde) <[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 16.

<sup>527</sup> The Hague Conference on Private International Law, *The Hague Convention Abolishing the Requirements of Legalization for foreign Documents* (1961) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41](http://www.hcch.net/index_en.php?act=conventions.text&cid=41)> accessed 5 April 2013; Academic Advisory Committee of the Federal Association of German Registrars, 'Free Movement of Public Documents and Mutual Recognition of the Effects of Civil Status Records in the European Union, Observations on the European Commission Green Paper "Less bureaucracy for citizens"' <[http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de\\_bds\\_bundesverband\\_der\\_deutschen\\_standesbeamtinnen\\_und\\_standesbeamten\\_en.pdf](http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de_bds_bundesverband_der_deutschen_standesbeamtinnen_und_standesbeamten_en.pdf)> accessed 5 April 2013, 4 – 5.

<sup>528</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 6.

cover all kinds of documents.<sup>529</sup> (Those which are excluded covers European Convention on the Abolition of Legislation of Documents executed by Diplomatic Agents or Consular Officers which in return deals with documents of diplomatic or consular action origin<sup>530</sup> striving to achieve ‘that the abolition of legalisation is likely to strengthen the ties between the member [s]tates by making it possible to use foreign documents in the same manner as documents emanating from national authorities’.)<sup>531</sup> Afterwards European Union has attempted to establish its own convention to perform ‘abolishing the legislation of documents’<sup>532</sup> but only several states implemented this law.<sup>533</sup>

There also exist other international tools ‘that enable civil status questions to be solved in crossborder situations’ and may thus facilitate recognition of civil statuses. The most prominent action in this regard is performed by International Commission on Civil Status.<sup>534</sup> Several European Union member states have joined this European intergovernmental organization<sup>535</sup> which has provided several international instruments in relation to civil statuses ‘the aim of which is to introduce uniform rules on conflicts of laws connected with people’s rights’<sup>536</sup>. There are ‘solutions envisaged by International Commission on Civil Status (...), in which the European Union could participate under terms to be defined’.<sup>537</sup> However, the possibility that International Commission on Civil Status could considerably

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<sup>529</sup> The Hague Conference on Private International Law, *The Hague Convention Abolishing the Requirements of Legalization for foreign Documents* (1961) <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41](http://www.hcch.net/index_en.php?act=conventions.text&cid=41)> accessed 5 April 2013, art 1.

<sup>530</sup> The Hague Conference on Private International Law, *The Hague Convention on the Abolition of Legislation of Documents executed by Diplomatic Agents or Consular* (1968) <<http://www.jus.uio.no/english/services/library/treaties/01/1-04/abolition-legislation-documents.xml>> accessed 5 April 2013, art 2.

<sup>531</sup> The Hague Conference on Private International Law, *The Hague Convention on the Abolition of Legislation of Documents executed by Diplomatic Agents or Consular* (1968) <<http://www.jus.uio.no/english/services/library/treaties/01/1-04/abolition-legislation-documents.xml>> accessed 5 April 2013, preamble.

<sup>532</sup> European Communities Convention, *Convention abolishing the legislation of documents in the Member States of the European Communities* (1987) <<http://www.likumi.lv/doc.php?id=67172>> accessed 5 April 2013.

<sup>533</sup> European Commission, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 6.

<sup>534</sup> European Commission, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12.

<sup>535</sup> European Commission, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 6; ‘The International Commission on Civil Status’ <<http://www.ciec1.org/SommaireAnglais.htm>> accessed 5 April 2013.

<sup>536</sup> European Commission, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12.

<sup>537</sup> European Parliament, ‘Recognition and Registration of Civil Status Documents in Cross-border Cases,’ (Directorate – General for International Policies of the Union, Policy Department C: Citizens’ Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde) <[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 4.

facilitate civil status recognition on a European Union scale is only hypothetical, because, for the time being, 'these [c]onventions are generally ratified by only a small number of countries, usually not more than ten'. It may be concluded that such a regulation that functions between a part of European Union states 'contributes to the fragmentation in legal terms of the rules applicable in cross-border situations'. This condition is incited by the fact that European Union states joining their own International Commission on Civil Status does not mean acceptance of all rules made by it. 'Not a single [International Commission on Civil Status] convention has been ratified by all [E]uropean [Union] member [s]tates which are also members of the [International Commission on Civil Status]'.<sup>538</sup> Of course, in case of an express desire, there are several ways to overcome this, namely, the same as performing other organizations' rules incorporating in European Union states. The first way is that the most relevant International Commission on Civil Status instruments may be turned into European Union instruments. This may fall under the critique that in this case European Union should continually follow changes in the original instruments and update its own in order not to fall behind, and development would proceed with less speed and quality than outside European Union states with which cooperation would take place. The second option is that European Union may suggest that its member states join International Commission on Civil Status instruments. The implementation of this possibility may be questioned because, if these instruments were so attractive to the member states, they would have already joined because the instruments are not especially recent. The third option suggests that European Union may itself join International Commission on Civil Status in case of changing the organization's rules regarding who can join.<sup>539</sup> Documents for the implementation of which in European Union these options may be considered in the context of this thesis are, of course, related to legal motherhood status for children born as a result of arrangements for gestational carriage.

There are few aspects touched upon in International Commission on Civil Status instruments to be viewed in the context of this thesis because, although the organization has extended effort towards addressing exclusively sharing of information and formalities regarding formatting of documents for its cross-border sharing, 'the work of this organization in relation to private international law issues

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<sup>538</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12.

