Seminar Report on Personal identity and status continuity – a focus on name and gender in the conflict of laws

Written by Thalia Kruger (University of Antwerp) and Laura Carpaneto (University of Genoa)

On 1 June 2023 the European Law Institute (ELI) and the Swiss Institute of Comparative Law (SICL) held the third session of a conference on personal identity and status continuity. The focus of this third session was on names and gender in the conflict of laws. The programme included recent amendments to Swiss legislation, the portability and recognition of names, and new gender statuses in private international law.

The conference, including a screening of the film 'The Danish Girl' (Tom Hooper, 2015), illustrated the importance of gender and names as part of people's identity, beyond the law. Names can be essential for people to identify with their religious group. In central and southern Africa, the use of names taken from people's own language instead of English names has been part of the black consciousness movement. The film showed the struggle of a person to change her sex despite the absence of any legal framework. And yet, Lukas Heckendorn Urscheler (director of the SICL) and Martin Föhse (University of St Gallen) showed that the societal issues turn into legal ones. Sharon Shakargy (University of Jerusalem) explained that the law is important when individuals have to use identity cards, credit cards, licences, certificates and the like. The law struggles to provide the most appropriate solutions, respecting the rights of all involved and ensuring portability of gender and names.

When talking about **rights**, there is a blurring, or at least a lack of terminological clarity, between human rights and fundamental rights. The free movement of persons in the EU is also classified as a fundamental right. Giulia Rossolillo (University of Pavia) compared the approaches of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) with respect to the

recognition and continuation of names. She showed that the solutions reached by the two courts can be quite different, as a result of their different approaches. The ECtHR uses the (human) right to the respect of private and family life protected by Article 8 of the European Convention of Human Rights (ECHR) while the CJEU uses the (fundamental) right to free movement of EU citizens. Moreover, the ECtHR is not so much concerned with the cross-border aspect, but focuses on the right to a person's identity. The CJEU emphasises continuity of name in cross-border contexts. For instance, the facts in the ECtHR case Künsberg Sarre v. Austria and the CJEU case Sayn-Wittgenstein were quite similar, dealing with the Austrian prohibition on the use of noble titles. The ECtHR found that Austria, but allowing for a long time the use of the noble 'von' and then disallowing it, violated the applicant's rights under Article 8 of the ECHR. The CJEU, on the other hand, found the obstacle to the right to free movement in the EU to be justified.

Different approaches to rights can also result in conflicting rights, i.e. the society's right to equality (no noble titles) versus the individuals' rights to continuity of name. Other rights that come into play, include the LGBTIQ+ rights and rights of women (a gender logic, Ilaria Pretelli SICL), and the rights linked to the free market (economic logic), societal rights, and the right to self-determination and autonomy, such as the right to freely choose and change a name.

Johan Meeusen (University of Antwerp) considered the **specific approach** of the European Commission to matters of gender, drawing lessons from the Commission's Parenthood Proposal, Com(2022) 695. The lessons are that the Commission uses PIL to pursue its political ambition to advance non discrimination and LGBTIQ rights in particular; is on a mission to achieve status continuity; invests in legal certainty and predictability; approaches status continuity first and foremost from a fundamental rights perspective; acts within the limits of the Union's competence but tries to maximize its powers; ambitious with an eye for innovation…but within limits.

Anatol Dutta (Ludwig Maximilians University of Munich) explained the different waves of changes in gender legislation nationally. He indicated that private international law influences people's status differently depending on whether it considers sex registration and sex change as substantive or procedural. This would determine whether the lex fori or lax causae is used. Even when agreeing

on a classification as substantive law, different legal systems use different connecting factors. Nationality is often used, but sometimes the individual is given a choice between the law of the habitual residence and nationality. Yet, public policy can still play a role (bringing back the ideas of human rights, discussed earlier).

All in all, it is becoming increasingly clear that the idea that private international law is a neutral and merely technical field of law is nothing more than a fiction. Besides the different right and approaches at play, as discussed above, feminist approaches (set out by Mirela Zupan, University of Osijek) also influence connecting factors and recognition rules.

Recognition and Public Certification of German Ipso Iure Converted Pay Paternity Into Paternity With Civil Status Effects Does Not Violate Swiss Ordre Public

This post has been written by Anna Bleichenbacher, MLaw, University of Basel, Nievergelt & Stoehr Law and Notary Office (Switzerland).

The Swiss Federal Supreme Court (Bundesgericht) published a leading decision on recognition and public certification of foreign conversions of ancient law pay paternities (Zahlvaterschaften) into paternities with civil status effects on June 15th, 2023 (decision of Swiss Federal Supreme Court 5A_81/2022 of May 12th, 2023).

Respondent in the present case was a German citizen, living in Germany

(**respondent**). She was born out of wedlock in 1967 and acknowledged by her father (**father**) in the same year, both in Germany. The acknowledgement included only a pay paternity. A pay paternity was a legal institution with an obligation to pay maintenance. The pay paternity did not include a legal child relationship recorded in the civil register.

