

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES AU
STATUT DES ENFANTS, NOTAMMENT CELLES DÉCOULANT DES CONVENTIONS DE
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

établi par le Bureau Permanent

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**QUESTIONNAIRE ON THE PRIVATE INTERNATIONAL LAW ISSUES
SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM
INTERNATIONAL SURROGACY ARRANGEMENTS**

drawn up by the Permanent Bureau

*Document préliminaire No 3 d'avril 2013 à l'attention
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 3 of April 2013 for the attention
of the Council of April 2014 on General Affairs and Policy of the Conference*

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES
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INTRODUCTION

This Questionnaire is addressed to Members of the Hague Conference and other interested States in fulfilment of the mandate provided by the Council on General Affairs and Policy of the Conference ("the Council") in April 2012, following consideration of Preliminary Document No 10 of March 2012.¹ The Council requested that the Permanent Bureau "continue the current work under the 2011 Council mandate and further prepare and distribute a Questionnaire in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage or "filiation" more broadly. The Questionnaire shall seek views on the needs to be addressed and approaches to be taken. The Permanent Bureau is invited to present its final Report to the Council in 2014".²

A detailed chronology of the background to this project is available on the website of the Hague Conference < www.hcch.net >, under "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)".

This Questionnaire has **five parts**:

- **Part I** contains questions on the internal law concerning the establishment and contestation of legal parentage in Member and interested States;
- **Part II** looks to the private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage;
- **Part III** addresses the particular challenges concerning International Surrogacy Arrangements³ ("ISAs");
- **Part IV** considers the current bilateral or multilateral instruments in the field; and
- **Part V** asks for thoughts on possible future work in this area.

Please note that the Permanent Bureau has used the same terminology in this Questionnaire as that which was used in the **Glossary** annexed to Preliminary Document No 10 of March 2012. This Glossary is accessible on the webpage of the project, "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)" and then "2011 - 2013".

The Permanent Bureau invites responses to the Questionnaire (in either English or French) by no later than **1 August 2013** in order to allow the Permanent Bureau sufficient time to consider the responses and to prepare the final Report requested by Members for the Council of 2014. Answers should be sent by e-mail to < secretariat@hcch.net > with the following heading and indication in the subject field: "Questionnaire - Parentage / Surrogacy - [name of Member, State or territorial unit, where applicable]".

It is acknowledged that this is a detailed Questionnaire and that, due to the legal position in some States, it may not be possible for Members and interested States to respond to all of the questions. The Permanent Bureau is extremely grateful for any information which may be provided. It is also hoped that the detailed information in the responses to this Questionnaire may be of use to Members beyond this project: for example, where consideration is being given, now or in the future, to domestic legislation in any of the areas considered below.

¹ Prel. Doc. No 10 of March 2012, "A Preliminary Report on the issues arising from international surrogacy arrangements", drawn up by the Permanent Bureau. See also the earlier Prel. Doc. No 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", also drawn up by the Permanent Bureau.

² Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 17-20 April 2012, para. 21. The "2011 Council mandate" referred to therein can be found at paras 17 to 20 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 5-7 April 2011.

³ See the **Glossary** annexed to Prel. Doc. No 10 of March 2012 (see note 1) for the definition of the terms used in this paper.

Please note: the Permanent Bureau intends, except where expressly asked not to do so, to place replies to this Questionnaire on the website of the Hague Conference.

Identification

Name of State (or territorial unit, where applicable): **Germany**

Information for follow-up purposes

Name and title of contact person: Dr Rolf Wagner

Name of Authority / Office: Federal Ministry of Justice

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QUESTIONNAIRE

Note: wherever possible, please provide a copy of, or a web-link to, any legislation, rules or case law mentioned in your response, along with a translation into English or French.

Part I: Internal law concerning the establishment and contestation of legal parentage

A. Birth registration

1. Please indicate which authorities in your State are responsible for registering the birth of a child:

Registry offices (Standesämter), i.e. the authorities responsible under Land (federal state) law for civil status matters, are responsible for registering the birth of a child.

With a view to Question 31a, which is connected to this issue, the following should be added:

Notarisations undertaken by the registry office may be subject to judicial review. If the registry office refuses to carry out the official act, it can, upon the request of those involved or of the supervisory authority, be ordered by the court to do so (section 49 of the Civil Status Act (Personenstandsgesetz); no translation available). The provisions of the Act on Procedure in Family Matters and Non-Contentious Matters (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit) apply to the legal proceedings. Moreover, those involved can also apply for the registry entry to be rectified by the court.

2. Please briefly describe the procedure for birth registration in your State, indicating whether such registration is mandatory⁴ and providing details concerning any specific rules which must be complied with (e.g., within what timeframe must a birth be registered, who can register a birth and where must the birth be registered):

The birth of a child must be registered within one week with the registry office in whose area of jurisdiction the child was born (section 18 of the Civil Status Act; no translation available).

3. Please explain what proof (evidence), if any, of legal *maternity* is required by the authorities in your State in order to register a putative⁵ legal mother:

Please tick all which apply:

- a) Hospital birth record (stating the name of the woman who gave birth to the child)
- b) Sworn statement by the putative legal mother stating that she gave birth to the child
- c) Signed statement by the putative legal mother stating that she gave birth to the child
- d) DNA test to prove a genetic link between the putative legal mother and child
- e) Other: please explain

⁴ See Art. 7 of the United Nations *Convention on the Rights of the Child* ("UNCRC"), 20 November 1989, which states that, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

⁵ "Putative" means "generally considered or reputed to be" and, in this document, is taken to mean the woman or man *claiming or claimed* (where it is not the individual him or herself making the assertion) to be the legal mother or father, respectively, of the child.

4. Please explain what proof (evidence), if any, of legal *paternity* is required by the authorities in your State in order to register a putative legal father:

Please tick all which apply:

- a) Formal acknowledgement⁶ by the putative legal father
- b) Formal acknowledgement by the putative legal father, with the legal mother and / or the child's evidenced consent: please specify The mother's consent is necessary (see Question 11).
- c) Judicial decision (court order) establishing or confirming legal paternity
- d) Sworn statement by the putative legal father stating that he is the genetic father
- e) Signed statement by the putative legal father stating that he is the genetic father
- f) Signed agreement between the legal mother and putative legal father
- g) DNA test to prove a genetic link between the putative legal father and child
- h) Other: please explain
5. What are the legal consequences in the internal law of your State of registering persons in the State records⁷ as the parents of a child?
- a) Those persons are the legal parents of the child for all purposes, unless and until the record is contested, and all the legal consequences which flow from legal parentage in your State will automatically follow (e.g., duty to provide maintenance, inheritance rules, naming rules, etc.):
- b) Other: please explain Registration alone has no constitutive effect. Notarisation is merely equivalent to a (refutable) evidentiary effect (section 54 of the Civil Status Act; no translation available). For example, notarisations provide proof in the register of births of the birth and of the additional details and other information on the civil status of those persons to whom the entry relates.
6. Are there any penalties for failing to comply with the rules concerning birth registration in your State: for example, misrepresenting to the authorities who are / is the legal parent(s) of the child?

Anyone who does not report the birth of a child, does not report it correctly or completely, not in the required manner or not within the set time-limit commits a regulatory offence. The regulatory offence is punishable with a fine. In addition, the registry office may impose a coercive fine in order to induce the person obliged to register the birth to do so.