<sup>539</sup> European Parliament, 'Recognition and Registration of Civil Status Documents in Cross-border Cases,' (Directorate – General for International Policies of the Union, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde) <[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 18.

regarding the legal status of children is limited'.<sup>540</sup> It has created instruments developing connections between bodies responsible for civil statuses in various states so they can share information regarding births and for that it has cared of formatting aspects while not that much of contents of them.<sup>541</sup> It has already half a century ago dealt with national laws regarding 'record of birth of natural child' which does not extend to motherhood deriving from not that recent assisted procreation methods as used for making real arrangements of international commercial gestational carriage.<sup>542</sup> It has dealt with nontraditional family extensions as far as only parentage in cases where children are born to unmarried parents.<sup>543</sup> These are the closest matters to the subject matter of this thesis as they relate to civil statuses arising from parent children relationship<sup>544</sup> and as they do not apply, it can be concluded that International Commission on Civil Status does not have an instrument for enforcement of intention to be a mother in relation to contracts for services of international commercial gestational carriage which may be used on a European Union scale.

Previous chapters 6 - 8.2 of this thesis describe rules already existing but not appropriate for reconciliation of involved interests related to contracts for services of international commercial gestational carriage. Although '[t]here are a number of international and regional efforts which have been, or are being undertaken which touch upon issues related to the legal status of children in cross-border cases' and they have affected European Union as well, they do not

comprehensively establish the international law rules, or indeed rules relating to cross-border co-operation either generally in relation

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<sup>540</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 22.

<sup>541</sup> International Commission on Civil Status, *The convention introducing an international family record book*, (Paris, No 15, 1974) <<http://www.ciec1.org/Conventions/Conv15Anql.pdf>> accessed 5 April 2013, art 2; International Commission on Civil Status, *The convention on the exemption from legislation of certain records and documents*, (Athens, No 17, 1977) <<http://www.ciec1.org/Conventions/Conv17Anql.pdf>> accessed 5 April 2013, art 1; International Commission on Civil Status, *The convention on the recognition and updating of civil status booklet* (Madrid, No 24, 1990) <<http://www.ciec1.org/Conventions/Conv24Anql.pdf>> accessed 5 April 2013, arts 1 – 2; International Commission on Civil Status, *The convention on the international exchange of information relating to civil status* (Neuchatel, No 3, 1997) <<http://www.ciec1.org/ListeConventions.htm>> accessed 5 April 2013, art 3.

<sup>542</sup> International Commission on Civil Status, *The convention on the establishment of maternal descent of natural children* (Brussels, No 6, 1962) <<http://www.ciec1.org/Conventions/Conv06Anql.pdf>> accessed 5 April 2013, art 1 – 2.

<sup>543</sup> International Commission on Civil Status, *The convention on the voluntary acknowledgement of children born out of wedlock* (Munich, No 18, 1980) <<http://www.ciec1.org/Conventions/Conv18Anql.pdf>> accessed 5 April 2013, preamble.

<sup>544</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 22.

to the legal status of children, or in relation to the legal status of children, or in relation to international [gestational carriage]<sup>545</sup>

and from this, it follows that they do not, either directly or indirectly, realize the European Union's policy in this context. This chapter of the thesis has extended the discussion of possible facilitation of policy realization by abolishing the existing procedure legalization for documents themselves, which may be dependent on complying with various formalities in order to ascertain that documents are accepted as real and cross-borders bureaucracy is viewed just as the local one because their providence is reliable. This chapter has demonstrated that, although various bureaucratic and formal aspects may generally facilitate enforcement of contracts for services of international commercial gestational carriage in the European Union, they are not fulfilling such a function at the moment, and the promotion of their effectiveness is not a primary concern in the context of this thesis. This leads to a further discussion on what and how in European Union extent may realize facilitation of enforcing an intention to be a mother by employing private international law measures for recognition of arrangements' content instead of the form of documents.

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<sup>545</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 22.

# 13. The most appropriate international lawmaker

Concerning coordination of private international law in European Union member states, the Hague Conference on Private International Law has similar goals to the European Union, namely, they are both against uncertainty and inconsistency and strive to fight it by employing such methods that harmonize the specific laws.<sup>546</sup> The recommended path to finding a solution to the problem may be a new international law, the implementation of which would prevent the situation where states have various international law solutions regarding the determination of competent forums as well as applicable law. When planning such a law, it is particularly necessary to optimize recognition which is essential for international enforcement of various arrangements. Measures for improvements in this direction may be incorporated in a multilateral convention.<sup>547</sup> Conventions are employed with the aim of coordination private international law by the Hague Conference on Private International Law. Such usual international legal instruments as conventions demand ratification process in the states who wish to join.<sup>548</sup> As a result, they may ensure that the conceived achievements are in force in many states, but their implementation can be very time-consuming and changes, for instance, improvements, are not easy to achieve because each state must take special steps in order for the measures to become their law.<sup>549</sup> Coordination of measures for improved enforcement of contracts for services of international commercial gestational carriage may proceed much more successfully as a result of European Union legislating for several reasons.

Unlike the Hague Conference on Private International Law, European Union hitherto has based its law development and coordination between and across member states upon the economical free movement needs<sup>550</sup> and it is mostly

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<sup>546</sup> Theodorus M de Boer, 'The Purpose of Uniform Choice of law rules: the Rome II Regulation' (2009) 56 *Netherlands International Law Review* 295, 297; Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 3; Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 278, 299, 300.

<sup>547</sup> Katarina Trimmings, Beaumont Paul, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 635 – 636.

<sup>548</sup> Susan M Nott 'For Better or Worse? The Europeanisation of the Conflict of Laws' (2002) 24 *Liverpool Law Review* 3, 11; Johan Meeusen, 'What Has It Got to do Necessarily With the European Union?: International Family Law and European (Economic) Integration (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 329, 224.

<sup>549</sup> Adrian Briggs, *The Conflict of Laws* (Oxford University Press 2002), 53; Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information* 419, 435.

