

Private International Law Issues on Cross-border Surrogacy Agreement under Korean Law*

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I. INTRODUCTION

A. Notion and types of surrogacy

In recent years, the issue of surrogacy has attracted public attention in the Republic of Korea (“Korea”), and this trend also applies to other countries. The term “surrogate mother” refers to “a woman who has gone through pregnancy and has given birth to a child after being conceived by a person other than her husband by an agreement between the parties providing that the child born will be handed over to another person”. In terms of substantive law, it raises the question of who, between the donor of the egg and the surrogate mother who has actually gone through pregnancy and has given birth, should be recognized as the mother of the child. Since this question is resolved through various approaches in different countries depending on cultural, political and social environments, complex questions of private international law arise as to the determination, contestation and recognition of the parents of children born through international surrogacy, as is described on the Hague Conference on Private International Law (“Hague Conference”) website.¹⁾

Different types of surrogacy can be identified according to various criteria. First, genetic (or classic) surrogacy and gestational surrogacy; second, commercial surrogacy and altruistic surrogacy; third, surrogacy requested by married couples, single women or men, non-married couples or same-sex males, depending upon the requesting party. The following discussion in this article is focused on the typical case involving a married Korean couple entering into a surrogacy agreement with a foreign surrogate mother (married or unmarried) and arranging for her to give birth to a child of the intended parents.

B. Issues discussed and order of discussion

The purpose of this article is to give an overview of the current status of the law of Korea on surrogacy, including both substantive law (實質法) and private international law (國際私法). The precise order of discussion is as follows: categorization of national legislations on surrogacy and the current status of Korean law on surrogacy (Chapter II), issues on surrogacy under Korean substantive law (Chapter III), issues on surrogacy under Korean private international law (in its narrow sense) (Chapter IV), recognition of foreign judgments in Korea on the legal status of a child born through surrogacy (Chapter V), international circulation of foreign public documents (i.e., birth certificates, civil status documents)(Chapter VI), international efforts to prepare uniform or harmonized rules on cross-border surrogacy (Chapter VII) and the direction of future

1) The website is available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited on October 17, 2018).

legislation of Korea on surrogacy (Chapter VIII).

II. CATEGORIZATION OF NATIONAL LEGISLATIONS ON SURROGACY AND CURRENT STATUS OF KOREAN LAW

A. Types of national legislations on surrogacy

While the categorization of approaches to surrogacy vary depending on the countries, the report of the Hague Conference opts for the following categorization:²⁾

(i) States which prohibit surrogacy arrangements; this is the case for example of China (mainland), France, Germany and several States of the U.S.A. (e.g., Arizona, District of Columbia). The main justifications given by some countries for such a prohibition lie in the commodification of children and the deterrence of women's exploitation. For instance, both commercial surrogacy and altruistic surrogacy are prohibited under Article 1(1) No. 7 of the German Embryo Protection Act and Article 14b of the Adoption Placement Act, which penalize the undertaking of surrogacy and commercial activities promoting it such as the placement of surrogate mothers. However, the surrogate mother and the intended parents are not subject to punishment. As to the scope of these provisions, it is limited to acts committed in Germany (Article 7, German Criminal Code).

(ii) States in which surrogacy is largely unregulated; this is the case for example of Japan, the Netherlands and several States of the U.S.A. (e.g., Michigan, New York). However, the guidelines of the Japan Society of Obstetrics and Gynecology prohibit doctors from engaging in surrogacy-related procedures.

(iii) States which expressly permit and regulate surrogacy; this is the case for example of the United Kingdom. Some countries, deeming it preferable to regulate the practice rather than to opt for absolute prohibitions, have adopted specific legislation.

(iv) States adopting a permissive approach to surrogacy, including commercial surrogacy; this is the case for example of India³⁾, Russia and several States of the U.S.A. (California, Nevada).

Although there appears to be no authoritative view directly on this point, it has been noted that the international map of surrogacy shows no territorial, cultural or legal patterns.⁴⁾

2) "Preliminary Report on the Issues arising from International Surrogacy Arrangements", Prel. Doc. No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference available at the website of the Hague Conference.

3) For more details on India, see Stellina Jolly, *Cross-Border Surrogacy: Indian State Practice*, in Sai Ramani Garimella and Stellina Jolly (eds.), *Private International Law: South Asian States' Practice* (2-17), p. 175 *et seq.*

4) Patricia Orejudo Prieto de Los Mozos, "Surrogacy", Jürgen Basedow et al. (eds.), *Encyclopedia of Private International Law* (Edward Elgar. 2017), p. 1692.

B. Current status of Korean law on surrogacy: permissibility of surrogacy agreements

There is no law prohibiting or regulating surrogacy in Korea. Therefore, if a Korean couple arranges for a surrogate mother to give birth to a child in Korea or abroad, the couple may be subject to criminal punishment in a foreign country but not under Korean law. However, providing an egg or sperm for compensation is strictly prohibited and the violation of such rule is subject to criminal sanctions under the following provisions of the Bioethics and Safety Act:

Bioethics and Safety Act of Korea

Article 23 (Rules on Production of Embryos) (3) No person shall provide or use an embryo, ovum, or spermatozoon for money, an interest in property, or any other consideration, solicit another person to provide or use an embryo, ovum, or spermatozoon for such consideration, or act as a broker for providing or using an embryo, ovum, or spermatozoon.

Article 66 (Penal Provisions) (omitted)

Therefore, both the donor and the donee are subject to punishment if the donation is made for compensation. However, because the surrogate mother does not provide eggs but uterine and maternal functions, it is difficult to see the procedure as violating the Bioethics and Safety Act.

