

# Belgian Journal of Private International Law: *Cautio judicatum solvi* and surrogacy (among other things)

Please see the the last issue of 2018 of the Belgian Journal of Private International Law here.

Besides the latest judgments by the Court of Justice of the European Union, it also contains case law of the Belgian Constitutional Court and courts of appeal. The cases are in Dutch or French.

The judgment of the Constitutional Court (of 11 October 2018) concerned the response to a question posed to this court by the Commercial Court of Liège (p. 14 pof the issue). It involved the so-called *cautio judicatum solvi*. The question was whether the fact that only foreign national plaintiffs can be requested to give a warranty for costs infringes the Belgian Constitution, particularly its Articles 10 and 11 guaranteeing equality and prohibiting discrimination. The Court referred to the limitations that the Court of Justice of the EU had already set to the application of the *cautio* (it cannot be used against EU citizens). Moreover, the provision only applies in the absence of international conventions eliminating the *cautio*. The issue in this case was that Belgian plaintiffs living abroad (in Ecuador in the current instance), even if they have no assets in Belgium cannot be subjected to such warranty. The court found that the *cautio juricatum solvi* (Art. 851 of the Code of Civil Procedure) infringes the Constitution. The differentiation in treatment is not justifiable as it is not the plaintiff's nationality but his or her residence outside Belgium and lack of property in Belgium that can cause the defendant to fear that he or she will not be able to recover costs. The Court left the provision intact and gave the legislator until 31 August 2019 to fix it.

\* In the meantime, on 24 Januari 2019, a legislative proposal was submitted to delete the *cautio judicatum solvi* from the Code of Civil Procedure.

Other judgments deal with the attribution of Belgian nationality, with parentage and with the recognition of marriages.

A judgment by the Court of Appeal of Brussels (judgment of 10 August 2018) addresses the recognition of the parentage of twins born out of a surrogate mother in California (p. 15 of the issue). The Californian judgment establishing the parentage of two men (one Belgian and one French) was at issue. The Court of appeal recognised the Californian judgment, thus recognising both fathers as parents. The Court considered two grounds for refusal (under Art. 25 of the Belgian Code of Private International Law). First it found that the recognition of the judgment would not amount to a result that was manifestly contrary to public policy. The Court on the other hand found that the intending fathers did attempt to evade the law that would have been applicable, i.e. Belgian law as the intended father whose parentage was at issue had Belgian nationality (and this law governs parentage according to Art. 62 of the Belgian Code of Private International Law).

However, the Court, after considering the particular situations of the children and the facts surrounding the case, found that the best interests of the children had the result that the parentage should be recognised in this case.

\* See also the case note (in French) by Patrick Wautelet entitled “De l’intérêt supérieur de l’enfant comme facteur de neutralisation de la fraude à la loi” (On the best interests of the child as a neutralising factor for evasion of the law) at p. 61 of the issue.