7. Is it possible to give birth anonymously in your State?

- Yes
- No

If so, please explain any rules which apply to such an anonymous birth and state what will appear on the child's birth record and / or birth certificate:⁸

⁶ In some States, this is called a "recognition" of paternity: the term "acknowledgement" is used in this document to avoid confusion with the private international law concept of "recognition". See further **Questions 11 et seq.** below.

⁷ It is acknowledged that there are different methods of recording births (and therefore legal parentage) across States, as well as different rules concerning matters such as when birth certificates will be issued, what information should be contained within the certificate and their constitutive value. Where applicable, please provide information concerning the rules in your State.

⁸ In this document, the "birth record" is taken to mean the information concerning the child's birth (including legal parentage) which is stored in the records of the relevant State authority (usually a registry). In contrast, the "birth certificate" is taken to mean the *extract* from this birth record which is usually given to the legal parent(s) to keep. In some States it may be that the information contained within the birth record is comprehensive (e.g., if the child has been adopted, the birth record will identify the birth parent(s)), whereas the birth certificate may provide only a limited part of this information. See also *ibid.*

There is no rule which permits an anonymous birth. Nevertheless, anonymous births do occur in practice. A law permitting a confidential birth (vertrauliche Geburt) will enter into force on 1 May 2014.

B. Establishment of legal parentage

8. Who, upon the birth of a child, is the legal mother *by operation of law* in your State (*i.e.*, with no need for the woman to take any steps to establish her legal maternity)?
- The woman who gives birth to the child
 - The genetic mother (*i.e.*, the woman whose gamete (egg) created the child)
 - There is no legal mother *by operation of law*: please explain
 - Other: please explain
9. Who, upon the birth of a child, is the legal father *by operation of law* in your State (*i.e.*, with no need for the man to take any steps to establish his legal paternity)?
- The husband of the woman who gave birth is *presumed* to be the legal father
 - The male partner of the woman who gave birth is *presumed* to be the legal father – please provide any conditions (*e.g.*, the couple must be cohabiting, etc.)
 - The genetic father (*i.e.*, the man whose gamete (sperm) created the child)
 - There is no legal father *by operation of law*: please explain
 - Other: please explain

If legal presumptions operate in your State, please specify in what circumstances, if any, it is possible to “rebut” these presumptions: The husband is not regarded as the child’s father if the child is born while a divorce petition is pending at court and a third person acknowledges paternity at the latest before the end of one year after the decree granting the divorce petition is declared final and absolute (section 1599(2), first sentence, of the German Civil Code (Bürgerliches Gesetzbuch, BGB); available in English at: http://www.gesetze-im-internet.de/englisch_bgb/index.html).

10. a) Is it possible in your State for a non-contentious (*i.e.*, unchallenged) application to be made to the relevant State authorities for a decision (sometimes called a “declaration”) establishing or confirming the legal parentage of a child?
- Yes – go to **Question 10 b**).
 - No – go to **Question 11**.
- b) Please explain to which State authorities such an application should be made:
- The authority responsible for birth registration (see **Question 1** above)
 - The judicial authorities (*i.e.*, the courts): please specify
 - Other State administrative authorities: please specify
 - Other: please explain
- c) Please explain who may bring such an application:
- Only the individuals currently considered to be the legal mother and / or father and / or the child
 - Any person claiming to be the legal mother and / or father of a child
 - Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question:
 - Any person
 - Other: please explain
- d) Is there a timeframe within which such an application must be made?

- Yes, please specify:
 No
 In certain situations: please explain

11. Is it possible in your State for a putative legal father to “voluntarily acknowledge”⁹ his legal paternity (if his legal paternity has not arisen by operation of law – see **Question 9** above)?

- Yes
 No

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic father, the man must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of the mother and / or child are required:

The child’s father can also be a man who effectually acknowledges paternity. Acknowledgement of paternity becomes effective on account of the man’s declaration, the mother’s approval and, if the mother does not have the duty of care and custody in that regard, also the child’s approval; acknowledgement and approval must be publicly recorded. An acknowledgement is only possible if no other man holds legal paternity (see Question 9). Whether the man is actually the child’s biological father or not is irrelevant as regards the acknowledgement of paternity (*cf.* sections 1592 et seqq. of the German Civil Code; available in English at: http://www.gesetze-im-internet.de/englisch_bgb/index.html).

In particular, please state whether it is possible for an individual to acknowledge legal paternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

The acknowledgement and approval may also be effected abroad before a German consular official (in which case account must also be taken of the Consular Act (Konsulargesetz)).

12. Is it possible in your State for a putative legal mother to “voluntarily acknowledge” her legal maternity?

- Yes
 No
 Not applicable – legal maternity always arises by operation of law (see **Question 8** above).

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic mother, the woman must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of any others is / are required:

In particular, please state whether it is possible for an individual to acknowledge legal maternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

⁹ See note 6 above.

13. Please explain the legal consequences in your State of a “voluntary acknowledgement” of legal parentage:

- a) Once the acknowledgement is authenticated by the State authorities, the author of the acknowledgement is considered a legal parent of the child for all purposes
- b) The acknowledgement is merely a declaration by the author that he / she is a legal parent and says nothing of the State’s acceptance of that issue
- c) Other: please specify

14. Is it possible for legal parentage to be established by agreement between the putative parents?

- Yes
- No

If so, please explain the procedure which must be undertaken and specify any restrictions which operate: The question cannot unequivocally be answered either in the affirmative or negative in Germany’s case. Rather, the mother is always the woman who gave birth to the child; a man may become the father if he effectually acknowledges paternity and, in particular, the mother approves of that acknowledgement (cf. response to Question 11; sections 1591 et seqq. of the German Civil Code, which is available in English at: http://www.gesetze-im-internet.de/englisch_bgb/index.html).

15. Is it possible in your State for two persons of the same-sex to be the legal parents of a child?

- Yes
- No

If so, please explain the legal mechanisms available in your State which enable this. Please tick all which apply and provide a brief explanation of the rule(s) and procedure. This may arise by:

- a) Operation of law:
- b) Order of the court or other State authorities:
- c) Adoption:
- d) Other:

C. Establishment of legal parentage where assisted reproductive technology (“ART”)¹⁰ has been used¹¹

16. Is ART permitted in your State?

- Yes, all forms of ART are permitted
- Yes, but there are certain restrictions on the services available and who may access these services: please specify See response to Question 17 below
- No, all forms of ART are completely prohibited – **please go to Section D.**
- Other: please explain

¹⁰ In this document, “assisted reproductive technology” (“ART”) is used in a broad sense to refer to any method used to achieve conception which involves artificial or partially artificial means and which is undertaken by a medical / health clinic or institution: *e.g.*, two of the most common methods are artificial insemination and in-vitro fertilisation. Donated gametes (egg and sperm) may be used but will not always be necessary. In this document, ART does not refer to “do-it-yourself” or “DIY” methods of non-procreative conception: *i.e.*, where medical third parties are not involved in the procedure.

¹¹ Please note: surrogacy arrangements are dealt with separately in **Section D** below.