Meanwhile, Article 56 of the Medical Ethics Guideline of the Korean Medical Association expressly provided in the past that “surrogacy for monetary compensation shall not be recognized and that doctors shall not conduct artificial insemination or implantation of conceived embryo in a surrogate mother”. Nonetheless, these provisions have been deleted at the time of the amendment of April 22, 2006. The Ethical Guidelines for Assisted Reproductive Medicine of the Korean Society of Obstetrics and Gynecology amended as of 1st July 2017, which purport to protect the rights and obligations of donors and surrogate mothers in connection with procedures involving donation of eggs and sperm, and their legal and ethical status, do not prohibit the surrogacy but set forth some conditions for conducting procedures of surrogacy. It is noteworthy that the Guidelines provide that the conduct of Assisted Reproductive Technology (“ART”) for surrogacy must be subject to the prior review of the relevant institution bioethics review committee. This implies that conduct of artificial insemination or implantation of conceived embryo in a surrogate mother is not prohibited.

It is also worth noting that the attitude of the Ethical Guidelines for Assisted Reproductive Medicine of the Korean Society of Obstetrics and Gynecology differs from that of the guidelines of the Japanese counterpart. However, the degree and extent of the deviation may be determined depending on how the committee actually handles the deliberation process.

III. ISSUES ON SURROGACY AGREEMENTS UNDER KOREAN SUBSTANTIVE LAW

The following discussion considers the domestic case in which a surrogacy agreement (“domestic surrogacy agreement”) is signed and a surrogate mother gives birth to a child in Korea. Such case can be deemed as giving rise to issues mainly under the Korean Civil Act, as well as the Constitution and human rights law. The issues surrounding surrogacy include the following: first, whether surrogacy is permitted; second, whether surrogacy agreements are valid and what effects they produce; and third, what the legal status of the child born through surrogacy should be, thus who should be regarded as the father and mother of the child. While it is not contested that there is an interaction between the two, the validity of surrogacy agreements does not directly influence the legal status of the child born through surrogacy.

A. Permissibility of surrogacy agreements

The attitude of the current Korean law has been discussed above (see Chapter II).

If Korea decides to permit surrogacy agreements in the future, regulation will be required to a certain extent. There can be a variety of views on such a regulation, but regulation on the payment of fees, the types of surrogacy (gestational surrogacy or genetic surrogacy, etc.), the qualification of the surrogate mother, the contracting method of the surrogacy agreement will certainly be necessary as a minimum.

B. Validity or effect of surrogacy agreements

Opinions diverge in Korea as to the validity of surrogacy agreements. The traditional view is that under Article 103 of the Korean Civil Act,⁵⁾ surrogacy agreements are contrary to public policy, thus null and void. However, there are also views according to which surrogacy agreements are entirely valid, or partially valid.

In determining whether surrogacy agreements are valid, the crucial question is whether one agrees or not with the objections that have been raised concerning the morality of surrogacy. The objections are as follows:⁶⁾ first, surrogacy agreements are inconsistent with human dignity in that the woman uses her uterus for financial profit; second, to deliberately become pregnant with the intention of giving up the child distorts the relationship between mothers and children; third, surrogacy is a degrading practice in that it amounts to child-selling; and fourth, since there are

5) Civil Act of Korea, Article 103 (Juristic Acts Contrary to Social Order): “A juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void”. This article is comparable to Article 90 of the Japanese Civil Code.

6) Warnock Report, cited in Bonnie Steinbock, “Surrogate Motherhood as Prenatal Adoption”, *Legal and Ethical Issues in Human Reproduction*, Vol. 16, 1988, p. 266.

some risks attached to pregnancy, no woman ought to be asked to undertake pregnancy for another, in order to earn money.

The issue is also related to the Constitution of Korea, and in particular to the protection of privacy (Article 17 of the Constitution) and fundamental rights of protection of marriage and family life (Article 36). It is also a matter related to human dignity and the fundamental right to pursue happiness (Article 10). If we can overcome the moral criticism against surrogacy, then we can accept the validity of surrogacy agreements. If we cannot overcome the criticism, the issue of moral and legal boundaries may become a problem, paving the way for Korean public policy to intervene. In addition, there is an argument according to which we do not need to permit surrogacy, since the parent-child relationship between the intended parents and the child born through surrogacy can be established through recognition (in the case of intended fathers) and adoption (in the case of intended mothers).

Assuming that surrogacy agreements are valid, then as a corollary, in the case where a party breaches such an agreement, the other party will have resort to remedies both under the law and the agreement, such as specific performance, termination of agreement or damages. Of course, these will not be available if the surrogacy agreement itself is null and void.

C. Legal status of a child born through surrogacy: determination of parentage

1. Relationship between the surrogate mother and the child

Under Article 1591 of the German Civil Code (BGB), the woman who gives birth is the mother of the child. Accordingly, as a matter of German law, only the surrogate mother is the legal mother and the intended mother (or genetic mother) cannot be regarded as such. There are no corresponding provisions in the Civil Act of Korea. However, the majority of legal commentators follow the principle "*mater semper certa est*", "Mother is always certain" (so-called 'birth principle'). If we adhere to this principle, the intended mother can never be the legal mother unless she adopts the child born through surrogacy. Nonetheless, it is doubtful whether this principle, which has prevailed over thousands of years, still holds true in modern society where the advancement in ART has enabled infertile women to arrange for a surrogate mother to give birth to a baby genetically linked to her, such practice being perfectly permitted in some other countries. Could it be justified to prohibit such an infertile woman, eager to have her own baby who is genetically linked to her, from resorting to a surrogacy agreement?

2. Relationship between the surrogate mother's husband and the child

If the surrogate mother is unmarried, the child born will be treated as an illegitimate child. In this case, the intended father may establish parentage in law by recognizing the child. On the other hand, if the surrogate mother is married, the child born is presumed to be the child of the

surrogate mother's husband. In this case, the husband of the surrogate mother will be able to file a suit seeking rebuttal of the aforementioned presumption.

3. Relationship between the intended parents and the child

If the birth mother is accepted as the legal mother, the intended father will need to recognize the child, and the intended mother adopt the child in order to establish legal parentage.

D. Recent judgment of the Seoul Family Court

Lately, the Seoul Family Court has rendered a meaningful decision on the child born through surrogacy. Interestingly, the case was not a typical surrogacy case in that even though the surrogate mother had given birth in California, she had not signed a surrogacy agreement governed by the laws of the State of California, there had been no judgment of a court of the State of California confirming that the intended mother was the legal mother of the child, and the surrogate mother was described as the mother of the child in the birth certificate issued by the hospital in California where the child was born.