According to the German law on the legal status of children born out of wedlock of August 19th, 1969 (**law on children born out of wedlock**), a father who has acknowledged his obligation to pay maintenance for a child in a public deed or an enforceable debt certificate, is seen as a legal father to child, recorded in the civil register, after the enforcement of the law on children born out of wedlock. In short, Germany knows the *ipso iure* conversion of the pay paternity into the paternity with civil status effects.

Switzerland also knows the legal institution of the pay paternity. However, Swiss law did not provide for *ipso iure* conversion of the pay paternity into a paternity with civil status effects.

The respondent's father was a Swiss citizen, living in Switzerland. In 2016, he died, not only leaving behind the respondent, but also his wife and a common daughter (born in wedlock; **appellants**). In 2017, the respondent appealed to the Swiss civil status authorities, claiming the registration and public certification of the birth in Germany as well as the legal child relationship to the father. After exhaustion of the intra-cantonal appeal process, the appellants reach the Swiss Federal Supreme Court with two main arguments against the registration and public certification of the respondent's legal child relationship to the father:

(1) Applicability of the Swiss Federal Act on Private International Law (PILA) in the present case

The PILA entered into force on January 1st, 1989. The appellants claimed that recognition and enforcement in the present case are governed by the respective law in force at the time of the respondent's birth in 1967. This would be the Federal Act on Civil Law Relations of Settled Persons and Residents of June 25th, 1891. The Swiss Federal Supreme Court made clear that the date of the foreign decision or other legal act (i.e. the acknowledgment of the child) is irrelevant. The time at which the question of recognition and enforcement arises is decisive.

Therefore, the PILA is applicable for the present case.

(2) Violation of the Swiss *Ordre Public* in case of recognition and public certification

The PILA supports the recognition and enforcement of foreign decisions and other legal acts by the principle "*in favorem recognitionis*". A foreign child acknowledgment is recognized in Switzerland if it is valid in form and content in one of the jurisdictions named in Art. 73 para. 1 PILA. These include the state of the child's habitual residence, the child's state of citizenship or the state of domicile or of citizenship of the mother or the father.

As mentioned above, the legal child relationship between the respondent and the father is based on the acknowledgment of the father in 1967 and the *ipso iure* conversion of the pay paternity into a paternity with civil status effects. The validity of this conversion in Germany has been proven by German civil status documents of the respondent.

Since Germany is a jurisdiction in the sense of Art. 73 para. 1 PILA, and the child acknowledgment is valid there, Switzerland will only refuse the recognition and public certification in case of violation of Swiss *Ordre Public*.

The Swiss Federal Supreme Court stated that, just because Swiss law does not provide for *ipso iure* conversion of the pay paternity, a German legal act on paternity valorization does not violate Swiss *Ordre Public*. This is mainly because both jurisdictions aim for a similar purpose, namely the equality of children born out of wedlock. In an *obiter dictum*, the Swiss Federal Supreme Court even doubts the conformity of Swiss regulation with fundamental rights.

In summary, the recognition and public certification of a German *ipso iure* converted pay paternity into a paternity with civil status effects does not violate the Swiss *Ordre Public*. In application of the PILA, Swiss civil status authorities are obliged to carry out the post-certification of such legal child relationship.

No Recognition in Switzerland of the Removal of Gender Information according to German Law

This note has been kindly provided by Dr. Samuel Vuattoux-Bock, LL.M. (Kiel), University of Freiburg (Germany).

On 8 June 2023, the Swiss Federal Supreme Court (Bundesgericht) pronounced a judgment on the removal of gender markers of a person according to German Law and denied the recognition of this removal in Switzerland.

Background of the judgment is the legal and effective removal 2019 of the gender information of a person with swiss nationality living in Germany. Such removal is possible by a declaration of the affected person (accompanied by a medical certificate) towards the Registry Office in accordance with Sect. 45b para. 1 of the German Civil Status Act (*Personenstandsgesetz*, PStG). The claimant of the present judgment sought to have the removal recognized in Switzerland and made a corresponding application to the competent local Swiss Office of the Canton of Aargau. As the Office refused to grant the recognition, the applicant at the time filed a successful claim to the High Court of the Canton of Aargau, which ordered the removal of the gender markers in the Swiss civil and birth register.

The Swiss Federal Office of Justice contested this decision before the Federal Supreme Court. The highest federal Court of Switzerland revoked the judgment of the High Court of the Canton of Aargau and denied the possibility of removing gender information in Switzerland as it is not compatible with Swiss federal law.