<sup>550</sup> Maarit Jantera-Jareborg, 'Unification of International Family Law in Europe – a Critical Perspective' in Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 198; Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 277.

striving to achieve this goal by the approach that there is a need for nondiscriminatory attitude towards anything coming from other European Union states, even if the specific concept, as status in the context of this thesis, does not exist in the state itself.<sup>551</sup> Basically European Union is concentrating on its freedoms in common market facilitation, focusing respectively on the related inner issues, and those which may be tackled more properly with its own measures instead of those used by other organizations.<sup>552</sup>

European Union measures may be extra effective because their law is special in the meaning that its law 'enforceability is greatly advanced by the doctrines of direct effect and primacy: European [Union] law is directly enforceable in the courts of the [m]ember [s]tates and prevails over national law.'<sup>553</sup> If European Union introduces private international law in a form of regulation, member states which have not opted out, are bound by it. Furthermore, European Union can exercise 'judicial control'. Other organizations who deal with international law, including the Hague Conference on Private International Law, lack a similarly effective mechanism for conflicts of laws rules.<sup>554</sup>

European Union law is a more valuable solution than the one created by Hague Conference because even in the case of harmonized or identical European Union private international law regarding particular subject matter as, in the case of this thesis, enforcement of contracts for services of international gestational carriage, it is possible that separate bodies in separate member states may apply this law according to their own understanding which may not comply with the result in another jurisdiction. European Court of Justice has the means to facilitate the application of uniform private international law, thus if not eliminating then at least reducing different understandings of European Union law by its rulings<sup>555</sup> Namely, European Court of Justice may contribute not only to lessening legal uncertainty but also, at the same time, to determining a unified interpretation, thus promoting the possibility that an organization is truly addressing problem issues as a union instead of unrelated states whose solutions are very likely not to be mutually

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<sup>551</sup> Maria R Marella, 'The Non-Subversive Function of European Private Law: The Case of Harmonization of Family Law' (2006) 12 *European Law Journal* 78, 105.

<sup>552</sup> Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information* 419, 433.

<sup>553</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 277.

<sup>554</sup> Johan Meeusen, 'What Has It Got to do Necessarily With the European Union?: International Family Law and European (Economic) Integration (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 329, 224.

<sup>555</sup> Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information* 419, 435; Aude Fiorini 'The Codification of Private International Law in Europe – Could the Community Learn from the Experience of Mixed Jurisdictions?' (2008) 23 *Tulane European and Civil Law Forum* 89, 92.

recognized.<sup>556</sup> States, on the other hand, may integrate in the union system because courts of every instance may use preliminary reference to receive preliminary ruling<sup>557</sup> regarding European Union private international law interpretation issues.<sup>558</sup>

However, if law of European Union origin is chosen for enforcement of contracts for services of international commercial gestational carriage, it must be taken into account that not only European Union member states have joined the Hague Conference on Private International Law<sup>559</sup> but the European Union has also acceded to it.<sup>560</sup> It means that European Union should not make or specifically harmonize law in an opposite direction from the Hague Conference on Private International Law.<sup>561</sup> It is not so much a prohibition than gain because, since there is no instrument concerning something that in case of this thesis is enforcement of contracts for services of international gestational carriage, European Union can take its own action as in any field which is not governed by the Hague Conference on Private International Law and do it first.<sup>562</sup>

European Union has the option to deal with enforcement of contract for services of international gestational carriage throughout its scope and in accordance with its essence. At the same time, it has the option of not going against the potential future actions of the Hague Conference because prospective action objectives have already been argued and priorities have been determined. Since 2010 it has 'acknowledged the complex issues of [p]rivate [i]nternational [l]aw and child protection arising from the growth in cross-border surrogacy arrangements'.<sup>563</sup> By following the focusing on (particularly significant in the context of this thesis) 'status of such arrangements under [p]rivate [i]nternational [l]aw and the status of children'<sup>564</sup> it has been doing research 'on the practical legal needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach to addressing international

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<sup>556</sup> Richard Fentiman, 'Methods and approaches: Choice of law in Europe: Uniformity and Integration' (2008) 82 *Tulane Law Review* 2021, 2021.

<sup>557</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 267.

<sup>558</sup> Gerhard-Rene de Groot, Jan-Jaap Kuipers 'The New Provisions on Private International Law in the Treaty of Lisbon' (2008) 15 *Maastricht Journal of European and Comparative Law* 109, 114, 110; Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 5.

<sup>559</sup> Maarit Jantera-Jareborg, 'Unification of International Family Law in Europe – a Critical Perspective' in Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 199.

<sup>560</sup> Council Decision 2006/719/EC on the accession of the Community to the Hague Conference on Private International Law [2006] OJ L 297/1, sole article.

<sup>561</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 300.

<sup>562</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 300.

<sup>563</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 12.

<sup>564</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 12.



[gestational carriage] issues.<sup>565</sup> The Hague conference on Private International Law sees that there is a lack of international law in this area and, when developing such, focus should be on firstly determination of competent authorities, secondly choice of law, thirdly 'corresponding rules providing for the recognition and enforcement of parental decisions relating to the legal parentage'. Fourthly, the aforementioned choice of law is viewed by Hague Conference on Private International Law as determinable in such a way that legal motherhood may be assigned 'by way of operation of law or by agreement', and fifthly, that recognition of legally assigned statuses should be based on common principles.<sup>566</sup> If European Union's goals are not cardinaly against these, then they, by first arranging the situation in their own territory, may create an example, and then consequently their law and even the already gained experience in applying it may serve as contribution to rules of larger scope, more specifically, that created by Hague Conference on International Law.<sup>567</sup> European Union action in coordinating enforcement of contracts for services of international gestational carriage might be critically analysed 'to determine how best to utilise the research and information, to consider possible collaboration and to avoid any duplication of work' between Hague Conference on Private international Law as the expanding party of concept extent and the European Union as an actual pioneer of measures.<sup>568</sup> In other words, measures of the European Union as the better equipped lawmaker may serve as leading guides to further development at not only regional but also global level. A mechanism for enforcement of contracts for services of international gestational carriage potentially created by the European Union would be less efficient for external matters, but it would be a contribution for bigger organizations such as Hague Conference on Private International Law to take an example and skip the implementation of less successful measures by responding to problems on a broader scale.