1. Factual background and progress of the trial

When it became difficult for the applicant (the intended father) and his wife to conceive and maintain naturally, they decided to have a child through surrogacy. In July 2016, the embryo conceived by the applicant and his wife was implanted in the surrogate mother who later gave birth to a child at a hospital in California. The birth certificate issued by the hospital designated the surrogate mother as the mother. In December 2017, the applicant reported the birth of the child to the administrative office in Seoul as a child born by his wife and submitted the birth certificate. However, the report was dismissed by the family register officer, due to the inconsistency between the mother's name on the report and that on the birth certificate.

The applicant filed a suit before the Seoul Family Court, requesting the Court to cancel the dismissal of the birth declaration. The first instance of the Seoul Family Court dismissed the suit, due to the abovementioned inconsistency. The applicant then filed an appeal. In response, the second instance of the Seoul Family Court dismissed the appeal in June of 2018.

2. Judgment of the Appellate court

The crux of the judgment of the Appellate court is that the mother-child relationship is determined by the natural fact of birth and that surrogacy agreements are invalid under Article 103 of the Civil Act of Korea. The details are as follows:

(i) Criteria for determination of mother-child relationship

Based upon the premise that the criterion for determining the mother-child relationship is the natural fact of birth, the Appellate court held that the dismissal of birth report is justified due to the inconsistency between the mother's names on the report and the birth certificate submitted to the administrative office.

The Appellate court further held that although there are views according to which, considering the advancement in science and technology, notably in artificial insemination, the determination of legal parental relationship must be based, not on the natural fact of 'birth', but on genetic commonalities or on the intent of the embryo provider and the birth mother, such views cannot be supported for the following reasons: first, it is relatively clear and easy to judge the natural fact of birth as opposed to other standards; second, since the mother-child relationship is not merely a legal one, but a relationship which includes an emotional tie resulting from for example the conception, that is, a 40 weeks pregnancy period, the pain of giving birth and breast-feeding, and since such emotional ties ought to be legally protected as 'motherhood', if parental relationship is determined on the basis of genetic commonalities or on the intent of the persons involved, such motherhood cannot be protected, and this may have negative consequences on the welfare of the child; third, the adoption of the aforementioned method based on genetic commonalities or the intent of the embryo provider can lead to the result that the woman will have to serve only for gestation or contain her sense of motherhood built through pregnancy, which is not consistent with the values and atmosphere of our society; and fourth, it is possible for the provider of the sperm or the egg to acquire the same status as the biological parents by adopting – in particular through '*chinyangja*' (meaning "full") adoption – the child born through surrogacy.

(ii) Permissibility of surrogacy and validity of surrogacy agreements

The Appellate court held that not only genetic (or classic) surrogacy but also gestational surrogacy are not permitted pursuant to Article 103 of the Civil Act of Korea, as they are contrary to good morals and other social order of Korea due to the following reasons: first, the criterion for determining the mother-child relationship according to the Civil Act is the fact of birth; second, the Family Relations Registration Act requires that at the time of the birth report, the fact of birth is proved by the birth certificate attached to the birth report; third, the Bioethics and Safety Act purports to contribute to ensuring ethics and safety and improving the health and the quality of life of the people by preventing any violation of human dignity and value.

IV. ISSUES ON SURROGACY AGREEMENTS UNDER KOREAN PRIVATE INTERNATIONAL LAW IN ITS NARROW SENSE

Cross-border surrogacy arrangements give rise to various private international law issues. This section discusses the issues of the applicable law and of the nationality of a child born through surrogacy, the issues of the recognition of foreign judgments and international jurisdiction being discussed further below (Chapter V). The issues of the applicable law surrounding surrogacy include those concerning the law applicable to the surrogacy agreement and the law applicable to the establishment of parentage.

Currently, most countries do not seem to have particular choice of law rules that apply to surrogacy agreements or other assisted reproductive techniques.⁷⁾

A. Law applicable to international surrogacy agreements

Regarding the law applicable to international surrogacy agreements, a question arises as to whether such agreements are subject to the ordinary contract rules, namely the principle of party autonomy, or to different principles applicable to family law agreements. The answer to this question is not clear at present, but if the latter is followed, the principle of party autonomy will not be permitted. In practice, countries which recognize the validity of domestic surrogacy agreements are likely to follow the former, whereas those which deny the validity of such agreements are likely to follow the latter.

Interestingly, in the United States, there is a standard contract for surrogacy which expressly allows for the selection of the governing law of surrogacy agreements with the following provisions:⁸⁾

Section XIV MISCELLANEOUS

Governing Law: This Agreement shall be governed by the laws of the State of (State).

It should be noted that the status of a child born through surrogacy is not directly related to the law applicable to the surrogacy agreement, even if the agreement itself provides that the surrogate mother is the mother of the child born through surrogacy. In other words, the law applicable to a surrogacy agreement merely governs contractual issues such as the formation of

7) For more details of private international law issues, see “Background Note for the Meeting of the Experts’ Group on the Parentage/Surrogacy Project”, Document for the attention of the Experts’ Group, available on the Hague Conference website at < www.hcch.net > under the “Parentage/Surrogacy Project”, paras. 9 and 35 *et seq.*

8) Available at http://www.allaboutsurgacy.com/sample_contracts/GScontract1.htm.

the agreement, its validity and effects, but does not govern the status of the child born through surrogacy.

B. Status of a child born through surrogacy: law applicable to the determination of parentage

The Private International Law Act (“PILA”) of Korea does not include a specific rule dealing with the law applicable to the status of a child born through surrogacy. While some countries, mainly of common law tradition, apply the *lex fori*, Korea determines parentage in accordance with the following Articles 40 and 41 of the Korean PILA.

1. Law applicable to the status of a child born through surrogacy

Article 40 Relationships between Parents and Legitimate Children

(1) The formation of a relationship between a parent and a legitimate child shall be governed by the national law (*lex patriae*) of one of the couple at the time of the child’s birth.