17. Is there regulation of the use of ART in your State?

Yes, legislation regulates the use of ART: please briefly explain

ART is regulated in the Embryo Protection Act (Embryonenschutzgesetz) of 13 December 1990. According to Section 1 of the Act, certain acts of improper use of reproductive technology are punishable with up to three years' imprisonment or a fine, namely

- Transferring to a woman an unfertilized egg cell produced by another woman (subsection 1 no. 1),
- The attempt to artificially inseminate an egg cell for any purpose other than achieving pregnancy in the woman from whom the egg cell originated (subsection 1 no. 2),
- The attempt to transfer within one treatment cycle more than three embryos to a woman (subsection 1 no. 3),
- The attempt to fertilize by gamete intrafallopian transfer more than three egg cells within one treatment cycle (subsection 1 no. 4),
- The attempt to fertilize more egg cells from a woman than may be transferred to her within one treatment cycle (subsection 1 no. 5),
- The removal of an embryo from a woman before completion of implantation in the uterus in order to transfer it to another woman or to use it for another purpose not serving its preservation (subsection 1 no. 6),
- The attempt to carry out the artificial insemination of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo to her (subsection 1 no. 7),
- The artificial penetration of a human egg cell by a human sperm cell or the transfer of a human sperm cell into a human egg cell artificially without the intention to achieve pregnancy in a woman from whom the egg cell originated (subsection 2).

In the cases referred to in subsection 1, nos 1, 2 and 6, the woman from whom the egg cell or embryo originated and the woman into whom the egg cell or embryo will be transferred, as well as in the cases referred to in Section 1, no. 7, the surrogate mother and the person who wishes to take long-term care of the child, will not be punished (subsection 3).

According to Section 4 of the Act, certain acts of unauthorised fertilization, unauthorised embryo transfer and artificial insemination after death are also punishable with up to three years' imprisonment or a fine:

- The attempt to artificially inseminate an egg cell without the woman whose egg cell is to be fertilized and the man whose sperm cell will be used for fertilization having given their consent (subsection 1 no. 1),
- The attempt to transfer an embryo into an woman without her consent (subsection 1 no. 2), or
- The intentional artificial insemination of an egg cell with the sperm of a man after his death (subsection 1 no. 3).

In the case referred to in subsection 1 no. 3, the woman who was artificially inseminated will not be punished (subsection 2).

According to Section 9 of this Act, only a physician may carry out artificial insemination, transfer a human embryo into a woman, preserve a human embryo or human egg cell which has already been penetrated by, or has artificially captured, a human sperm cell.

Yes, there are rules or "codes of practice" concerning the use of ART which emanate from the medical regulatory bodies: please briefly explain The German Medical Association also has Guidelines on Assisted Reproduction (of 17 February

2006) which elaborate the codes of practice for carrying out ART under the Embryo Protection Act.

- No, there are no rules at all – **go to Question 19**
 Other: please explain

18. If ART is regulated in your State, please state whether the legislation or rules specify the following matters (please tick all which apply and provide a brief explanation, where applicable):

- a) Who may access ART services (e.g., relationship status; age or health requirements; nationality / residency requirements, etc.): Under the German Medical Association's Guidelines on Assisted Reproduction, there are certain restrictions on the marital status of the mother and the father involved. In general, ART may only be carried out if the couple is married. If the woman who wishes ART is unmarried, ART may only be carried out in certain limited circumstances.
- b) Who may perform ART services: According to Section 9 of the Embryo Protection Act, only a physician may carry out ART.
- c) The regulation of medical or other institutions which perform ART services (e.g., the licensing of clinics or hospitals): Medical or other institutions which perform certain ART-related activities, such as the procurement and relevant laboratory tests, processing, preservation, testing and storage of egg and sperm cells, as well as the distribution of sperm cells for heterologous insemination, require a license in accordance with the German Medicines Act.
- d) Which ART services may be performed: Under the requirements of the Embryo Protection Act, all ART services may be performed. The German Medical Association's Guidelines on Assisted Reproduction contain specific requirements regarding certain techniques.
- e) Whether egg donation is permitted and, if so, under which conditions: Egg donation is prohibited under the Embryo Protection Act.
- f) Whether sperm donation is permitted and, if so, under which conditions: Sperm donation is permitted under the Embryo Protection Act. According to Section 4 of the Act, the man whose sperm cell is to be used for the artificial insemination must have given his consent. The artificial insemination of an egg cell with the sperm of a man after his death is prohibited. The Transplantation Act and the German Medical Association's Guidelines on Assisted Reproduction contain certain additional requirements, including on quality and safety issues.
- g) The costs of ART (including the amount paid to any gamete donors): The costs of ART are dependent on the methods used. ART involves costs between 200 and 3,400 euros per treatment. Statutory health insurance companies pay 50% of the costs in certain circumstances for up to three ART treatments, including the costs of medication. The statutory health insurance companies may allow for additional benefits in their statutes.
- h) The anonymity of gamete donors:
- i) The right of the child to know his / her genetic or birth origins:
- j) The legal parentage of any child born as a result of ART (see also **Questions 19 to 22** below)
- k) Other: please explain

19. Please explain the consequences of ART for legal *maternity* arising *by operation of law*:

- a) The woman giving birth to the child will always be considered the legal mother of the child, irrespective of any ART which has led to the birth
- b) Other: please specify

Please explain whether the above position results from legislation, rules, case law or other source(s) of law: According to section 1591 of the German Civil Code, the

mother is (always) the woman who gave birth to the child (the English translation of the German Civil Code is available at: http://www.gesetze-im-internet.de/englisch_bgb/index.html).

20. Please explain the consequences of ART for legal *paternity* arising *by operation of law*:

Please tick all boxes which apply:

- a) The husband of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment: His consent is not required; however, the husband may challenge his paternity if he did not consent to the artificial insemination.
- b) The male partner of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
- c) The genetic father will always be the legal father:
- d) Other: please explain If the mother is not married, the father may also be that man who has acknowledged paternity of the child (cf. response to Question 11); if he consented to the artificial insemination, he cannot challenge paternity.

Please explain whether the above position results from legislation, rules, case law or other source(s) of law: In such cases, as in other cases, the provisions set out in sections 1592 et seqq. of the German Civil Code apply to paternity; the specific provision in section 1600(5) of the German Civil Code applies to challenging paternity. The English translation of the German Civil Code is available at: http://www.gesetze-im-internet.de/englisch_bgb/index.html.

21. Please explain whether gamete donors are, in any situations, considered the legal parent(s) of a child born as a result of ART:

The mother of the child is always the woman who gave birth to the child; it is irrelevant who donated the ovum. The sperm donor is the child's father if he is married to the mother, he has effectually acknowledged paternity or his paternity was established by a court.

22. If your State permits same-sex couples to access ART services, please specify the consequences concerning legal parentage for any child born to a same-sex couple who have used ART to conceive a child:

In so far as same-sex couples are permitted to have children by means of sperm donation (cf. response to Question 25), no specific rules apply; that means that the mother is the woman who gave birth to the child; the mother's civil partner must adopt the child in order to become its parent.

23. Is information available concerning how many ART procedures are undertaken in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information The German IVF Registry (DIR) collects data on all ART procedures and publishes annual reports. In 2011 a total of 49,696 women were treated by means of extracorporeal fertilization (Assisted Reproductive Technique, ART) in 80,943 cycles. In the same year, the clinical pregnancy rate for IVF was 30.2% and for ICSI 28.3%.

In 2010, where ovarian function was intact, data show that a birth was documented for 23.7% of all embryo transfers.