Still, the first provision that should be taken into account is that it is important that European Union member states have given the European Union institutions the power to legislate since they can only work with what they are allowed to do.<sup>569</sup>

<sup>565</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 2.

<sup>566</sup> Anne-Marie Hutchinson, 'The Hague Convention on Surrogacy: Should We Agree to Disagree?' <[http://www.dawsoncornwell.com/en/documents/ABA\\_AMH.pdf](http://www.dawsoncornwell.com/en/documents/ABA_AMH.pdf)> accessed 5 April 2013, 13.

<sup>567</sup> European Parliament 'Recognition of Parental Responsibility: Biological Parenthood v Legal Parenthood. i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (Directorate - General for Internal Policies Policy Department Citizens' Rights and Constitutional Affairs, Note by Velina Tedorova) <<http://claradoc.gpa.free.fr/doc/394.pdf>> accessed 5 April 2013, 30.

<sup>568</sup> Hague Conference on Private International Law Permanent Bureau 'Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements' (Prel. Doc. No 11, March 2011) <<http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>> accessed 5 April 2013, 24.

<sup>569</sup> Treaty on European Union [2010] OJ C 83/13, arts 4 - 5.

## 13.1. European Union competence regarding conflict of laws rules

European Union is competent to perform all that is 'conferred upon' it by Treaty on European Union and Treaty on the Functioning of the European Union.<sup>570</sup> Competence regarding its 'area of freedom, security and justice' is shared by the European Union with its member states.<sup>571</sup> European Union actions must be in accordance with 'the principles of subsidiarity and proportionality'.<sup>572</sup> From this, it follows that it doesn't act if member states themselves are capable to sufficiently deal with particular problem and act accordingly only as far as necessary to reach the related aim.<sup>573</sup> As discussed in previous chapters (6 and 11) of this thesis, member states themselves cannot sufficiently deal with enforcement of contracts for services of international commercial gestational carriage in the European Union.

Applying the relevant concept to this thesis it is evident that European Union is competent to harmonize its member states' rules in 'area of freedom, security and justice', in order to ensure that decisions made in each member state can be mutually recognized in others.<sup>574</sup> It means that this competence may be accordingly realized in relation to international matters<sup>575</sup> that expressly include several different private international law concerns because private international law is law that addresses issues that are not limited to one state<sup>576</sup> what enforcement of contracts for services of international gestational carriage certainly is. Consequently it means that the respective member states' conflicts of law rules as such that fall in the scope of 'area of freedom, security and justice', may be harmonized, if, for some reason, they seem expedient.<sup>577</sup> (European Union law measures on justice in European Union territory prescribe for its ensuring with private international law, they do not include 'harmonization or unification of

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<sup>570</sup> Treaty on European Union [2010] OJ C 83/13, arts 4, 1, 5.2.

<sup>571</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 4.2.j.

<sup>572</sup> Treaty on European Union [2010] OJ C 83/13, art 5.1.

<sup>573</sup> Treaty on European Union [2010] OJ C 83/13, art 5.2.

<sup>574</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 81.1.

<sup>575</sup> Peter McEleavy (ed.), 'Current developments Private International Law' (2008) 57 *International and Comparative Law Quarterly* 969, 977.

Treaty on Functioning of the European Union [2010] OJ C 115/47, art 81.1.

<sup>576</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 272.

Treaty on Functioning of the European Union [2010] OJ C 115/47, art 81.2.

<sup>577</sup> Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 4.

Treaty on Functioning of the European Union [2010] OJ C 115/47, Title V.

substantive private law',<sup>578</sup> which also, of course, means everything regarding family issues).<sup>579</sup>

The fact that, because of non-enforcement of intended motherhood following contracts for services of international gestational carriage, an obstacle to freedom to move and receive services in the European Union is made, can certainly be a reason for such harmonization of private international law, because it is planned that European Union institutions 'shall adopt measures, particularly when necessary for the proper functioning of the internal market'<sup>580</sup> (in the context of this thesis it is essential to underline that '[t]he concept of 'internal market' is not limited to the free movement of goods, but comprises the four freedoms, i.e. the free movement of goods, persons, services and capital',<sup>581</sup> which consequently includes services of gestational carriage). Such a formulation provides European Union institutions with greater discretion than the historical condition that measures for freedom security and justice may only be adopted if necessary for European Union common market freedoms.<sup>582</sup> It may alleviate the harmonizing of law concerning family matters, for which it is not always easy to find a direct link with internal market.<sup>583</sup> But, at the same time, it underlines the possibility to deal with enforcement of contracts for services of international commercial gestational carriage, because, although not 'all measures in the field of judicial cooperation in family matters having crossborder implications could be considered necessary for the proper functioning of the internal market'<sup>584</sup> judicial cooperation regarding the subject matter of this thesis also fits into the desired sound provision of cross border services because non-enforcement of intended motherhood (as discussed in chapter 11 of this thesis) hinders freedom to move and receive services in the European Union.

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<sup>578</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, Title V; Jurgen Basedow, 'The Communitarisation of Private International Law' (2009) 73 *The Rabel Journal of Comparative and International Private Law* 455, 457.

<sup>579</sup> Mario Tenreiro, Monika Ekström, 'Unification of Private International Law in Family Law Matters within the European Union' in Boele-Woelki, K., *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 187.

<sup>580</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 81.2.

<sup>581</sup> Mario Tenreiro, Monika Ekström, 'Unification of Private International Law in Family Law Matters within the European Union' in Boele-Woelki, K., *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 187.

<sup>582</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 272; Gerhard-Rene de Groot, Jan-Jaap Kuipers 'The New Provisions on Private International Law in the Treaty of Lisbon' (2008) 15 *Maastricht Journal of European and Comparative Law* 109, 114, 111.