(2) (omitted)

Article 41 Relationships between Parents and Illegitimate Children

(1) The formation of a relationship between a parent and an illegitimate child shall be governed by the law of the mother’s national law (*lex patriae*) at the time of the child’s birth. However, the formation of a parent and child relationship between the father and the child may also be governed by the law of the father’s national law (*lex patriae*) at the time of the child’s birth or by the law of the child’s current habitual residence.

(2) Recognition may also be governed by the national law (*lex patriae*) of the person recognizing the child in addition to the laws set forth in paragraph (1).

(3) (omitted)

In the case of a child born through surrogacy, parentage is established first in accordance with Article 40 of the Korean PILA if the surrogate mother is married. Since under the Korean Civil Act, the person giving birth is the mother, it seems impossible to apply Article 40 to intended parents who are of Korean nationality. However, the notion of “relationships between parents and legitimate children” in Article 40 being broader than that in the Korean Civil Act, the general theory on characterization of private international law allow for it to be applied without difficulty.

The problem in applying Article 40 is who, between the intended parents and the couple giving birth, that is the surrogate mother and her husband, ought to be held as the ‘couple’ (or ‘spouses’) at the time of the birth of the child. In Korea, although there has not been a lot of discussion directly on this point, the influential view is that both are couples. Take, for example, intended parents A+B of Korean nationality and who arrange for a woman D of State X (married to her husband C) to be conceived with the egg of B fertilized by the sperm of A in her uterus, and

C giving birth to a child E several months later. In this case, the establishment of parentage during marriage between A+B and E follows the Korean law, whereas the establishment of parentage during marriage between C+D and E follows the law of the State X. According to Korean law, parentage between B and E will be denied while parentage between D and E will be recognized, whereas according to the laws of the State X, parentage between D and E will be denied while parentage between B and E will be recognized. Here, a question arises as to how this conflicting situation ought to be resolved. According to the traditional view, the application of the laws of the State X would be contrary to Korean public policy, thus on this basis the Korean court will apply Korean law and recognize parentage between D and E. On the other hand, according to a more liberal view, the law which is more favorable to the best interests of the child will be applied as the governing law. However, this can in turn lead to a split between two views according to which priority must be given either to the surrogate mother or to the intended mother.

2. German PILA

Article 19 of the German PILA (Einführungsgesetz zum Bürgerlichen Gesetzbuch. EGBGB) provides as follows on the establishment of parent-child relationship:

Article 19 Descent

- (1) The descent of a child is governed by the law of the place where the child has his or her habitual residence. In relation to each parent the descent can also be determined by the law of the country of this parent's nationality. If the mother is married, the descent can also be determined by the law that governs the general effects of the marriage under article 14(1) at the time of the birth of the child; if the marriage was dissolved before by death, the relevant time is the time of dissolution.
- (2) (omitted)

Article 19 subjects the establishment of parent-child relationships to the laws of the habitual residence of the child, the law of the country of the nationality of the father or the mother, or if the mother is married, to the law that governs the general effects of the marriage. In the past, the first connecting factor, namely the habitual residence of the child, took precedence, but nowadays, the three connecting factors are understood to be alternatives of the same rank. As for the second connecting factor, a question arises as to how the father or the mother should be determined, as it is the case with both the Korean PILA and the Japanese PILA. With regard to the first connecting factor, the difficulty lies in the determination of the child's habitual residence. It should be determined depending on where the child resides after birth. Thus if the child has moved to Germany after birth with the intended father or mother, his or her habitual residence will be in

Germany.

3. Hidden *renvoi*

In some States (for example in countries of common law tradition), courts apply the *lex fori* to decide on the formation of the parent-child relationship, whereas the Korean PILA leads to the application of foreign law. Here, one could argue that the choice of law rules are hidden in the rules of international jurisdiction in those States whose courts apply the *lex fori*. Along the lines of this analysis, in its decision of 26th May 2006, the Supreme Court of Korea supported the doctrine of hidden *renvoi* and applied Korean law in a divorce case, as opposed to the laws of the State of Missouri which had been originally designated as the law applicable to the divorce by the Korean PILA.

In order for the doctrine of hidden *renvoi* to be applied, Korea must have international jurisdiction in accordance with the international jurisdiction rules of the foreign country whose law has been designated as the applicable law (*e.g.*, State of California). According to the Family Code of California (§7962 (e)), Korea has international jurisdiction as the State of the residence of the intended parents. If so, in a case where the laws of the State of California, as the law of the surrogate mother, are rendered applicable according to the rules of the Korean PILA, parentage of the child born through surrogacy would be governed by Korean law as a result of hidden *renvoi*.

C. Application of foreign law and violation of Korean public policy

A distinction must be made between the violation of public policy in the context of the governing law of surrogacy agreements, and the violation of public policy in the context of the governing law of the establishment of parentage. The latter being of greater importance, it will be the centre of the following discussion. But before, it is desirable to mention briefly the general theory of public policy under the Korean PILA.

1. General theory on public policy under the Korean PILA

(i) Article 10 of the Korean PILA⁹⁾

Article 10 (Provisions of Foreign Law Contrary to Public Order)

The application of provisions of a foreign law is excluded if such application would be manifestly incompatible with the good morals and other social order of the Republic of Korea.

In order to exclude on the grounds of violation of public policy the application of the foreign law

9) This article is comparable to Article 42 of the Japanese PILA.

designated by the Korean PILA, firstly, such application must constitute a violation of the principles of Korean law; secondly, these principles must be fundamental *i.e.*, they should belong to the basic moral beliefs or fundamental values and notions of justice of Korea; and thirdly, the violation must be so serious that it exceeds the tolerable. Whether or not these requirements are satisfied should be judged relatively, in consideration of the links between the case and Korea (the so-called “Inlandsbeziehung”). A mere difference of legislation does not amount to a violation of Korean public policy. The conflict between the fundamental values of Korean law and the result of the application of foreign law in the case in question should be so serious that it cannot be tolerated in Korea. In other words, in a situation where fundamental values clash with each other, the abovementioned public policy provision aims to protect the fundamental values of Korea by setting a limit upon the application of foreign values. It is very difficult to judge what is contrary to international public policy, but such judgment must be made individually *in concreto*. For example, if the application of a foreign law results in the violation of the fundamental rights guaranteed by the Korean Constitution, it would most probably constitute a violation of public policy, since the Korean Constitution reflects Korea’s basic moral beliefs or fundamental values and notion of justice as the fundamental norms of Korea.