According to Swiss private international law, the modification of the gender indications which has taken place abroad should be registered in Switzerland according to the Swiss principles regarding the civil registry (Art. 32 of the Swiss Federal Act on the Private International Law, IPRG). Article 30b para. 1 of the Swiss Civil Code (ZGB), introduced in 2022, provides the possibility of changing gender. The Federal Supreme Court notes that the legislature explicitly refused to permit a complete removal of gender information and wanted to maintain a binary

alternative (male/female). Furthermore, the Supreme Court notes that the legislature, by the introduction in 2020 of Art. 40a IPRG, neither wanted to permit the recognition of a third gender nor the complete removal of the gender information.

Based on these grounds, the Federal Supreme Court did not see the possibility of the judiciary to issue a judgment *contra legem*. A modification of the current law shall be the sole responsibility of the legislature. Nevertheless, the Supreme Court pointed out that, due to the particular situation of the affected persons, the European Court of Human Rights requires a continual review of the corresponding legal rules, particularly regarding social developments. The Supreme Court, however, left open the question of whether the recognition of the removal of gender information could be a violation of Swiss public policy. The creation of a limping legal relationship (no gender marker in Germany; male or female gender marker in Switzerland) has not been yet addressed in the press release.

Currently, only the press release of the Federal Supreme Court is available to the public (in French, German and Italian). As soon as the written grounds will be accessible, a deeper comment of the implications of this judgment will be made on ConflictOfLaws.

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish

government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person*

> *concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a

rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935

Towards an EU Regulation on the International Protection of Adults

On 31 May 2023, the European Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (in the following: EU Adult Protection Regulation – EUAPR). This proposal is a response to significant demographic and social changes in the EU: Many Member States face enormous challenges posed by an increasingly aging population. Due to considerable improvements in medical care in recent decades, people grow much older than they used to, and this lengthening of the average lifespan in turn leads to an increase in age-related illnesses such as Alzheimer's disease. This demographic change creates problems for private international law, because the mobility of natural persons has increased within the EU where borders may, in principle, be

crossed without restrictions. Many people who have left their state of origin in search for work elsewhere in their youth or middle age do not return to their home state after retirement, but rather spend the last part of their lives where they have established a new habitual residence. Besides, more and more people decide to leave their home state once they have reached the age of retirement. Such processes of migration at a late stage in life may have different reasons: Some old-age movers may want to avoid a heavy taxation of their estates that would put a burden on their heirs, some may wish to circumvent other restrictions of domestic inheritance laws (e.g. the right to a compulsory portion), others may simply wish to spend the remaining parts of their lives in milder climates, e.g. the Mediterranean, or look for a place to stay where the cost of living is lower, e.g. in some parts of Eastern Europe. When these persons begin to suffer from an impairment or an insufficiency of their personal faculties which no longer allows them to protect their interests themselves, however, intricate conflict of laws problems may arise: The authorities or courts of which state shall have jurisdiction to take protective measures concerning vulnerable adults or their property? Which law is to be applied to such measures? Under which conditions may protective measures taken in one state be recognised and enforced in other states?

The EUAPR is meant to solve these problems.It is in many parts based on proposals made by two working groups set up by the European Law Institute and the European Association of Private International Law, respectively. The Regulation will partially supersede and complement the Hague Convention on the International Protection of Adults (in the following: Hague Adult Protection Convention – HAPC), a derogation which is permitted by Art. 49(2) and (3) HAPC. The Hague Convention was concluded on 13 January 2000 and entered into force on 1 January 2009 between France, Germany and the United Kingdom (restricted to Scotland, however). Today, the Convention is in force as well in Switzerland, Finland, Estonia, the Czech Republic, Austria, Monaco, Latvia, Portugal, Cyprus, Belgium, Greece, and Malta. The Netherlands, Ireland, Italy, Luxembourg, and Poland have signed the Convention, but have not ratified it yet. In the Netherlands, however, the Convention is already applied by the courts as a part of Dutch autonomous law (see Hoge Raad 2 February 2018, ECLI:NL:HR:2018:147). Thus, more than 23 years after the HAPC was concluded, the status of ratifications is rather unsatisfactory, as only 12 EU Member States have ratified the Convention so far. In order to speed up this process, the Regulation shall be

accompanied by a Council Decision authorising Member States to become or remain parties, in the interest of the EU, to the HAPC.

For a long time, it was controversial whether the EUAPR could be based on the EU's general competence in PIL matters (Art. 81(2) TFEU) or whether such a measure ought to be classified as concerning family law within the meaning of Art. 81(3) TFEU. On the one hand, adult protection is traditionally codified in the family law sections of many Member States' civil codes (e.g. in Germany), and people will frequently benefit from the protection of family members (see COM(2023) 280 final, p. 4). On the other hand, a guardian, curator or a person endowed with a power of representation does not necessarily have to be a relative of the vulnerable adult. Following the example set by the EU Succession Regulation, the Commission eschews the cumbersome special procedure envisioned for family law matters and bases its proposal on Art. 81(2) TFEU instead.