<sup>583</sup> Peter McElevy (ed.), 'Current developments Private International Law' (2008) 57 *International and Comparative Law Quarterly* 969, 977.

<sup>584</sup> Mario Tenreiro, Monika Ekström, 'Unification of Private International Law in Family Law Matters within the European Union' in Boele-Woelki, K., *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 187.

## 13.1.2. The best instrument

While there are no other relevant, for instance, the Hague Conference on Private International Law rules that could be applied to European Union or whose ratification the European Union could recommend to its member states, it can only create its own law.<sup>585</sup> Just as when dealing with other issues, for enforcement of contracts for services of international commercial gestational carriage it is also necessary to choose the most appropriate legal instrument for the volume of integration that is planned to achieve.<sup>586</sup> In order for member states to be obliged to implement European Union law norms in their own law, they may be directives, which until now have been typical for reaching the goal that European Union member states have harmonized rules for private matters.<sup>587</sup> However, for the concerns of private international law like ensuring more effective 'uniformity' currently regulations are applied. They do not demand legislative action from member states and do not provide them with discretion,<sup>588</sup> because 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all [m]ember [s]tates'.<sup>589</sup> The direct applicability means that regulations 'by their entry into force render automatically inapplicable any conflicting provision of current national law' and 'also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with [European Union regulation]' because 'they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member states'.<sup>590</sup> Because of these characteristics, those were regulations into which conventions were transformed, and these conventions were originally employed to attempt to implement 'the principle of free movement of judgements' directly in the European Union, trying to 'provide for the mutual recognition of judgement'.<sup>591</sup>

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<sup>585</sup> Theodorus M de Boer, 'Prospects for European Conflicts Law in the Twenty-First Century' in Patrick J Borchers, Joachim Zekoll, *International Conflict of Laws for the Third Millennium: Essay in Honor of Friedrich K. Juenge* (Transnational Publ 2001), 190 – 191.

<sup>586</sup> Susan M Nott 'For Better or Worse? The Europeanisation of the Conflict of Laws' (2002) 24 *Liverpool Law Review* 3, 11; Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information* 419, 433-434; Johan Meeusen, 'What Has It Got to do Necessarily With the European Union?: International Family Law and European (Economic) Integration (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 329, 224.

<sup>587</sup> Ewoud Hondius, 'Towards a European "Ius Commune": The Current Situation in Other Fields of Private Law' in Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003), 119.

<sup>588</sup> Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information* 419, 436.

<sup>589</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, 288.

<sup>590</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 17.

<sup>591</sup> European Parliament, 'Recognition and Registration of Civil Status Documents in Cross-border Cases,' (Directorate – General for International Policies of the Union, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Note by Paul Lagarde)

These characteristics have facilitated the application of mutual recognition principle to specific family relationship forming models, restricting the possibility that their corresponding statuses may be limping in international situations in the European Union, therefore there is reason to believe it may be advantageous that 'more regulations could be created under which all family-law decisions, be they status decisions or other court decisions, are generally recognized'. While striving for this mutual recognition aim, it is still important for such conflict of laws rules that relate to which state's law to apply are organized on a European Union level, thus reducing the search for more favorable jurisdiction through its states.<sup>592</sup> As a way of achieving this, 'harmonisation of the conflict-of-law rules [it] is therefore essential if consistency of decision-making in civil status matters is to be achieved in the E[uropean] U[nion]',<sup>593</sup>

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<[http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI\\_NT\(2010\)425653\(PAR00\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2010/425653/IPOL-JURI_NT(2010)425653(PAR00)_EN.pdf)> accessed 5 April 2013, 17.

<sup>592</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 51.

<sup>593</sup> Academic Advisory Committee of the Federal Association of German Registrars, 'Free Movement of Public Documents and Mutual Recognition of the Effects of Civil Status Records in the European Union, Observations on the European Commission Green Paper "Less bureaucracy for citizens"' <[http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de\\_bds\\_bundesverband\\_der\\_deutschen\\_standesbeamtinnen\\_und\\_standesbeamten\\_en.pdf](http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/de_bds_bundesverband_der_deutschen_standesbeamtinnen_und_standesbeamten_en.pdf)> accessed 5 April 2013, 19.

### 13.1.1.1. Mutual recognition

For enforcement of contracts of international commercial gestational carriage in the European Union it is necessary for the resulting relationships to be legal and recognized across European Union member states' borders. If rules on recognition and enforcement of arrangements in any area are not harmonized by incorporating the mutual trust concept, they may vary according to the law of each state where the enforcement is sought. From this, it follows that, if the place is not selected in the course of a very careful evaluation, the result is likely to be unfavorable to the party who initially desires enforcement.<sup>594</sup>

Private international law that European Union is competent to create may assist in establishing clarity within international cases regarding 'which foreign judgements are capable of recognition and enforcement within [other] national system'.<sup>595</sup> In the context of this thesis it may be mother and child family's legal relationship status that is necessary to be established in accordance with contracts for services of international commercial gestational carriage. European Union competence relating to private international law may serve to deal with situations when some state's law refuses to recognize a status following from atypical family creation efforts which without a doubt includes receiving services of gestational carriage. This ability may be valuable in reducing the closely related stalling of free movement in European Union territory that fails to avert free common market non-supportive European Union member states' national laws.<sup>596</sup> In other words, freedoms in European Union are guaranteed by the fact that European Union states may trust in each other's decisions.<sup>597</sup> If this does not take place, then those who have received their status in an unusual way and are not universally recognized, may in fact only move in a limited number of states,<sup>598</sup> unlike the desired scenario where legal status may travel along with, in the context of this thesis, intended mothers and their children.<sup>599</sup> Sound movement of them can still be dependent on status origin jurisdiction and the applied law, namely, the law that determines their choice.

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<sup>594</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 46.

<sup>595</sup> Susan M Nott 'For Better or Worse? The Europeanisation of the Conflict of Laws' (2002) 24 *Liverpool Law Review* 3, 3.