Koreans lawyers have begun to pay more attention to the role of fundamental rights under the Constitution in deciding on the violation of public policy since the Supreme Court expressly referred to the constitutional value in its decisions of 2012 when refusing to recognize Japanese decisions on the subject of forced slave labor.

2. Law applicable to surrogacy agreements and violation of public policy

If a surrogacy agreement is valid under Korean law, no difficulty arises.

On the other hand, if a surrogacy agreement which would be invalid under Korean law is still valid under the law applicable to the international surrogacy agreement, then it leads to the question of whether the application of the foreign law can be refused on the basis of Korean public policy.

3. Law applicable to the status of a child born through surrogacy and violation of public policy

The invalidity of an international surrogacy agreement under Korean law does not necessarily imply that the application of foreign law as the applicable law on the status of the child born through surrogacy constitutes a violation of public policy, because the best interests of the child ought to be taken into consideration.

The issue is whether the application of the foreign law of the birth State assigning the motherhood to an intended mother would be against Korean public policy, and for this reason

refused. Discussions on this matter go in parallel with the issue of recognition of a foreign judgment assigning the motherhood of a child born through surrogacy to an intended mother. This issue is discussed in more detail in Chapter IV.

The conclusion is as follows: according to the traditional view, the application of a foreign law which recognizes the intended mother as the mother is contrary to Korean law which is understood as opting for the birth principle, and would constitute a violation of public policy. However, a more flexible view of the modern society (considering for example the decisions of the German Supreme Court and of the European Court of Human Rights) suggests that the application of such foreign law is not necessarily a violation of Korean public policy under certain conditions. The crucial issue to be resolved is what these conditions are precisely.

D. Adoption of a child born through surrogacy when parentage between the intended parents and the child is not recognized under the applicable law

If there is a genetic bond between the intended father and the child born through surrogacy, the parentage may be established by recognition by the father. If the applicable law does not establish parentage between the intended mother and the child, the intended mother may establish one by adopting the child. Some legal commentators argue that it is not necessary to admit the establishment of parentage between the intended mother and the child, because there is the possibility of adoption. The above-mentioned decision of the Seoul Family Court also referred to such point in the domestic surrogate case. Meanwhile, whether such allegations are also valid in the case of international surrogacy is controversial. At the international level, there is a wide consensus that the issue of parentage surrounding the surrogate mother cannot be adequately addressed through adoption. The reasons behind such argument are as follows:¹⁰⁾

First of all, there are intended parents who do not wish to have their child registered as an adopted child. Moreover, the adoption process is time consuming and costly. In addition, it is difficult in some cases to satisfy the requirements under certain laws that the parents be in custody of the child for a certain period of time prior to his or her adoption, or that the consent of the birth mother be given after a certain period of time (for instance, two weeks) after birth because in the case of surrogacy, the consent could be viewed as having been given well in advance of the birth. In addition, if a Korean intended mother wants to adopt a child born to a California surrogate, courts of the State of California would not permit the adoption of the child, since under the California State law, the intended mother is the legal mother of the child. If adoption is not permitted, the child will virtually be without a mother. Adoption also exposes the

10) Claudia Mayer, "Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterchaftsfällen", *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 2014, Band 78, S. 585ff.

child to greater risk when compared with the establishment of parentage with the intended parents upon birth. The intended parents may also refuse to adopt if the child has a disability or if they have divorced during the course of surrogacy, or they may also simply regret the decision of having a child born through surrogacy.

E. Nationality of a child born through surrogacy

Under Article 2(1) (Acquisition of Nationality by Birth) of the Nationality Act of Korea, a person whose father or mother is a national of Korea at the time of the person's birth shall be a national of Korea at birth. Under Article 3 (Acquisition of Nationality by Recognition) of the same act, a foreign national recognized by his or her father or mother can acquire the Korean nationality upon report to the Minister of Justice ("KMOJ") if he or she is a minor under the Civil Act of Korea and if the father or mother was a national of Korea at the time of birth. The reference to the "father or mother" here is understood as implying the legal father or mother.

The question is whether a child born to a foreign surrogate mother can fall under Article 2 if the intended parents are Koreans. The key issue here is who the father or mother of the child is under the Korean PILA, which depends once again upon the establishment of parentage with the intended parents of the child born through surrogacy. In the typical surrogacy case discussed herein, the child born through surrogacy can acquire the Korean nationality at the time of birth if he or she is attributed to the Korean intended parents (Nationality Act, Article 2) or if he or she is recognized by his/ her father upon report to the KMOJ (Article 3 of the same act).

In the worst scenario, the child born through surrogacy could be stateless and unable to acquire the nationality of neither the State of birth nor the receiving State (Korea).

V. RECOGNITION OF FOREIGN JUDGMENTS ON THE LEGAL STATUS OF A CHILD BORN THROUGH SURROGACY

In Japan, the famous *Mukai Aki case* has attracted the attention of the public on the issue of recognition of foreign judgments on the surrogate motherhood. However, since there is no comparable case in Korea yet, it is not easy to affirm with certainty which position the Korean courts will take if a similar case arises before them.

A. Requirements of recognition of foreign judgments in Korea

Article 217 of the Civil Procedure Act of Korea provides the five requirements for the recognition of foreign judgments.¹¹⁾ The main obstacle to the recognition of foreign judgments on surrogacy is

11) Article 217 is comparable to Article 118 of the Civil Procedure Act of Japan.

the public policy provision. More precisely, the issue is whether the recognition of a foreign judgment confirming the motherhood of a child born through surrogacy of an intended mother would be against Korean public policy. Before examining this public policy provision, the requirement concerning international jurisdiction, which is one of the five requirements evoked above, will be briefly mentioned.¹²⁾

B. International jurisdiction (indirect jurisdiction)

Jurisdiction problems tend to arise not as a stand-alone issue, but rather as one in connection with the recognition of foreign judgments.