For further details see: <http://www.deutsches-ivf-register.de/pdf-downloads/dirjahrbuch2011-e.pdf>

No

Other: please explain

D. Surrogacy arrangements

Regulation of surrogacy

24. Does your State permit surrogacy arrangements?

- a) Yes, *all* forms of surrogacy arrangements are permitted:
- i. As a result of express legislation or rules: please specify
 - ii. By default, because surrogacy is unregulated in internal law.
Go to **Question 26**.
- b) No, any form of surrogacy is expressly prohibited by law: please specify, including any sanctions for breach of this prohibition:

According to the Embryo Protection Act, all forms of surrogacy are prohibited.

According to Section 1 of this Act, the following are punishable with up to three years' imprisonment or a fine:

- The transferral to a woman of an unfertilized egg cell produced by another woman (subsection 1 no. 1),
- The attempt to artificially inseminate an egg cell for any purpose other than achieving pregnancy in the woman from whom the egg cell originated (subsection 1 no. 2),
- The removal of an embryo from a woman before completion of implantation in the uterus in order to transfer it to another woman (subsection 1 no. 6),
- The attempt to carry out artificial insemination in a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her (subsection 1 no. 7),
- The artificial penetration of a human egg cell by a human sperm cell, or the transfer of a human sperm cell into a human egg cell artificially, without the intention to achieve pregnancy in the woman from whom the egg cell originated (subsection 2).

In the cases referred to in subsection 1, nos 1, 2 and 6, the woman from whom the egg cell or embryo originated and the woman into whom the egg cell or embryo will be transferred, and, in the case referred to in subsection 1, no. 7, the surrogate mother and the person who wishes to take long-term care of the child will not be punished (subsection 3).

Go to **Question 26**.

- c) It depends upon the nature of surrogacy arrangement (*e.g.*, commercial surrogacy arrangements are prohibited): please specify
- d) Other: please specify

Please provide any clarification, where necessary:

25. If your State has legislation or rules permitting certain or all forms of surrogacy arrangements:

a) Are the parties to the surrogacy arrangement required to obtain State approval of the arrangement *prior* to conception?

- Yes, pre-approval by the relevant State authorities is required. Please explain the procedure:
- No, pre-approval is not required – the rules only regulate legal parentage following the birth of the child. Please explain the procedure:
- Other: please specify

b) Please state whether the following aspects of the surrogacy arrangement are regulated in the rules / legislation:

Please tick all which apply:

- i. Who may be intending parents¹² to an arrangement, including:
- a. Nationality, domicile or residency requirements:¹³
please specify
- b. Marital or other relationship status:
- c. Age requirements:
- d. Health requirements:
- e. Psycho-social requirements:
- f. Other:
- ii. Who may be a surrogate mother, including:
- a. Nationality, domicile or residency requirements:¹⁴
please specify:
- b. Marital or other relationship status:
- c. Age requirements:
- d. Health requirements:
- e. Psycho-social requirements:
- f. The surrogate mother must already have her own children:
- g. Other:
- iii. Which types of surrogacy arrangements are permitted, *e.g.*, traditional and / or gestational,¹⁵ etc.: please specify
- iv. Which medical institutions or clinics may facilitate a surrogacy arrangement (where medical intervention is necessary for the type of surrogacy arrangement being undertaken) and the level of financial remuneration which may be paid for these services: please specify
- v. Which other bodies or persons may facilitate a surrogacy arrangement (*e.g.*, by acting as an intermediary and undertaking tasks such as advertising for surrogate mothers, “matching” surrogate mothers with intending parents, organising certain aspects of the arrangements for the intending parents, etc.) and whether such bodies or persons may receive financial compensation for their services: please specify

¹² Please note that, for simplicity, this document always refers to intending parents in the plural form. However, it is understood that, in some States and in certain circumstances, single persons may enter into a surrogacy arrangement. Please specify this, where relevant, in any response.

¹³ See **Parts II** and **III** below for questions concerning the private international law rules regarding legal parentage and international surrogacy arrangements, respectively.

¹⁴ See **Parts II** and **III** below for questions on the private international law rules concerning legal parentage and international surrogacy arrangements, respectively.

¹⁵ See the **Glossary** for the definition of the terms used in this paper.

- vi. Whether financial remuneration can be paid to the surrogate mother:
 - a. No financial remuneration at all is permitted
 - b. Only reasonable expenses may be paid: in which case please state whether the legislation or rules define what are such "reasonable expenses":
 - c. Compensation beyond reasonable expenses is permitted: please specify what exactly is permitted:
 - vii. Whether the surrogacy arrangement is contractually enforceable: please specify
 - viii. Who may make decisions concerning the pregnancy (*e.g.*, whether an abortion should be undertaken in certain situations, what medical treatment should be undertaken if problems arise, etc.): please specify
 - ix. The legal parentage of the child following his / her birth (see further **Questions 26 to 30** below):
 - x. Other: please specify
- c) Please explain any legal consequences, both criminal (*e.g.*, penal sanctions) and civil (*e.g.*, for the legal parentage of the child), if the requirements set down in the legislation or rules are not complied with:
- d) Please provide any additional information you think necessary concerning the nature of the regulation of surrogacy in your State:

Surrogacy and legal parentage

26. Upon the birth of a child following a surrogacy arrangement, who is / are the legal parent(s) *by operation of law* (*i.e.*, without any further steps being taken by any individuals) according to the internal law of your State?

Please explain, including whether this results from legislation, case law or other source(s) of law: Surrogacy is not permissible in Germany. According to section 1591 of the German Civil Code, the mother is always the woman who gave birth to the child; the father is the mother's husband or that man who has acknowledged paternity (section 1592 nos 1 and 2 of the German Civil Code; available in English at: http://www.gesetze-im-internet.de/englisch_bgb/index.html).

(N.B.: Given that surrogacy is not permissible in Germany, no answers can be provided to Questions 27 to 29.)

27. Where necessary, are there any legal mechanisms in your State to enable intending parents to establish their legal parentage?

Please tick all which apply:

- a) Yes, prior to the birth the intending parents can seek a court order declaring that they will be the parents of the child born to a surrogacy arrangement (a "pre-birth order").

Please specify any legal requirements to obtain such an order (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- b) Yes, *following* the birth the intending parents can seek a court order transferring legal parentage to them (in some States, known as a "parental order" or "parentage order").

Please specify any legal requirements to obtain such a transfer of legal parentage (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- c) No
- d) Other: please specify
- e) Such mechanisms are unnecessary – the surrogacy contract is sufficient to establish the legal parentage of the intending parents.
- f) Such mechanisms are unnecessary – the intending parents will be the legal parents upon the birth of the child by operation of law: see the response to **Question 26** above.

28. Where a surrogacy arrangement has been undertaken in your State, will the fact of the surrogacy arrangement be visible on the child's birth record and / or certificate?

- Yes: please describe exactly what will be on the record and / or certificate
- No: please explain

29. Is information available concerning how many surrogacy arrangements take place in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information
- No
- Other: please explain

30. Are you aware of any illegal practices in your State concerning surrogacy arrangements?

- Yes – please state the practices of which you are aware and, if possible, how frequently they are occurring:
- No
- Other: please explain Some parents travel abroad to have a child by a surrogate mother; the question then arises of whether the intended parents' parentage, which is based on a foreign law, will be recognised in Germany or not; the courts required to take a decision on this matter have issued quite varied rulings; the Federal Court of Justice (Bundesgerichtshof) has issued no consistent decisions on the matter (cf. responses in Part II, especially Question 49).