<sup>596</sup> Maria R Marella, 'The Non-Subversive Function of European Private Law: The Case of Harmonization of Family Law' (2006) 12 *European Law Journal* 78, 102, 104.

<sup>597</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 300.

<sup>598</sup> Maria R Marella, 'The Non-Subversive Function of European Private Law: The Case of Harmonization of Family Law' (2006) 12 *European Law Journal* 78, 101.

<sup>599</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 52.

## 13.1.1.2.Applicable law

'Rules of applicable law (...) are not rules on procedure. Instead they define (positively or negatively) the content of national rules that regulate the status of and relationships between natural (...) persons in a cross-border context'. They can thus 'play a central role in identifying the substantive rules regulating civil aspects of crossborder activity' such as service of international commercial gestational carriage in the European Union.<sup>600</sup> Rules on applicable law list factors that have to be taken into account determining which national substantive legal measures must be used for international subject matter in question.<sup>601</sup> Although harmonization is recommended, harmonized rules on applicable law will not always lead to cross borders recognition and enforcement, moreover, 'the view that recognition of foreign judgements does not have to depend on choice-of-law consideration is now widely accepted'. A practical illustration may be found in the fact that there have been successful instruments regarding not only the forum but also recognition while there has been no related instrument on applicable law. However, applicable law may serve as reason for the transpiring of simpler recognition<sup>602</sup> and, consequently, applicable law determination is something that could be useful to achieve before hoping for freedom of judgements,<sup>603</sup> it may even be stated that '[i]t is now taken for granted, apparently, that uniform conflicts rules will help to implement principle of mutual recognition'<sup>604</sup> of 'a status existing in one state, whether created by operation of law or based on a court decision, remains in effect in another',<sup>605</sup> because it provides credibility.<sup>606</sup> Such a view is obviously in effect among European Union lawmakers because the already existing European Union private international law regulations on choice of law, by the way, are based on 'the harmonization of conflict-of-law rules as those facilitating the mutual recognition of judgements'.<sup>607</sup>

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<sup>600</sup> Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008), 75.

<sup>601</sup> Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information* 419, 419; Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 3.

<sup>602</sup> Theodorus M de Boer, 'The Purpose of Uniform Choice of law rules: the Rome II Regulation' (2009) 56 *Netherlands International Law Review* 295, 306 – 308.

<sup>603</sup> Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287, 303.

<sup>604</sup> Theodorus M de Boer, 'The Purpose of Uniform Choice of law rules: the Rome II Regulation' (2009) 56 *Netherlands International Law Review* 295, 306.

<sup>605</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 52.

<sup>606</sup> Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going Too Far?' (2008) 22 *International Journal of Law, Policy and the Family* 178, 190.

<sup>607</sup> European Parliament and Council Regulation 2008/593/EC on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, recital 4; European Parliament and the Council Regulation 2007/864/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, recital 4.

Specifically in the context of this thesis, harmonized conflict rules on applicable law may reduce problems with ‘limping’ legal statuses that in the context of international gestational carriage is legal motherhood and whose differences may become obstacles for free movement.<sup>608</sup> Any harmonized private international law regarding applicable law may provide more foreseeability and ensure that parties may perform cross borders movement and arrangements more safely than none at all. However, it is not the best scenario; it would be better to employ such a ‘connecting factor’ that would be better specifically for gestational carriage cases<sup>609</sup> (they may also be several ‘connecting factors’ due to the comprehensive movement options<sup>610</sup> in the context of realizing arrangements of gestational carriage). Accordingly, applicable law should not only appoint any law for a sake of just having one but make it such as to ‘strike a reasonable balance between the interests of the parties’<sup>611</sup> taking into account that enforcement of contracts for services of international commercial gestational carriage must also be in the best interests of children (as discussed in chapter 9). It is not about which law substance is in the best interests of child. Rules on applicable law do not deal with expectations of parties regarding substance of national law, they only care about determination of rules applicable. It may be specified that ‘they do not refer to the law the parties actually expect to apply, but the law they should expect to apply’<sup>612</sup> (this means that it is simply ‘foreseeable and known in advance’).<sup>613</sup> And this is important because, if European Union does not regulate substantive laws of member states, in case of this thesis regarding gestational carriage, it allows preserving the countries’ differences. The fact that conflicts of law rules are harmonized, however, only determined which of them are applicable, thus making the options easier to oversee and making the process simpler. Even more, they protect differences of states if European Union private international law concerning the issue ‘do[es] not exclude the application of foreign law’.<sup>614</sup> Although the number of pros for mutual recognition and enforcement is not exceeded, such harmonized applicable law, of course, also features cons, namely, there is a stronger chance

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<sup>608</sup> Aude Fiorini, ‘Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going Too Far?’ (2008) 22 *International Journal of Law, Policy and the Family* 178, 188.

<sup>609</sup> Theodorus M de Boer, ‘The Purpose of Uniform Choice of law rules: the Rome II Regulation’ (2009) 56 *Netherlands International Law Review* 295, 305.

<sup>610</sup> European Commission, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 14.

<sup>611</sup> Theodorus M de Boer, ‘The Purpose of Uniform Choice of law rules: the Rome II Regulation’ (2009) 56 *Netherlands International Law Review* 295, 328.

<sup>612</sup> Theodorus M de Boer, ‘The Purpose of Uniform Choice of law rules: the Rome II Regulation’ (2009) 56 *Netherlands International Law Review* 295, 315.

<sup>613</sup> European Commission, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 14.

<sup>614</sup> Nynke A Baarsma, *The Europeanisation of International Family Law* (Asser Press 2011), 283.



that applicable law will be more foreign, and it may result not only in inaccurate interpretation of said law but also in more expensive litigation,<sup>615</sup> because

the problems associated with the variety of substantive laws (how, for example, to characterise legal terms) remain as does the uncertainty in determining the content of the foreign law and its application along with the effort required to do so.<sup>616</sup>

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<sup>615</sup> Vesna Lazic, 'Recent Developments in Harmonizing Private International Law in Family Matters' (2008) 10 *European Journal of Law Reform* 75, 90.