In this regard, the Family Code §7962(e) of the State of California is noteworthy in that it sets forth jurisdiction rules specific to surrogacy, under which action to establish the parent-child relationship between the intended parent(s) and the child as to a child conceived pursuant to an assisted reproduction agreement for gestational carriers may be filed in i) the county where the child is anticipated to be born, ii) the county where the intended parent or intended parents reside, iii) the county where the surrogate resides, iv) the county where the assisted reproduction agreement for gestational carriers is executed, or v) the county where medical procedures pursuant to the agreement are to be performed.

The issue of international jurisdiction on surrogacy is not entirely clear under Korean law since there is no provision directly on this point. However, in a typical cross-border surrogacy case discussed herein, the jurisdiction of the courts where the intended parents or the surrogate mother has their or her domicile could be accepted without much difficulty. In addition, if the judgment of Californian courts is rendered as the result of the Korean intended parents' suit against the surrogate mother in California, the general jurisdiction of the Californian court would be easily accepted. Similarly, the Supreme Court of Japan recognized in 2007 the indirect jurisdiction of the State court of Nevada, and in 2014, the Supreme Court of Germany recognized the indirect jurisdiction of the State of California in a surrogacy case.

C. Recognition of foreign judgments on the status of a child born through surrogacy

The question of the recognition of foreign judgments on international surrogacy agreements and on the status of children born through surrogacy must be considered. Since the latter is of greater importance, it will be the focus of the discussion below. The crucial issue is whether the

12) Another issue is whether a foreign judgment confirming the motherhood of an intended mother regarding the child born through surrogacy constitutes a foreign judgment under Article 217(1). There could be an argument that such judgment is a simple confirmation by a judge and thus performs a certifying function without importing a judge's own judgment, and for these reasons does not qualify as a foreign judgment.

recognition of a foreign judgment confirming the motherhood of an intended mother would be against Korean public policy.

1. Traditional view

In its judgment of 23rd March 2007 (*Mukai Aki* case), the Supreme Court of Japan refused to recognize a judgment of the State of Nevada confirming the parentage of the intended parents, on the grounds that its recognition would be against Japanese public policy. However, there is no comparable Korean decision on this point. Considering the Korean courts' conservative attitude toward domestic surrogacy, they are likely to take the traditional view¹³⁾ held by the Supreme Court of Japan.

2. More liberal view

However, there could be a more flexible view according to which there is no violation of public policy. For example, in Germany, there is a split of opinions, some of which emphasize the best interests and the fundamental rights of the child and of the intended parents, and assert that the recognition of a foreign judgment which regards the intended parents as the legal parents is not contrary to German public policy.

The following grounds could be suggested to support such argument: First, as we can see from the example of the California Family Code, the birth principle to which Korean law adheres is not necessarily taken for granted all over the world. Second, the prohibition of surrogacy is based on a general precautionary perspective in order to protect children from trading and commodification. However, focus should be laid more on the best interests or welfare of the child once the child is born. Even if the intended parents have violated the law, the child should not be made an orphan or stateless for the purpose of imposing sanctions on them. Third, we cannot deny the fundamental rights or human rights that the Korean Constitution or the international human rights treaties grant to a couple or a child. However, in order not to violate public policy, the principle of rule of law should be observed in the process of concluding and implementing the surrogacy agreement. In order to judge this matter, we must consider whether the surrogate mother's human dignity has been infringed, whether the governing law establishing the requirements to ensure the surrogate mother's voluntary participation has been observed, and whether the surrogate mother has voluntarily delivered the child to the intended parents.

In its ruling of 10th December 2014,¹⁴⁾ the German Federal Supreme Court (BGH) held that despite the domestic prohibition of surrogacy, recognition of the Californian judgment granting

13) Chris Thomale, *Mietmutterchaft, Eine international-privatrechtliche Kritik* (Mohr Siebeck, 2015), S. 51.

14) BGHZ 203, 350 = IPRax 2015, 261 = NJW 2015, 479 = FamRZ 2015, 240.

legal parenthood to the intended parents of a child born through surrogacy could not be refused on the grounds of violation of public policy, and ordered the civil registry office to register the child's birth and describe the appellants (Lebenspartners) as the joint legal parents. The Court held that German public policy had not been violated by the mere fact that legal parenthood in a case of surrogacy treatment was assigned to the intended parents, if one intended parent was also the child's biological father, even when the surrogate mother had no genetic relation to the child.

In its decisions of 26th June 2014 (*Mennesson v. France & Labassee v. France*), the European Court of Human Rights held that Article 8(1) of the European Convention on Human Rights (ECHR) on the child's right to respect for his/ her private life encompassed the right of the child to establish a legal parent-child relationship which was regarded as part of the child's identity within domestic society.¹⁵⁾ The Court further held that although France had not violated the right to respect for family life of the intended parents and children, there had been a violation of the child's right to respect for private life (Article 8). Although France and other parties to the Convention have a wide margin of appreciation in relation to matters such as surrogacy, in these situations, France had overstepped its margin of appreciation by refusing to recognize under French law children having French biological fathers.¹⁶⁾

If Korean law adheres to the birth principle, recognition of foreign judgments confirming the motherhood of an intended mother would in principle be against Korean public policy, and such judgments would probably not be recognized. However, in order to protect the human rights and best interests of the child, it is necessary to open up the possibility of exceptions under which decisions of the Californian courts confirming the motherhood of an intended mother could be recognized as long as certain conditions are met. Such conditions need to be further refined. In sum, in the case where the child born through surrogacy would have no home if the foreign judgment is not recognized, we should respect the fundamental rights and human rights of the child in question.