As far as the spatial scope of the EUAPR is concerned, Art. 59 EUAPR contains detailed rules on the relation between the Regulation and the HAPC. The basic factor that triggers the application of the EUAPR is the vulnerable adult's habitual residence in the territory of a Member State (Art. 59(1)(a) EUAPR). There are some exceptions to this rule, however, in order to ensure a smooth coordination with the Contracting States of the HAPC which are not Member States of the EUAPR (see Art. 59(1)(b) and (2) EUAPR). The substantive scope of the EUAPR is broadly similar to that of the HAPC, although it should be noted that Art. 2(2) EUAPR speaks of "matters" to which the Regulation shall apply, whereas Art. 3 HAPC uses the narrower term "measures". This may allow the inclusion of ex-lege powers of representation which are not directly covered by the HAPC. The Regulation's personal scope is defined in Art. 3(1), which states that, for the purposes of the EUAPR, an adult is a person who has reached the age of 18 years. Although the Regulation is largely a response to problems created by an aging population, it must be borne in mind that its scope is not restricted to elderly people, but encompasses all adults above the age of 18, and, if the exceptional condition of Art. 2(2) EUAPR is met, even younger people.

With regard to the rules on jurisdiction, the Regulation largely refers to the HAPC, with one significant divergence, though. The Convention does not permit a direct prorogation of jurisdiction, because it was feared that an uncontrolled freedom of prorogating the authorities of another state could be abused to the

detriment of the adult concerned. Art. 8(2)(d) HAPC merely gives the authorities of a Contracting State having jurisdiction under Art. 5 or 6 HAPC the possibility of requesting the authorities of another Contracting State designated by the adult concerned to take protective measures. Contrary to this restrictive approach, Art. 6(1) EUAPR provides that the authorities of a Member State other than the Member State in which the adult is habitually resident shall have jurisdiction where all of the following conditions are met:

- the adult chose the authorities of that Member State, when he or she was still in a position to protect his or her interest;
- the exercise of jurisdiction is in the interest of the adult;
- the authorities of a Member State having jurisdiction under Art. 5 to 8 HAPC have not exercised their jurisdiction.

The following paragraphs 2 to 3 of Art. 6 EUAPR concern formal requirements and the integration of the adult's choice of court into the HAPC's jurisdictional framework. The possibility of choosing the competent authorities is a welcome addition to the choice-of-law provision on powers of representation in Art. 15 HAPC.

In order to determine the applicable law, Art. 8 EUAPR refers to Chapter III of the HAPC. As in the HAPC, there are no specific conflicts rules for ex-lege powers of representation. Moreover, advance medical directives that are not combined with a power of representation (Art. 15 HAPC) are neither covered by the HAPC nor the EUAPR. Since the authorities exercising their jurisdiction under the HAPC usually apply their own law pursuant to Art. 13(1) HAPC, the spatial scope of the Convention's jurisdictional rules also indirectly determines the reach of its conflicts rules. This will lead to a new round of the debate that we are familiar with in the context of the relationship between the Hague Child Protection Convention and the Brussels IIb Regulation, i.e. whether the intended parallelism only works if at least a hypothetical jurisdiction under the respective Convention's rules can be established, or whether it suffices that jurisdiction is established according to a provision that is only found in the respective Regulation. Within the framework of the EUAPR, this problem will arise with regard to a choice of court pursuant to Art. 6 EUAPR, an option that is not provided for by the HAPC. Applying Art. 13(1) HAPC in this context as well seems to be the preferable solution, which leads to an indirect choice of law by the vulnerable adult even in cases where no voluntary power of representation is established under Art. 15

HAPC.

The recognition of measures taken in other Member States is governed by Art. 9 and 10 EUAPR. Notwithstanding mutual trust – and, in this particular area of law, with good reason – , the Regulation still contains a public policy clause (Art. 10(b) EUAPR). For the purpose of enforcement, Art. 11 EUAPR abolishes the declaration of enforceability (exequatur) that is still required under Art. 25 HAPC, thus allowing for simplified enforcement procedures within the EU.

A major innovation is found in Chapter VII. The Regulation will introduce a European Certificate of Representation (Art. 34 EUAPR) which will supersede the certificate under Art. 38 HAPC. The Certificate shall be issued for use by representatives, who, in another Member State, need to invoke their powers to represent a vulnerable adult (Art. 35(1) EUAPR). The Certificate may be used to demonstrate that the representative is authorised, on the basis of a measure or confirmed power of representation, to represent the adult in various matters defined in Art. 35(2) EUAPR.

Apart from those substantive achievements, the Regulation contains necessary rules on rather procedural and technical subjects, such as the cooperation between the competent authorities (Chapter VI EUAPR), the establishment and interconnection of protection registers (Chapter VIII EUAPR), digital communication (Chapter IX EUAPR), and data protection (Chapter X EUAPR). These rules will also lead to a major modernisation compared with the older rules of the HAPC.