<sup>616</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 52.

### 13.1.1.3.Jurisdiction

Even before addressing consequences of contracts for services of international commercial gestational carriage application of relevant law and recognition and enforcement can take place, it is necessary to know who may perform it or, in other words, who has the jurisdiction.<sup>617</sup> Practically, for instance, '[i]f, in a question of family law, the courts or administrative bodies of several states have international jurisdiction, the applicable law is decided by the conflict-of-law rules of the relevant forum'<sup>618</sup> which 'focus on determining which country's legal system should determine the substantive issues.'<sup>619</sup>

Generally the rules on jurisdiction assist by providing a list according to what criteria should be determined where the matters regarding enforcement will be settled, for instance, which court will resolve the related disputes. Lack of common rules on criteria for selecting the forum, especially in cross borders cases, may provide motivation for 'forum shopping' in European Union, striving to find a forum where law is more beneficial for its seeker.<sup>620</sup> Since because of enforcement of contracts for services of international commercial gestational carriage, when striving to employ free movement, the search for laws more favourable for these arrangements is taking place, jurisdiction may also be important for these matters and it may be sought, because applicable law and law application could both be dependent on it. Specifically in the context of this thesis it is clear that, if private international law regarding applicable law are not harmonized, then, since competent jurisdiction may also impact the selection of law itself, which takes place based on national conflict rules<sup>621</sup> then as a result, even when finding an initially favourable place, its law solutions may not be recognized and enforced elsewhere. However, if, when harmonizing, applicable law determination in European Union member states was coordinated, then parties do not have a pressing reason to search where a forum's national private international law may determine a more favourable (for them) substantive applicable law. Namely, all states are then

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<sup>617</sup> Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 International Journal of Legal Information 419, 420.

<sup>618</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 39.

<sup>619</sup> Rob George, *Ideas and Debates in Family Law* (2012 Hart), 41.

<sup>620</sup> Susan M Nott 'For Better or Worse? The Europeanisation of the Conflict of Laws' (2002) 24 Liverpool Law Review 3, 3; Eleanor C Ritaine, 'Harmonizing Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 International Journal of Legal Information 419, 419, 423; Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 3.

<sup>621</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 39.

following a unified pattern for selecting substantive law,<sup>622</sup> and it facilitates trust in result – that it will be recognized throughout European Union. Additionally, if rules determining competent forum have been harmonized, then the fact that decisions are made according to harmonized criteria in a determined and thus universally recognized, most proper jurisdiction is a reason for facilitation of mutual reliability and the possibility of international enforcement.

However, if there are no unified conditions for how to select one jurisdiction, it is more convenient for those who wish and can afford to not only go where law is more favourable to them but also to prematurely obtain legal information regarding private international law stipulations in other European Union member states as well as contents of substantive law that may settle the matter. If there is litigation for enforcement, then its costs in various states may, of course, differ considerably. If not mutual recognition and international enforcement facilitating, then at least some solutions may be found without European Union legislation. For instance, while there are no harmonized rules on determination of jurisdiction in European Union in a specific area, parties involved in cross borders problematic arrangements may take advantage of the fact that predictable may be, for example, those states who have declared that in all cases they will employ their own substantive law<sup>623</sup> but it does not mean that other European Union states will view the result the same as one they would have decided themselves.

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<sup>622</sup> Susan M Nott 'For Better or Worse? The Europeanisation of the Conflict of Laws' (2002) 24 Liverpool Law Review 3, 9.

<sup>623</sup> Nina Detlehof, 'Arguments for the Unification and Harmonization of Family law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003), 51.

## 13.1.1.4. Legislative procedure

Since European Union is competent to legislate in this area, in order to achieve certainty of contracts for services of international commercial gestational carriage enforcement across borders and that free movement is not hindered because of conflict of laws, it is possible to propose a regulation. The initiative can, of course, come from the Commission but there are several other options open. Initiative for legislating can originate from European Parliament, and it basically means that its majority may 'request the Commission to submit any appropriate proposal on matters on which it considers that a [European] Union act is required for purpose of implementing [t]reaties'. Commission may avoid further action but it has a duty to explain to the European Parliament, why.<sup>624</sup> Also, the Council 'acting by a simple majority may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals'. In this case Commission may also avoid further action, but it has a duty to explain the Council, why.<sup>625</sup> If European Union institutions themselves have not addressed private international law matters that concern such issues as, in case of this thesis, the enforcement of contracts for services of international gestational carriage coordinating, then European Union citizens also have the option of declaring their initiative. Namely, activists interested in a specific matter and residing in seven separate European Union member states may start the proceedings,<sup>626</sup> that, by using signatures, European Union Parliament elections' voting age<sup>627</sup> determined minimum number of its citizens (million) from minimum number (one fourth) of member states<sup>628</sup> may

take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act is required for the purposes of implementing the [t]reaties.<sup>629</sup>

While reacting to the initiative, European Commission may propose a 'legislative act'.<sup>630</sup> Private international law measures may consequently be taken by

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<sup>624</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art. 225.

<sup>625</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art. 241.

<sup>626</sup> European Parliament and Council Regulation 2011/211/EU on the citizens' initiative [2011] OJ L 65/1, art 3.2.

<sup>627</sup> European Parliament and Council Regulation 2011/211/EU on the citizens' initiative [2011] OJ L 65/1, arts 3.1, 3.4.

<sup>628</sup> European Parliament and Council Regulation 2011/211/EU on the citizens' initiative [2011] OJ L 65/1, recital 5, art 2.1, art 7.1, annex I.