VI. INTERNATIONAL CIRCULATION OF FOREIGN PUBLIC DOCUMENTS (I.E., BIRTH CERTIFICATES, CIVIL STATUS DOCUMENTS)

In the *Mukai Aki case* mentioned above, the Japanese couple implanted their embryo to an

15) For more details on the decision, see Claire Fenton-Glynn, International surrogacy before the European Court of Human Rights, *Journal of Private International Law*, 2017, Vol. 13, p. 546 *et seq.*; Rainer Frank, *Französisches Kindschaftsverhältnis bei Leihmutterchaft in Kalifornien-Anerkennung* (NJW 2015, 3211)", *FAmRZ* 2014, 1527ff.; Mehmet Akif Poroy, "Cross-Border Surrogacy under Turkish Law and the Jurisprudence of the European Court of Human Rights", *Nomos* No. 42 (Institute of Legal Studies, Kansai University, 2018), p. 39 *et seq.*

16) ECtHR of June 26, 2014, No. 65192/11.

American surrogate mother who later on gave birth to twins in the State of Nevada. Since the couple had obtained a judgment from a Nevada court confirming their parenthood, the recognition of the foreign judgment became an issue before the Japanese courts.¹⁷⁾

On the other hand, if there is only a birth certificate, without trial, in India in a similar case, a question arises as to whether Korean authorities should recognize the parentage based upon the certificate. Issuance of an official document (a birth certificate) is an administrative matter which does not involve any procedure comparable to a court trial. Therefore, the recognition of a foreign official document cannot be identified as the recognition of a foreign judgment, and a Korean court will treat it as a matter of evidence. Once the authenticity of a foreign official document is established, its evidentiary value is evaluated by a Korean judge in his or her free discretion, but the court precedent tends to presume that the statement in the official document is true. In its decision of 25th August 2018 on the above-mentioned domestic surrogacy case, the Seoul Family Court acknowledged the evidentiary value of the birth certificate (which stated that the surrogate mother gave birth) issued by the hospital in California. However, if the intended mother had been described as the legal mother on the birth certificate, then the Korean court would have regarded the description as being false and would have denied its evidentiary value.

From a different perspective, the birth certificate of India could be regarded as a description of the legal state established in India, so here arises a question of recognition of legal status (so-called “*Anerkennung von Rechtlagen*”, “*reconnaissance des situations*”) discussed in the European Union. However, in Korea, the recognition of legal status is not permitted. Even assuming that it is permitted, it cannot be recognized if it is contrary to public policy. Here arises another question as to whether, even if it is against Korean public policy, the parentage established in India should nevertheless be recognized on the basis of the fundamental rights or human rights of the child born through surrogacy as conferred by the Korean Constitution and international human rights treaties.

My understanding is that, unlike the recognition of foreign judicial decisions where there is some consistency between the practices of different States, the recognition of foreign public documents such as birth certificates is treated through various approaches depending on the countries. Therefore, uniform or harmonized rules on this issue would be welcomed.

17) My understanding is that there is a split of opinions in Japan as to whether the approach in terms of recognition of foreign judgment is appropriate in such case. In Korea, if the judgment of the State of California qualifies as a foreign judgment, then Korean courts will opt for the recognition of foreign judgment approach. In that case, the applicable law will not be an issue to be reviewed by Korean courts. On the other hand, if the judgment does not qualify as a foreign judgment, the approach in terms of applicable law will be adopted. As to the discussion under Japanese law, see 佐藤やよひ, “生殖補助医療と親子関係”, 櫻田嘉章・道垣内正人(編), 国際私法判例百選 [新法対応補正版], 2007, p. 122

VII. INTERNATIONAL EFFORTS TO PREPARE UNIFORM OR HARMONIZED RULES ON CROSS-BORDER SURROGACY

In this regard, the ongoing Surrogacy Project of the Hague Conference dealing with the “Private International Law Issues surrounding the Status of Children, including Issues arising from International Surrogacy Arrangements” since 2011¹⁸⁾ is noteworthy. The Korean Government should pay more attention to the project and participate in it more actively.

VIII. DIRECTION OF FUTURE KOREAN LEGISLATION ON SURROGACY

Despite the numerous attempts, no legislation has yet been passed on this matter in Korea. We need to consider Korea’s legislation on surrogacy in the context of substantive law as well as in the context of private international law in its broad sense. In terms of substantive law, it would be better for Korea to regulate surrogacy and to minimize the potential for harm, instead of deeming it as being totally illegal. In order to depart from the traditional principle, *i.e.*, “*mater semper certa est*”, a consensus of the Korean public will be necessary.

In terms of private international law, it is premature at the moment to offer concrete guidelines. Moreover, Korean legislation alone cannot solve the problem properly since it is of global nature. We should closely monitor the discussions held on the international level, including those ongoing at the Hague Conference, while carefully examining the various issues surrounding surrogacy at the national level.¹⁹⁾

IX. CONCLUDING REMARKS

In this article, I have briefly discussed the substantive law issues arising from a typical surrogacy case where a married Korean couple enters into a surrogacy agreement with a foreign surrogate mother and arranges for her to give birth to a child. I have also discussed private international law issues from the perspective of Korean law: first, the validity of surrogacy agreements and the parentage of the child born through surrogacy on substantive law, and second, the private international law issues, *i.e.*, the law applicable to the validity of surrogacy agreements and the parentage of the child born through surrogacy. Private international law issues arise because there is a conflict between laws and values among various States. More precisely, under Korean law, the surrogate mother is likely to be viewed as the legal mother according to the birth principle,

18) For more details, see <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

19) In this regard, the book entitled “生殖補助医療と法” (櫻田嘉章 外, 日本学術協力財団, 2015) provides insights for further research on surrogacy.

whereas in countries where Korean intended parents tend to go (e.g., California), the intended mother is regarded as the legal mother according to the intent principle. The question is whether, from the perspective of Korean courts, the application of Californian law and the recognition of the California court judgment confirming the establishment of parentage between the intended mother and the child born through surrogacy would constitute a violation of Korean public policy. Considering the conservative attitude of the Korean courts, they are likely to refuse the application of the foreign law along with the recognition of the foreign judgment on the grounds that it constitutes a violation of Korean public policy. In principle, such an attitude seems acceptable, but at present I believe that exceptions should be allowed under certain conditions. In the future, with the increase of the awareness of the Korean society of the importance of fundamental rights and human rights, exceptions will certainly be accepted with less resistance. However, the requirements for exceptions must be clarified and refined in the future. The Federal Republic of Germany Supreme Court's 2014 decision and the European Court of Human Rights' 2014 judgments could provide some insight regarding this matter.