E. Contestation of legal parentage

31. Which authority(ies) in your State may determine a dispute concerning legal parentage?

- a) The authority responsible for birth registration (see **Question 1** above)
- b) The judicial authorities (*i.e.*, the courts): please specify The family courts are responsible for taking decisions pertaining to the law of descent.
- c) Other State administrative authorities: please specify
- d) Other: please explain

32. Who may bring an action to challenge legal parentage?

- a) Only the individuals currently considered to be the legal mother and / or father and / or the child
- b) Any person claiming to be the legal mother and / or father of a child

- c) Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question
- d) Any person
- e) Other: please explain Only paternity may be challenged; maternity cannot be challenged. Those persons or authorities referred to in section 1600 of the German Civil Code may challenge paternity (an English translation of the German Civil Code is available at: http://www.gesetze-im-internet.de/englisch_bgb/index.html). They include:
- (aa) Individuals currently considered to be the legal mother and/or father and/or the child
- (bb) Any person claiming to be the legal father of a child: The man must in addition declare by affidavit that he had sexual intercourse with the mother during the conception period; there must be no social and family relationship between the child and its legal father;
- (cc) The competent authority is authorised to challenge the paternity of that man who acknowledged paternity; there must be no social and family relationship between the child and its father.
33. Is there a timeframe within which legal parentage must be challenged (*i.e.*, after which time, any challenge to legal parentage is effectively barred)?
- Yes, please specify: The period within which legal parentage must be challenged is two years, beginning from the point at which the man learns of the circumstances which speak against his being the legal father; the time limit within which an authority must challenge legal parentage is one year; if the child's representative has not challenged paternity, the child can do so itself once he or she reaches the age of majority (cf. section 1600b of the German Civil Code, which is available in English at: http://www.gesetze-im-internet.de/englisch_bgb/index.html).
- No
- In certain situations: please explain
34. On what grounds may legal *maternity* be challenged before the authorities in your State?
- a) Only on the basis that the "mother" did not, in fact, give birth to the child
- b) Only on the basis that the "mother" is not, in fact, the genetic mother of the child (*i.e.*, the woman from whom the gamete (egg) came)
- c) Other: please explain
35. On what grounds may legal *paternity* be challenged before the authorities in your State?
- a) Only on the basis that the "father" is not, in fact, the genetic father of the child (*i.e.*, the man from whom the gamete (sperm) came)
- b) Other: please explain
36. What are the legal consequences of a successful challenge concerning legal parentage?
- a) The decision of the State authorities concerning legal parentage is binding *erga omnes* (*i.e.*, on all persons, for all purposes)
- b) The decision of the State authorities will only be binding for limited, specific purposes: please explain
- c) It depends upon the context in which the challenge has been made (*e.g.*, if in the context of a maintenance claim, it will be binding only as concerns the payment of maintenance): please explain
- d) Other: please explain

37. What happens to a child's birth record and / or birth certificate when legal parentage is successfully challenged?
- a) The birth record and / or certificate is revised and the old record and / or certificate will be permanently deleted
 - b) The birth record and / or certificate is amended but the original record and / or certificate is retained
 - c) Other: please explain A subsequent amendment is made to the birth entry and a new birth certificate issued.

F. The acquisition of nationality by children

38. How may a child acquire the nationality of your State?

Please tick all which apply:

- a) By birth within the territory of the State
- b) By "descent", where one or both of his / her *legal* parents is / are a national of the State: please explain which law, in this context, will apply to the question of who is / are the child's *legal* parents for the purposes of determining nationality: See response to Question 61 v)
- c) By "descent", where one or both of his / her *genetic* parents is / are a national of the State: please explain how the genetic link must be evidenced:
- d) If the child would otherwise be "stateless" (*i.e.*, without the nationality of any other State):¹⁶ please specify
- e) Other: please specify

G. Legal developments

39. Please state whether the law in your State concerning the matters covered in **Part I** above (*i.e.*, birth registration, establishment and contestation of legal parentage, ART, surrogacy and nationality concerning children) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before parliament or before the courts) to change the law in future:

No legal changes have been made.

Especially gay and lesbian groups are calling for co-maternity and surrogacy to be made permissible; further, calls are being made for a rule to be introduced on sperm donation.

In its ruling of 15 July 2013 (file no. XII ZR 49/11) the Federal Court of Justice held that a sperm donor (the "biological father") may also in certain cases challenge another man's legal paternity, since "sexual intercourse" (Beiwohnung) did not rule out paternity arising from a sperm donation being challenged ("sexual intercourse" is always a necessary requirement, cf. response to Question 32 b)).

40. Please provide any other information you consider relevant concerning cases (reported, or otherwise) or other developments which have occurred in your State in relation to the Questions appearing in **Part I** above.

¹⁶ As to which, see note 4 above, citing Art. 7 of the UNCRC.

In its decision of 6 February 2013 (file no. I-14 U 7/12) Hamm Higher Regional Court granted a child conceived by means of heterologous insemination the right to be informed of the sperm donor's identity against the attending physician.

In its judgment of 3 November 2011 in the case *S. H. and Others v. Austria* (application no. 57813/00), the Grand Chamber of the European Court of Human Rights held, by a majority, that the Austrian ban on using sperm and ova donation for in vitro fertilization was not in breach of the Convention. The case concerned a complaint by two married couples from Austria about the ban on medically-assisted procreation techniques they wished to use.

Part II: Private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage

A. PIL and co-operation rules concerning birth registration

41. Please explain when the relevant authorities in your State will assume (international) jurisdiction to register the birth of a child:

- a) Only when the child is born on the territory of the State
- b) When at least one of the putative *legal* parents is a national of the State, regardless of the place of birth of the child
- c) When at least one of the putative *genetic* parents is a national of the State, regardless of the place of birth of the child
- d) When the child is considered a national of the State,¹⁷ regardless of the place of birth of the child
- e) Other, please specify: Section 36(1) of the Civil Status Act sets out the following rule as regards children born abroad:

Where a German national is born abroad (...), the vital event may be notarised in the register of births upon application; the time of the submission of the application is decisive as regards their holding German nationality (...). The same applies to stateless persons, homeless foreigners and foreign refugees within the meaning of the Geneva Convention relating to the Status of Refugees with a domestic residence.

42. When registering a child's birth, which law will the relevant authorities apply to the question of who is / are the legal parent(s) of the child *by operation of law*?¹⁸

- a) The *lex fori* (*i.e.*, the internal law of your State) is always applied by the relevant authorities
- b) If the situation has foreign elements (*e.g.*, the putative parent(s) or child are foreign nationals, or the child was born overseas, etc.), foreign law may, or must, be applied to this question. Please specify the applicable law rules: The law applicable to the establishment of paternity is mainly set out in Articles 19, 20 and 23 of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche). The relevant conflict-of-law rules are as follows:

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

¹⁷ As to which, see **Question 38** above.

¹⁸ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identify in **Question 45** below.

mother is married, the descent can also be determined by the law that governs the general effects of the marriage under article 14 subarticle 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) If the the parents are not married to each other, the obligations of the father towards the mother because of the pregnancy are governed by the law of the country of the mothers habitual residence.

Art. 20 (Challenge of the descent)

The descent can be challenged according to any one of the laws, that govern its preconditions. The child, in any event, can challenge the descent under the law of his or her habitual residence.