In sum, the proposal of the EUAPR will considerably strengthen the international protection of vulnerable adults within the EU.

The Supreme Administrative Court

of Bulgaria's final decision in the Pancharevo case: Bulgaria is not obliged to issue identity documents for baby S.D.K.A. as she is not Bulgarian (but presumably Spanish)

This post was written bij Helga Luku, PhD researcher at the University of Antwerp.

On 1 March 2023, the Supreme Administrative Court of the Republic of Bulgaria issued its final decision no. 2185, 01.03.2023 (see here an English translation by Nadia Rusinova) in the *Pancharevo* case. After an appeal from the mayor of the Pancharevo district, the Supreme Administrative Court of Bulgaria ruled that the decision of the court of first instance, following the judgment of the Court of Justice of the European Union (CJEU) in this case, is "valid and admissible, but incorrect". It stated that the child is not Bulgarian due to the lack of maternal ties between the child and the Bulgarian mother, and thus there is no obligation for the Bulgarian authorities to issue a birth certificate. Hereafter, I will examine the legal reasoning behind its ruling.

Background

On 2 October 2020, the Administrative Court of the City of Sofia in Bulgaria requested a preliminary ruling from the CJEU in the case C-490/20 V.M.A. v. Stolichna Obshtina, Rayon '*Pancharevo*'. It sought clarification on the interpretation of several legal provisions. Specifically, the court asked whether a Member State is obliged, under Article 4(2) of the Treaty on European Union (TEU), Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU), and Articles 7, 24, and 45 of the Charter of Fundamental Rights of the European Union (the Charter), to issue a birth certificate to a child, who is a national of that Member State, in order to obtain the identity document. This inquiry arose with respect to a child, S.D.K.A., born in Spain, whose birth

certificate was issued by Spanish authorities, in accordance with their national law. The birth certificate identifies a Bulgarian national, V.M.A., and her wife, a British national, as the child's mothers, without specifying which of the two women gave birth to the child.

The CJEU decided that Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter, read in conjunction with Article 4(3) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged

- to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and
- to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

The trajectory of the case within the Bulgarian courts

On the basis of the decision of the CJEU in the *Pancharevo* case, the referring court, i.e. the Administrative Court of the City of Sofia obliged the authorities of the *Pancharevo* district to draw up the birth certificate of S.D.K.A., indicating two women as her parents.

The mayor of the Pancharevo district then filed an appeal to the Supreme Administrative Court of Bulgaria, contending that the decision is inadmissible and incorrect.

Based on its considerations, the Supreme Court held that the decision of the court of first instance is "valid and admissible but incorrect". Its rationale is premised on several arguments. Firstly, it referred to Article 8 of the Bulgarian Citizenship Law, which provides that a Bulgarian citizen by origin is everybody of whom at least one of the parents is a Bulgarian citizen. In the present case, the Supreme Court deemed it crucial to ascertain the presence of the biological link of the child, S.D.K.A. with the Bulgarian mother, V.M.A. Thus, it referred to Article 60 of

the Bulgarian Family Code, according to which the maternal origin shall be established by birth; this means that the child's mother is the woman who gave birth to the child, including in cases of assisted reproduction. Therefore, the Supreme Court proclaimed in its ruling that the Bulgarian authorities could not determine whether the child was a Bulgarian citizen since the applicant refused to provide information about the child's biological mother. Consequently, the authorities could not issue a birth certificate and register the child's civil status. Furthermore, in a written defence presented to the court of first instance by the legal representative of V.M.A., it was provided that S.D.K.A. was born to K.D.K., the British mother, and the British authorities had also refused to issue a passport to the child, as she was not a British citizen.

The Supreme Administrative Court of Bulgaria ruled that the child is not a Bulgarian citizen, and the conclusion of the CJEU that the child is a Bulgarian citizen and thus falls within the scope of EU law (Articles 20 and 21 TFEU and Article 4 of Directive 2004/38/EC) is inaccurate. According to the Supreme Court's legal reasoning, these provisions do not establish a right to claim the granting of Bulgarian citizenship, and Union citizenship is a prerequisite for enjoying free movement rights.

In these circumstances, the Supreme Administrative Court of Bulgaria held that the refusal to issue a birth certificate does not result in the deprivation of citizenship or the violation of the child's best interests. It referred to the law of the host country, Spain. Article 17 of the Spanish Civil Code of July 24, 1889, provides that Spanish citizens by origin are persons born in Spain to parents:

- who are foreigners if at least one of the parents was born in Spain (except for the children of diplomatic or consular officials accredited to Spain),
- who are both stateless, or
- neither of whose national laws confer nationality on the child.

According to this Article, the Supreme Court reasoned that since the national laws of the parents named in the child's birth certificate (i.e. Bulgarian and UK legislation), issued in Spain, do not grant citizenship to the child, baby S.D.K.A. must be considered a Spanish citizen by virtue of this provision.