ANNEX²⁰⁾

Private International Law Act (韓國國際私法)

Article 40 Relationships between Parents and Legitimate Children

- (1) The formation of a relationship between a parent and a legitimate child shall be governed by the national law (*lex patriae*) of one of the couple at the time of the child's birth.
- (2) If the husband has died before the child's birth, the husband's national law (*lex patriae*) at the time of his death shall be deemed his national law (*lex patriae*) for the purpose of paragraph (1).

Article 41 Relationships between Parents and Illegitimate Children

- (1) The formation of a relationship between a parent and an illegitimate child shall be governed by the law of the mother's national law (*lex patriae*) at the time of the child's birth. However, the formation of a parent and child relationship between the father and the child may also be governed by the law of the father's national law (*lex patriae*) at the time of the child's birth or by the law of the child's current habitual residence.
- (2) Recognition may also be governed by the national law (*lex patriae*) of the person recognizing

20) These are the provisions of the relevant acts of Korea. English translations are available on the Korea Ministry of Government Legislation website at <http://www.law.go.kr>

the child in addition to the laws set forth in paragraph (1).

- (3) In cases under paragraph (1) where the father has died before the child's birth, the father's national law (*lex patriae*) at the time of his death shall be deemed his national law (*lex patriae*); in cases under paragraph (2) where the person recognizing the child has died before the recognition, the national law (*lex patriae*) of the person at the time of his death shall be deemed his national law (*lex patriae*).

Nationality Act of Korea (韓國國籍法)

Article 2 (Acquisition of Nationality by Birth)

- (1) Any of the following persons shall be a national of the Republic of Korea at birth:
1. A person whose father or mother is a national of the Republic of Korea at the time of the person's birth;
 2. A person whose father was a national of the Republic of Korea at the time of the father's death, if the person's father died before the person's birth;
 3. A person who was born in the Republic of Korea, if both of the person's parents are unknown or have no nationality.
- (2) An abandoned child found in the Republic of Korea shall be deemed born in the Republic of Korea.

Article 3 (Attainment of Nationality by Acknowledgement)

- (1) Where a person, who is not a national of the Republic of Korea (hereinafter referred to as "alien"), is acknowledged by his/her father or mother who is a national of the Republic of Korea, and meets all the following requirements, the person may attain the nationality of the Republic of Korea by notifying the Minister of Justice thereof:
1. The alien shall be a minor under the Civil Act of the Republic of Korea;
 2. At the time of the alien's birth, his/her father or mother was to be a national of the Republic of Korea.
- (2) A person who makes a notification under paragraph (1) shall attain the nationality of the Republic of Korea at the time of notification.
- (3) Procedures for notification under paragraph (1) and other necessary matters shall be determined by Presidential Decree.

Civil Procedure Act of Korea (韓國民事訴訟法)

Article 217 (Recognition of Foreign Judgments)

- (1) A final and conclusive judgment which is no longer subject to ordinary review or any other decision acknowledged to have the same force (“final judgment, etc.”) of a foreign court shall be recognized, if all of the following requirements are met:
1. the foreign court had international jurisdiction to adjudicate the case according to the principles on jurisdiction under the law of the Republic of Korea or international treaty;
 2. a defeated defendant was served, by a lawful method, a written complaint or document corresponding thereto, and notification of date or written order allowing him/her sufficient time to defend (excluding cases of service by public notice or similar), or that he/she responded to the lawsuit even without having been served such documents;
 3. the recognition of such final judgment, etc. does not undermine good morals or other social order of the Republic of Korea in light of the contents of such final judgment, etc. and judicial procedures; and
 4. reciprocity exists, or the requirements for recognition of final judgment, etc. in the Republic of Korea and the foreign country to which the foreign court belongs are not far off balance and are not substantively different on critical points.
- (2) Courts of the Republic of Korea shall examine *ex officio* whether the conditions under paragraph 1 are satisfied.

Article 217-2 (Recognition of Final Judgment, etc. on Compensation of Damage)

- (1) Where final judgment, etc. on compensation of damage give rise to a result being markedly against the basic order of the law of Korea or international treaties entered into by Korea, a court shall not recognize the whole or part of the relevant final judgment.
- (2) Where a court examines the requirements under paragraph 1, it shall consider whether the scope of compensation of damage awarded by a foreign court comprises litigation costs and expenses, including fees for lawyers, and the scope thereof.

Civil Enforcement Act of Korea (韓國民事執行法)

Art. 26 (Compulsory Enforcement of Foreign Judgment)

- (1) A compulsory enforcement based upon a final and conclusive judgment which is no longer subject to ordinary review or any other decision acknowledged to have the same force (“final judgment, etc.”) of a foreign court may be conducted only if a court of the Republic of Korea has approved

such compulsory enforcement by means of an enforcement judgment.

- (2) A lawsuit seeking an enforcement judgment shall be under the jurisdiction of the district court located at the debtor's general forum, and if there exists no general forum, it shall be under the jurisdiction of the court having jurisdiction over a lawsuit against the debtor under Article 11 of the Civil Procedure Act.

Art. 27 (Enforcement Judgment)

- (1) An enforcement judgment shall be made without making any review as to whether the judgment is right or wrong.
- (2) A lawsuit seeking an enforcement judgment shall be dismissed if it falls under any of the following subparagraphs:
 1. When it has not been proved that the final judgment, etc. of a foreign court has become final, conclusive and no longer subject to ordinary review;
 2. When the final judgment, etc. of a foreign court fails to fulfill the conditions under Article 217 of the Civil Procedure Act.