Artikel 23 (Consent)

The necessity and the granting of the consent of the child, and of a person who is related to the child under family law, to a declaration of descent, to conferring a name, or to an adoption are additionally governed by the law of the country of which the child is a national. Where the best interest of the child so requires, German law shall be applied instead.

It should be noted that

- The different connecting factors listed in Article 19 para. 1 of the Introductory Act to the Civil Code are not applied in a "cascade" but are of equal rank. If – pursuant to Article 19 - the application of more than one legal system can be considered, the applicable law is chiefly determined by what serves the best interests of the child;
- Renvoi is in principle not ruled out (Article 4 of the Introductory Act to the Civil Code); however, by way of exception renvoi is ruled out where it would jeopardise the objective of the conflict-of-law rule whose alternative connecting factors aim to serve the best interests of the child.
- The application of foreign law is subject to the public policy clause (Article 6 of the Introductory Act to the Civil Code);
- The law applicable to the form of legal acts (e.g. a declaration of descent) is set out in Article 11 of the Introductory Act to the Civil Code. Article 11 para. 1 of the Introductory Act to the Civil Code reads as follows: "A legal act is formally valid if it satisfies the formal requirements of the law which is applicable to the legal relationship forming the subject matter of the legal act, or the law of the country in which the act is performed, are observed."

(An English translation of the Introductory Act to the Civil Code is available online at: http://www.gesetze-im-internet.de/englisch_bgbeg/)

c) Other: please specify

43. Have your State authorities ever encountered difficulties resulting from a child's birth being registered in two (or more) States (e.g., the child is registered in your State as the State of birth, and in the State of the parents' nationality and the registers conflict)?

Yes: please explain the circumstances of the case(s) and the difficulties which arose: A foreign birth certificate designated a father who was not the father under German law.

No

44. Are there any bilateral or multilateral¹⁹ agreements in force between your State and any other State such that:

a. When a child's birth is registered which involves foreign elements (e.g., one or more foreign national parents), this information is communicated to the authorities in the other relevant State?

Yes: please specify Bilateral agreements are in force with Italy (exchange of notes of 31 May 1937, Reich Ministerial Gazette (Reichsministerialblatt), p. 1138), Austria (Agreement of 18 Nov. 1980, Federal Law Gazette (BGBl) 1981 II, p. 1050), Switzerland (Agreement of 4 Nov. 1985, Federal Law Gazette 1988 II, p. 126) and Luxembourg (Agreement of 3 June 1982, Federal Law Gazette 1983 II, p. 698).

There are no formal agreements but this may happen in practice: please explain

No

b. When there are changes to a child's legal parentage *subsequent to* birth registration as a result of steps taken in your State (e.g., due to a subsequent voluntary acknowledgement of paternity in your State, or a contestation of legal parentage, etc.), this information is communicated to the relevant authorities in the State of the child's birth (where this is not your State)?

Yes: please specify Bilateral agreements are in force with Italy (exchange of notes of 31 May 1937, Reich Ministerial Gazette (Reichsministerialblatt), p. 1138), Austria (Agreement of 18 Nov. 1980, Federal Law Gazette (BGBl) 1981 II, p. 1050), Switzerland (Agreement of 4 Nov. 1985, Federal Law Gazette 1988 II, p. 126) and Luxembourg (Agreement of 3 June 1982, Federal Law Gazette 1983 II, p. 698).

There are no formal agreements but this may happen in practice: please explain

No

B. PIL rules concerning the establishment of legal parentage

By operation of law or agreement

45. Does your State have rules specifying which law is applicable to the establishment of legal parentage by operation of law?²⁰

Yes: please specify see Question 42

No: the *lex fori* (i.e., the internal law of the State) will always be applied where a question of legal parentage arises

46. Does your State have rules specifying which law is applicable to the establishment of legal parentage by agreement?

Yes: please specify

No: the *lex fori* (i.e., the internal law of the State) will always be applied where a question of legal parentage arises

Not applicable: it is not possible to establish legal parentage by agreement

By voluntary acknowledgement

¹⁹ E.g., the *Conventions on the international exchange of information relating to civil status* of 4 September 1958 and of 12 September 1997 or the *Convention on the recognition and updating of civil status booklet*, 5 September 1990, all adopted under the aegis of the International Commission on Civil Status (< www.ciecl.org >).

²⁰ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identified in **Question 42** above.

47. Please explain in which circumstances your State authorities will consider they have (international) jurisdiction to accept a voluntary acknowledgement of legal parentage by a putative parent:

Please tick all which apply:

- a) When the child is (habitually) resident in your State: please specify
- b) When the child is a national of your State
- c) When the individual acknowledging the child is (habitually) resident in your State: please specify
- d) When the individual acknowledging the child is a national of your State
- e) Other: please specify Under German law the question of international jurisdiction does not arise in the context of the voluntary acknowledgement of legal parentage as such acknowledgement does not have to be made before a competent judicial or administrative authority. The acknowledgment and the required approval (of the mother and – as the case may be – the child) only have to be publicly recorded (section 1597(1) of the German Civil Code, which is available in English at: www.gesetze-im-internet.de/englisch_bgb/).

By contrast, the question of international jurisdiction may arise when paternity has to be judicially established (see section 1592(3) of the German Civil Code, available in English at: www.gesetze-im-internet.de/englisch_bgb/). In such cases, German courts have international jurisdiction when either the child, the mother or the (alleged) father is a German national or habitually resident in Germany (see Question 53, section 100 of the Act on Procedure in Family Matters and Non-contentious Matters – no translation available).

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii. At the time of the acknowledgement, or
- iii. At another time: please specify

48. Which law will be applied to determine: a) the formal validity of the acknowledgement; and b) the substantive validity of the acknowledgement, *i.e.*, whether it validly establishes legal parentage?

Please tick all which apply:

- a) For the formal validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify
 - vi. Other: please specify See Question 42 – the above-mentioned conflict-of-law rules govern questions of formal validity as well as questions of substantive validity.
- b) For the substantive validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify

- vi. Other: please specify See Question 42 – the above-mentioned conflict-of-law rules govern questions of formal validity as well as questions of substantive validity.

Please state whether, in relation to a) and / or b), one or more of these laws will be applied (possibly in a “cascade”), with a view to favouring the establishment of legal parentage: In principle yes; see question 42. However, the different laws which might be applicable pursuant to Article 19 of the Introductory Act to the Civil Code are not applied in a “cascade” but are of equal rank. Which law applies in a specific case depends in particular on the best interests of the child.

Please specify, in relation to a) and b), whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled: (1) at the time of the child’s birth; (2) at the time of the acknowledgement; or (3) at another time (in which case, please specify):

- a)
b)

As the connecting factor (e.g. the child's habitual residence, see Article 19 para. 1 of the Introductory Act to the Civil Code) might change, the applicable law might change as well. In such cases it is up to the new applicable law to establish whether the legal status acquired under the former applicable law continues to exist.

C. PIL rules concerning the recognition of legal parentage established abroad

Birth certificates

49. Please explain when, if ever, a birth certificate drawn up in another State will be recognised in your State *as validly establishing the legal parentage of those persons recorded within it (i.e., the recognition of the content of the certificate)*.²¹

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign birth certificate will be recognised;
b) the procedure which must be undertaken for recognition;
c) any conditions for recognition (*e.g.*, the birth certificate must be authenticated by way of legalisation or apostille²²); and
d) any grounds of *non*-recognition.