The applicability of Spanish law was expressly confirmed by the Spanish Government during the hearing at the CJEU, provided in paragraph 53 of

Advocate General Kokott's Opinion, stating that if the child could claim neither Bulgarian nor UK nationality, she would be entitled to claim Spanish nationality. Thus, the Supreme Court ruled that the child is Spanish and averted the risk of leaving the child stateless.

Is the decision of the Supreme Administrative Court of Bulgaria in conformity with EU law interpretation?

In light of the ruling of the CJEU on the *Pancharevo* case, certain aspects might have required further scrutiny and more attention from the Supreme Court. Paragraph 68 of the *Pancharevo* judgment provides:

"*A child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same-sex, one of whom is a Union citizen,* ***must be considered, by all Member States, a direct descendant of that Union citizen*** *within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Article 21(1) TFEU and the secondary legislation relating thereto.*"

According to this paragraph, it can be inferred that Bulgaria and other Member States must recognize a child with at least one Union citizen parent as a direct descendant of that Union citizen. This paragraph has important implications as regards the establishment of the parent-child relationship. The CJEU, in its case law (C-129/18 SM v Entry Clearance Officer), has firmly established that the term "direct descendant" should be construed broadly, encompassing both biological and legal parent-child relationships. Hence, as a family member of the Bulgarian mother, according to Article 2 (2)(c) of Directive 2004/38, baby S.D.K.A., should enjoy free movement and residence rights as a family member of a Union citizen. In its decision, however, the Supreme Administrative Court of Bulgaria did not conform to the CJEU's expansive understanding of the parent-child relationship. Therefore, its persistence in relying on its national law to establish parenthood exclusively on the basis of biological ties appears to contradict the interpretation of EU law by the CJEU.

The Supreme Administrative Court of Bulgaria seems relieved to discover that the child probably has Spanish nationality. It can be doubted, however, at what conclusion the court would have arrived if the child were not recognized as

Spanish under Spanish nationality laws, especially considering that the child was not granted nationality under UK legislation either. In such a scenario, the Supreme Court might have explored alternative outcomes to prevent the child from becoming stateless and to ensure that the child's best interests are always protected.

Registration Open: Webinar Series on the Future of Cross-border Parenthood in the EU

As announced on this blog and on the blog of the EAPIL, a series of webinar has been organised under the title ***The Future of Cross-Border Parenthood in the EU – Analyzing the EU Parenthood Proposal***.

This is just a quick reminder for those who also read the EAPIL blog – and a new announcement for those who do not – that registration is open through the form available here.

The programme of the series is as follows:

- 3 May 2023, webinar chaired by Claire Fenton-Glynn: *Surrogacy in comparative perspective* (Jens Scherpe), and *What's in it? Subject matter, scope and definitions* (Cristina González Beilfuss)
- 10 May 2023, webinar chaired by Fabienne Jault-Seseke: *The EU Proposal and primary EU law: a match made in heaven?* (Susanne Gössl), and *The law governing parenthood: are you my father?* (Tobías Helms)
- 17 May 2023, webinar chaired by Nadia Rustinova: *The mutual recognition of decisions under the EU Proposal: much ado about nothing?* (Alina Ontanu), and *Who decides on parenthood? The rules of jurisdiction* (Maria Caterina Baruffi)

- 24 May 2023, webinar chaired by Steven Heylen: *Authentic documents and parenthood: between recognition and acceptance* (Patrick Wautelet), and *The European certificate of Parenthood: a passport for parents and children?* (Ilaria Pretelli)

The series of webinars is organized by Cristina González Beilfuss (Universitat de Barcelona), Susanne Gössl (Universität Bonn), Ilaria Pretelli (Institut Suisse de Droit Comparé), Tobias Helms (Universität Marburg) and Patrick Wautelet (Université de Liège) under the auspices and with the support of EAPIL, the European Association of Private International Law.

Save the Dates: EAPIL Webinar Series on the Proposal for an EU Regulation on Parenthood

As already reported here, the European Kommission adopted a Proposal for a Regulation in December 2022 which aims to harmonize at the EU level the rules of private international law with regard to parenthood. In May the EAPIL is organizing a series of four webinars to discuss the main elements of the proposal, find weaknesses and possibilities of improvement.

Each Wednesday, the webinar will start at 6 pm and end at 8 pm CET. It will focus on two topics, each presented by one expert, who will discuss the content of the proposal and examine the questions and possible improvement it raises. There will be ample room for discussion.

The programme of the series is as follows:

- 3 May 2023, chaired by Claire Fenton-Glynn:
  - The EU Proposal on Parenthood: lessons from comparative and substantive law (Jens Scherpe)
  - What's in it? Subject matter, scope and definitions (Cristina

González Beilfuss)
- 10 May 2023, chaired by Fabienne Jault-Seseke:
  - The EU Proposal and primary EU law: a match made in heaven? (Susanne Gössl)
  - The law governing parenthood: are you my father? (Tobías Helms)
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  - Authentic documents and parenthood: between recognition and acceptance (Patrick Wautelet)
  - The European certificate of Parenthood: a passport for parents and children? (Ilaria Pretelli)

For more information please visit the Website of the EAPIL.