<sup>629</sup> Treaty on European Union [2010] OJ C 83/13, art 11.4; European Parliament and Council Regulation 2011/211/EU on the citizens' initiative [2011] OJ L 65/1, art 2.1, recital 1.

<sup>630</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 289.

European Parliament and the Council following 'ordinary legislative procedure',<sup>631</sup> which includes 'codecision'<sup>632</sup> and 'qualified majority voting'<sup>633</sup> in most areas.<sup>634</sup> If private international law regarding enforcement of contracts for services of international commercial gestational carriage is advanced as family law, it may be adopted in a more complicated way – by employing 'special legislative procedure'.<sup>635</sup> Although there is a chance that European Union institutions may legislate on family law international matters with simplified procedure (the qualified majority voting), the legislators of member states may not allow it. Namely, it may be useful in case of this thesis' subject because it can be employed if the states believe that some specific aspects of family law that should not be infringed upon by out-of-state regulations are concerned.<sup>636</sup> (Here it should be noted that European Union cannot perform 'drafting of substantive European rules' in this area because it 'has no competence to intervene in the substantive family law of [m]ember [s]tates'<sup>637</sup> which, in the context of this thesis, may determine, for example, that they need to establish family ties between mother and child.)

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<sup>631</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art. 81.2, 289.1.

<sup>632</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, art 294.

<sup>633</sup> Treaty on European Union [2010] OJ C 83/13, art 16.4.

Treaty on Functioning of the European Union [2010] OJ C 115/47, art. 238.

<sup>634</sup> Peter McEleavy (ed.), 'Current developments Private International Law' (2008) 57 *International and Comparative Law Quarterly* 969, 976.

<sup>635</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, arts 81.3, 289.2.

<sup>636</sup> Treaty on Functioning of the European Union [2010] OJ C 115/47, arts 294, 238; Gerhard-Rene de Groot, Jan-Jaap Kuipers 'The New Provisions on Private International Law in the Treaty of Lisbon' (2008) 15 *Maastricht Journal of European and Comparative Law* 109, 112, 113, 114; Peter McEleavy (ed.), 'Current developments Private International Law' (2008) 57 *International and Comparative Law Quarterly* 969, 976; Peter Stone, *EU private international law: harmonization of laws* (2<sup>nd</sup> ed, Edward Elgar 2010), 5.

<sup>637</sup> European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF>> Accessed 5 April 2013, 12.

# Conclusion

While it is impossible to legally realize the aims of arrangements for services of international commercial gestational carriage in many states, there are safe harbours who allow the enforcement of respective agreements. Such exist in the European Union as well. Women without favourable conditions for realizing the right to procreate in a specific state may thus choose international arrangements. If children born as a result cannot obtain a legal mother who was intended, her right to procreate is violated. There is no real free movement in order to receive services of international commercial gestational carriage. European Union member states' law, even if it regards some aspects of contracts for services of international commercial gestational carriage, is most likely with an objective that can be characterized as restrictive. This also creates difficulties in how to recognize and enforce the consequences of international arrangements. It is a problem because it directly regards contracts' hard externalities, namely, the human right of children already born to receive care from the mother and state. They are due their respective legal statuses on the basis of which they can realize their various rights, including their freedoms as European Union citizens.

Council of Europe in accordance with European Court on Human Rights opinion has attempted to create measures that would allow children born in the European Union to procure a legal mother in correspondence with unified conditions. However, they are unfortunately not suitable for enforcement of contracts for services of international commercial gestational carriage. It is mainly because, although children created through this option gain a legal mother, it is usually not the intended mother. Even if, as an exception, the intended mother may succeed in obtaining the gestational carrier's assent for giving the child to her, the gestational carrier, in accordance with Council of Europe measures, has no option of receiving legal payment for her services. Although this organization has acknowledged the need for regulations related to the consequences of currently used non-traditional procreation, there is no evidence that it would seek to change its approach in the near future that would also be applicable to the European Union states.

One option how to deal with the fact that there is legal uncertainty due to state differences is private international law. Since forums tend to choose different connecting factors in order to determine proper law, international action would be of use. European Union current rules regarding conflicts of laws, although generally regarding commercial contracts, do not touch upon personal statuses in

the focus of this thesis. Regulations regarding recognition and enforcement of various documents of some kind of family relationships are furthermore not applicable for enforcement of contracts for services of international commercial gestational carriage due to the payment involved or the fact that they only concern the maternal responsibilities instead of establishment of legal motherhood.

In the European Union, rules created by Hague Conference on International Law may also be applicable, but, although it has started research on issues of enforcement of contracts for services of international commercial gestational carriage, none of its current instruments have been amended in order to be applicable to these matters. Its measures regarding adoption are interesting in this context, because they are about establishment of ties between parents and children from different states. Although these measures have been acknowledged as the optimal model for a possible future legal instrument on legal parentage, the existing substance is not applicable, mainly because before creating a child, it is not allowed to conclude an agreement that this child will later be given in adoption to a person chosen by the gestational mother on her own discretion and that this gestational carrier will profit from the realizing of service performed by her.

Other Hague Conference on Private International Law instruments close to the thesis subject matter have, unfortunately, included in their scope the solving of arguments between spouses regarding parental responsibilities, not legal parentage establishment.

Non-existing mechanism of mutually recognized and enforced contracts for services of international gestational carriage is an obstacle to the European Union citizens' freedom to move and exercise their right to procreate by employing gestational carriage arrangements. Furthermore, it is against the best interests, included in international rights instruments, of children born as a result of these arrangements not to be in a limping legal position.

The enforcement interests involved may be optimally reconciled by harmonizing private international law measures at European Union level. European Union should and could limit non-enforcement including enforcement of contracts for services of international commercial gestational carriage in its area of freedom security and justice. This would eliminate conflicts of laws obstacle of freedom to move as acknowledged by the European Court of Justice. It would facilitate mutual recognition of the effects of these arrangements and statuses respective to those in the European Union.

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