Under German law, birth certificates drawn up in another State are in principle not recognized as validly establishing the legal parentage of those persons recorded on them. Instead, the authority before which the question of legal parentage arises (e.g. a German registry office or court) applies the law which is applicable according to German private international law in order to examine the parentage of the child in the specific case.

It should be noted that the application of foreign law is subject to the public policy clause (Article 6 of the Introductory Act to the Civil Code). That means that even if the substantive law of the state in which the birth certificate was drawn up is to be applied (according to German conflict-of-law rules) the persons recorded on the foreign birth certificate are – from a German perspective – not always considered the legal parents.

²¹ It is understood that, from time to time, this issue may arise in the course of other proceedings (*e.g.*, proceedings concerning succession or maintenance).

²² See, in this regard, the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, available on the Hague Conference website at < www.hcch.net > under “Apostille Section”.

According to the International Commission on Civil Status (ICCS) Convention No. 16, one special case applies to multilingual extracts from civil status records. According to Article 8, second sentence, of the ICCS Convention No. 16, multilingual extracts are equal to extracts issued in accordance with the rules of domestic law in force in the state from which they emanate (re the evidentiary effect of domestic civil registration documents, cf. response to Question 31 d).

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign birth certificate, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Article 6 of the Introductory Act to the Civil Code reads as follows:

"A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights."

Article 6 of the Introductory Act to the German Civil Code presupposes that the application of a foreign law in a specific case leads to the consequence that it is manifestly incompatible with the fundamental principles of German law. In cases of dispute the courts must issue a decision on the matter. The courts have not issued consistent decisions on this matter, which is in part due to the circumstances of each individual case differing. For example, especially in cases involving surrogacy account must be taken of the fact that under German law the legal mother can only be the woman who gave birth to the child. By contrast, the legal father can also be that man who has effectually acknowledged paternity. However, paternity cannot be effectually acknowledged if the child's mother is married and her husband has to be regarded as the child's legal father (see Part I. B.).

The courts have affirmed a violation of public policy in the following cases, for instance:

- In a case in which paternity was consciously untruthfully acknowledged without the child's approval (Federal Court of Justice, decision of 5 Feb. 1975, file no. IV ZR 90/73, BGHZ Vol. 64, p. 19; no translation available);
- In regard to a provision under Ukrainian law, according to which the child's (alleged) genetic parents are at the same time the legal parents of a child to which a (married) Ukrainian surrogate mother gave birth (Berlin Administrative Court, order of 5 Sept. 2012, file no. 23 L 283,12; no translation available).

By contrast, the courts denied a violation of public policy in the following cases:

- In the case of the recognition of a Ukrainian court decision in which the legal parentage of the genetic parents of a child to which a (married) Ukrainian surrogate mother gave birth was established (Friedberg Local Court, order of 1 March 2013, file no. 700 F 1142/12 RI; no translation available);
- Acknowledgement of paternity of a child born in the Russian Federation to an (unmarried) Russian national who was suspected of being the surrogate mother (Nuremberg Local Court, order of 14 Dec. 2009, file no. UR III 0264/09; no translation available).

Voluntary acknowledgements

50. Please explain when, if ever, a voluntary acknowledgement undertaken in another State will be recognised in your State *as validly establishing the legal parentage of the author of the acknowledgement* (i.e., the recognition of the content of the acknowledgement).²³

²³ It is understood that, from time to time, this issue may arise in the course of other proceedings (e.g., proceedings concerning succession or maintenance).

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign acknowledgement will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

Acknowledgement is not automatically recognised. Under German law, procedural recognition is, as a general rule, only possible – under very specific preconditions (esp. public policy clause) – if that recognition refers to a foreign COURT decision.

Where, by contrast, the issue of recognition arises in relation to certain legal consequences (e.g. legal parentage) which the foreign law attaches to a certain subject matter (e.g. acknowledgement of parentage made abroad), there is no procedural recognition. Rather, it must be examined whether the acknowledgement of parentage made abroad establishes legal parentage under the substantive law applicable pursuant to German conflict of law rules. The application of foreign law is subject to the public order clause (cf. response to Questions 42 and 49 and Article 6 of the Introductory Act to the Civil Code, which is available in English at: http://www.gesetze-im-internet.de/englisch_bgbeg/). That authority must carry out the review before which the question of legal parentage (possibly also as a preliminary question, e.g. regarding nationality) is raised. This may be an authority (e.g. registry office or foreign representation) or a court.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign acknowledgment of parentage, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Cf. response to Question 49.

Decisions of judicial authorities

51. Please explain when a decision of the relevant judicial authority of another State establishing a child's legal parentage (*i.e.*, a court judgment or order) will be recognised in your State as validly establishing legal parentage.²⁴

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign decision will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

The recognition of a foreign court decision establishing a child's legal parentage is based on sections 108 and 109 of the Act on Procedure in Family Matters and Non-Contentious Matters (FamFG, Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit). No translation of these legal provisions is available. According to section 108(1) of the Act, there is no special procedure regarding recognition. According to section 109 of the Act, recognition must, however, be refused if there are certain obstacles to that recognition. The office (court or authority, e.g. registry office) before which the recognition or non-recognition of the foreign court decision is to be asserted must examine *ex officio* whether there are any obstacles to recognition.

According to section 109 of the Act, the foreign court decision may not be recognised

²⁴ *Ibid.*

- if the courts in the other state are not competent under German law (section 109(1), no. 1 FamFG);
- if one of those involved has not made a statement in the main proceedings and relies to the fact that they were not informed correctly about the document instituting the proceedings or not in time so that they could assert their rights (section 109(1), no. 2 FamFG);
- if the decision is incompatible with an earlier decision issued in Germany or an earlier foreign decision that has been recognized in Germany or if the proceedings on which it is based is incompatible with earlier proceedings pending in Germany (section 109(1), no. 3 FamFG);
- if recognition of the decision leads to a consequence which is manifestly incompatible with the fundamental principles of German law, especially if it is incompatible with fundamental rights (section 109(1), no. 4 FamFG; = public policy clause);
- if reciprocity is not guaranteed (section 109(4) FamFG).

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign decision, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

A public policy violation was affirmed in the following cases:

- Establishment of paternity by a foreign court without obtaining an expert opinion and only based on a witness's statement by hearsay, although the respondent denied ever having sexual intercourse with the mother and offered to cooperate in the drawing up of an expert opinion on descent (Federal Court of Justice, judgment of 26 Aug. 2009, file no. XII ZB 169/07, no translation of which is available).
- Establishment of paternity by a foreign court without the child's alleged father (whose name and address were known to the court) being involved in the proceedings (violation of the right to be heard; judgment issued by Naumburg Higher Regional Court of 15 July 2008, file no. 3 WF 168/08; no translation available).
- Dismissal of the child's application to have the non-existence of paternity established on the grounds that only the ostensible father had the right to challenge paternity (e.g. Stuttgart Regional Court, judgment of 25 Sept. 1975 file, no. 2 T 296/75; no translation available).

For further examples, please refer to the response to Question 49.

52. Please specify the *effects* of the recognition of the legal parentage established abroad (see **Questions 49 to 51** above) and which law(s) govern(s) these effects:

No uniform answer can be provided in regard to the matters addressed in Questions 49 to 51. Rather, a distinction must be drawn between what is known as "procedural recognition" of foreign COURT decisions (applies to Question 51) and what is known as "substantive law recognition" (pursuant to the provisions of international private law; applies to Questions 49 and 50).