The Dutch Supreme Court on how to deal with the CISG on appeal (Willemen Infra v Jura)

On 24 February 2023, the Dutch Supreme court has ruled in the case Willemen Infra v Jura, ECLI:NL:HR:2023:313. The ruling clarifies the scope of the Dutch courts' duty to apply the CISG (UN Convention on Contracts for the International Sale of Goods, 1980) ex officio on appeal. The Dutch appellate courts shall not review of their own motion whether the first instance court had to apply the CISG to the dispute, if the question of governing law was not the subject of parties' objections on appeal and thus got "beyond the parties' dispute".

Facts

The facts of this case related to a sale of gutters by a Dutch seller to a Belgian buyer. The gutters were to be used for the renovation of a runway at Zaventem airport. According to the seller's general terms and conditions, the disputes were to be resolved before a Dutch court on the basis of Dutch law.

After the start of performance, the buyer had reasons to assume that that the seller was unable to timely supply the products of the required quality. The buyer refused to take all the purchased gutters.

Proceedings

The seller disagreed and claimed damages for the loss of profit caused by the breach of contract. In the proceedings, the buyer submitted a counterclaim, invoking partial avoidance of contract and, alternatively, nullity of contract due to vitiation of consent. The buyer submitted namely that it had concluded the contract based on misrepresentation relating to the products' quality (the certificates which the products should have) and the delivery time.

The seller relied on both the CISG and Dutch law in its written submissions, including the statement that the choice for Dutch law in the general terms and conditions should be interpreted as excluding the application of the CISG. During the oral hearing, both parties referred to Dutch law only (see on this the Conclusion of the Advocate General, at [3.4]). The first instance court ruled as follows in relation to applicable law: '*According to the [seller], the contract is governed by Dutch law. (…) 'The court contends that [the buyer] also relies on Dutch law in its arguments, and thus follows [the seller's] reasoning. The court follows the parties in this and shall apply Dutch law*." (the formulation is quoted in *Willemen Infra* v *Jura* at [4.3.1], compare to Advisory Council's Opinion nr 16). The court has then applied the Dutch civil code, not the CISG, to the dispute.

The seller appealed against the decision, but not against the applicable law. Nevertheless, the appellate court considered of its own motion, whether the contract was governed by the CISG. It ruled that the contract fell under the CISG's scope; the Convention was directly applicable on the basis of article 1(1)(a) CISG, as both Belgium and the Netherlands are Contracting States to CISG. Furthermore, the parties to the dispute have not explicitly excluded the CISG's application based on article 6. The appellate court has applied the CISG to the contractual claim, and Dutch law – to the claim relating to the vitiation of

consent, as this matter falls outside the Convention's scope. The buyer has labelled the application of the CISG 'surprising', because no claim in appeal targeted applicable law.

In cassation, the Dutch Supreme has ruled that applicable law was indeed "beyond the parties' dispute" on appeal. Therefore, the appellate court was neither free to determine applicable law anew nor free to apply CISG of its own motion (*Willemen Infra* v *Jura* at [2.1.2]- [3.1.6]).

CISG and procedural ordre public?

The ruling is logical from the point of view of civil procedure. Appellate review follows up on – and is limited by – the points invoked on appeal. Issues "beyond the parties' dispute" are not reviewed, unless these issues fall under the rules of procedural ordre public, which the appellate courts must apply of their own motion. While there is no unanimously accepted definition of the Dutch procedural ordre public, the cassation claim explicitly suggested that 'the CISG is not of ordre public' (see Conclusion of the Advocate General, at [3.3.]). Whereas this element of the cassation claim has been satisfied, neither the Advocate General nor the Court have engaged with the discussion whether procedural ordre public covers direct application (or applicability) of the Convention's uniform substantive sales law, even if it would be confined to establishing whether the parties have opted-out the CISG based on its article 6.

European Commission Proposal for a Regulation on Private International Law Rules Relating to Parenthood

This piece was written by Helga Luku, PhD researcher at the University of Antwerp

On 7 December 2022, the European Commission adopted a Proposal for a Regulation which aims to harmonize at the EU level the rules of private international law with regard to parenthood. This proposal aims to provide legal certainty and predictability for families in cross-border situations. They currently face administrative burdens when they travel, move or reside in another Member State (for family or professional reasons), and seek to have parenthood recognised in this other Member State. The proposal follows on a declaration two years ago by the Commission President von der Leyen in her State of the Union address that **"If you are a parent in one country, you are a parent in every country".**

How will this proposal change the current situation?

In line with the case law of the Court of Justice of the EU, Member States are required to recognise parenthood for the purpose of the rights that the child derives from Union law, permitting a child who is a Union citizen, to exercise without impediment, with each parent, the right to move and reside freely within the territory of Member States. Thus, parenthood established in one Member State should be recognised in other Member States for some (limited) purposes. There is currently no specific EU legislation that requires Member States to recognise parenthood established in other Member States for all purposes.

Different substantive and conflict-of-law rules of Member States on the establishment and recognition of parenthood can lead to a denial of the rights that children derive from national law, such as their succession or maintenance rights, or their right to have any one of their parents act as their legal representative in another Member State on matters such as medical treatment or schooling. Thus, the proposal aims to protect the fundamental rights of children and as it is claimed by the Commission, to be in full compliance with the UN Convention on the Rights of the Child. Through the proposed Regulation, the Commission intends to enable children, who move within the Union to benefit from the rights that derive from national law, **regardless of**:

- **the nationality of the children or the parents** (on the condition that the document that establishes or proves the parenthood is issued in a Member State);
- **how the child was conceived or born** (thus including conception with assisted reproductive technology);

- **the type of family of the child** (including e.g. the recognition of same-sex parenthood or parenthood established through adoption).

In principle, the proposal does not interfere with substantive national law in matters related to parenthood, which are and will remain under the competence of Member States. However, by putting the children's rights and best interests in the spotlight of the proposal, the Commission is requiring Member States to disregard their reluctance toward the recognition of some types of parenthood.

As the Union aspires an area of freedom and justice, in which the free movement of persons, access to justice and full respect of fundamental rights are guaranteed, the Commission proposes the adoption of Union rules on international jurisdiction and applicable law in order to facilitate the recognition of parenthood among the Member States. It covers not only the recognition of judgments but also the recognition and acceptance of authentic instruments. In this sense, the proposal covers the three main pillars of private international law and it will also introduce a European Certificate on Parenthood.

The main aspects of this proposal include:

- **Jurisdiction**: jurisdiction shall lie alternatively with the Member State of habitual residence of the child, of the nationality of the child, of the habitual residence of the respondent (e.g. the person in respect of whom the child claims parenthood), of the habitual residence of any one of the parents, of the nationality of any one of the parents, or of the birth of the child. Party autonomy is excluded. (Chapter II, articles 6-15)
- **The applicable law**: as a rule, the law applicable to the establishment of parenthood should be the law of the State of the habitual residence of the person giving birth. If the habitual residence of the person giving birth cannot be established, then the law of the State of the birth of the child should apply. Exceptions are foreseen for the situation where the parenthood of a second person cannot be established under the applicable law. (Chapter III, articles 16-23).
- **Recognition**: the proposal provides for the recognition of court decisions and authentic instruments with binding legal effects, which establish parenthood, without any special procedure being required. However, if one of the limited grounds for refusal is found to exist, competent authorities of Member States can refuse the recognition of parenthood

established by a court decision or an authentic instrument with binding effects. (Chapter IV, articles 24-43)

- **Acceptance:** the proposal also provides for the acceptance of authentic instruments with no binding legal effect. These instruments do not have a binding legal effect because they do not establish parenthood, but they refer to its prior establishment by other means or to other facts, thereby having only evidentiary effects. It may be a birth certificate, a parenthood certificate, an extract of birth from the register or any other form. The acceptance of these instruments with evidentiary effects can be refused only on public policy grounds. (Chapter V, articles 44-45)
- **Creation of a European Certificate of Parenthood**: children or their legal representatives can request it from the Member State in which the parenthood was established. This Certificate will be issued in a uniform standard form and will be available in all Union languages. It is not mandatory but children or their legal representatives have the right to request it and have it recognised in all Member States (chapter VI, articles 46-57).

What is next?

Since the current proposal concerns family law issues with cross-border implications, under Article 81(3) of the Treaty on the Functioning of the European Union, the Council shall act unanimously via a special legislative procedure after consulting the European Parliament. Besides the sensitive area the proposal regulates, it also adopts a pro-diversity and non-discrimination policy, including the recognition of same-sex parenthood and surrogacy. Thus, considering the different approaches and national identities of Member States, often associated with their more conservative or liberal convictions, unanimity will not be easy to reach. However, if unanimity cannot be reached, a number of Member States can still adopt the proposal in enhanced cooperation (see: Article 20 Treaty on European Union). This is not an uncommon procedure for Member States when they have to adopt legislation that concerns family law issues, e.g. Regulation 1259/2010 on the law applicable to divorce and legal separation (Rome III) and Regulation 2016/1103 on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. However, if it happens that the proposal is adopted in enhanced cooperation, it is doubtful whether its objective to provide the same rights for all children is truly achieved.

Additionally, the participating Member States will probably include those that did not impose very restrictive requirements with regard to the recognition of parenthood in their national laws, even before the adoption of the Regulation in enhanced cooperation.