In the case of "procedural recognition", this effect is extended, subject to any obstacles to recognition (esp. public policy), i.e. the effects of the foreign decisions extend to Germany so that first and foremost the law of the issuing state is decisive.

The situation is different when it comes to "substantive law recognition". Which legal effects arise in Germany from a matter arising abroad must be determined pursuant to those provisions of private international law which are decisive for the recognising state. Thus, depending on the provisions implementing private international law in

the recognising state, either domestic or foreign law may be decisive, although the application of foreign law is subject to the public policy clause.

D. PIL rules concerning the contestation of legal parentage

53. Please explain when the relevant State authorities (which you identified in **Question 31** above) have (international) jurisdiction to determine a dispute concerning a child's legal parentage:

- a) When the child whose parentage is disputed is (habitually) resident in your State: please specify
- b) When the child whose parentage is disputed is a national of your State
- c) When a putative parent disputing legal parentage is (habitually) resident in your State: please specify
- d) When a putative parent disputing legal parentage is a national of your State
- e) Other: please specify No uniform answer can be provided which covers all those public offices (courts and authorities, cf. Question 31) which need to be taken into account.

The international jurisdiction of German courts is based – in so far as EU law or international conventions are not deemed to take precedence – on Section 100 of the Act on Procedure in Family Matters and Non-Contentious Matters (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit), of which no translation is available. Accordingly, German courts have international jurisdiction in parent and child matters if the child, the mother, the father or the man who declares by affidavit that he had sexual intercourse with the mother during the conception period either (a) have German nationality or (b) have their habitual residence in Germany.

As regards registry offices, see the responses to Questions 31 d) and 41 e).

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii. At the time the relevant State authorities are seized with the dispute, or
- iii. At another time: please specify No abstract, precise time point can be specified for all conceivable constellations.

As regards the courts' international jurisdiction, the principle applies that such jurisdiction must apply at the time the court decision is taken. However, there are exceptions to this principle. For instance, it may be sufficient for the circumstances establishing jurisdiction to have been fulfilled at a certain point during the proceedings (e.g. when the proceedings were instituted) so that their not applying at a later date is not detrimental to the proceedings (*perpetuatio fori*). According to prevailing opinion, the various interests must be balanced on a case by case basis in regard to whether *perpetuatio fori internationalis* is to be assumed.

54. In the context of a contestation of legal parentage, which law will the authorities apply to the question of who is / are the legal parent(s) of a child?

Please tick all which apply:

- a) The *lex fori* (*i.e.*, the internal law of your State)
- b) The law of the State of the child's nationality
- c) The law of the State of the (habitual) residence of the child: please specify
- d) The law of the State of the putative parent's nationality

- e) The law of the State of the putative parent's (habitual) residence:
please specify
- f) Other: please specify According to Article 20 of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche, EGBGB; available in English at: http://www.gesetze-im-internet.de/englisch_bgbeg/), descent may be challenged on the basis of any of the laws which govern its preconditions. The child may in any event challenge descent under the law of the country of his or her habitual residence. Depending on the circumstances of the specific individual case, descent may also be challenged under the law of that state of which the parent in question has nationality or – in the case of married parents – according to the set of rules governing the legal effects of a marriage (Article 20 read in conjunction with Article 19, first sentence, of the Introductory Act to the Civil Code; cf. Question 42 regarding the latter provision).

Please state whether one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage: There is no order of rank ("cascade") if several laws are applicable. Rather, the legal orders referred to in Article 20 of the Introductory Act to the Civil Code are alternatives, i.e. the challenge can be based on any of the legal orders referred to there. The reason for this rule is that considerable weight is attached to the interest in establishing the truth as regards descent.

E. "Cross-border reproductive care"²⁵ and the consequences for legal parentage

55. If persons resident in your State access ART services in another State, are there any specific PIL rules concerning the establishment of the legal parentage of the child born as a result (e.g., the law of the State in which the ART service was obtained will apply to the question of the child's legal parentage)?

- Yes: please explain
 No
 Other: please explain

56. Are you aware of any cases, other than international surrogacy cases (see **Part III** below), where difficulties concerning the establishment or recognition of a child's legal parentage have arisen as a result of individuals resident in your State accessing ART services in another country, or individuals resident abroad accessing ART services in your State?

- Yes: please provide details
 No

F. Legal developments and practical challenges

57. Please state whether the law in your State concerning the matters covered in **Part II** above (i.e., the PIL and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage) has changed in the past five years, or whether any initiatives are underway (e.g., in government, before Parliament or before the courts) to change the law in future:

No amendments were made to the national (autonomous) provisions of private international law over the course of the past five years as regards the international law of descent.

²⁵ In this paper, "cross-border reproductive care" is taken to mean when person(s) who wish to access ART services cross a border to do so, for whatever reason (often it is linked with the restrictive rules in their "home" jurisdiction, lower costs or better success rates abroad).

However, the European Commission has announced a European initiative to facilitate the free movement of documents and the recognition of the legal effect of civil registration documents. So far only the Commission's Proposal on abolishing the requirement of legalisation for foreign public documents (Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228)) is available. It is not, however, known how far the Commission's considerations have progressed in regard to the recognition of the legal effects of civil registration certificates. Before reflecting on this issue, however, the rules on applicable law should be harmonised.

58. Other than cases involving international surrogacy arrangements (as to which see **Part III** below), are there any other cases of which you are aware where difficulties have arisen in your State in relation to establishing, contesting, or recognising a child's legal parentage as a result of the cross-border movement of the child and / or his / her putative parents?

(Some possible examples can be found at Part IV (b) of Prel. Doc. No 11 of March 2011.)

Please provide as much detail as possible concerning the situation which arose and the difficulties encountered: None known

Part III: The particular challenges concerning International Surrogacy Arrangements²⁶ ("ISAs")

This Part asks for information regarding the experience of State authorities with ISAs. It is divided into two sections:²⁷

- **Section A** asks a number of questions concerning "**Incoming cases**" of ISA: i.e., those cases in which your State was the State of residence of the intending parents, and the State to which it was sought to bring child(ren), born to a surrogate abroad, to live.
- **Section B** continues with questions concerning "**Outgoing cases**" of ISA: i.e., those cases where your State was the State in which the surrogate mother gave birth and from which the child(ren) needed to leave to travel to the State of residence of the intending parents in order to live with them in that State.

A. Incoming cases²⁸

This Section is inapplicable – there have been no "Incoming cases" of ISA in this State. Go to Section B.

²⁶ See the **Glossary** for the definition of the terms used in this paper.

²⁷ Please note: it is understood that, in relation to both "Incoming" and "Outgoing" cases, there may be more than two States involved in a particular case: e.g., the surrogate may be resident in a different State to the State in which she travelled (or, in some cases, was trafficked) to give birth; in other cases, a gamete donor may be resident in a third State etc. Please explain any such elements in your responses to the questions in this part.

²⁸ I.e., those cases where your State was the State of residence of the intending parent(s), and the State to which it was sought to bring the child(ren), born to a surrogate abroad, to live.

Basic empirical data

59. Do you have any information concerning:

- a) The number of **Incoming cases** of ISA which have required the assistance of your State authorities in recent years?

Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

No information is available

- b) How many children have been born to surrogate mothers in another State as a result of ISAs involving intending parents resident in your State?

Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Incoming cases of ISA involving your State²⁹ and, further, please provide a general comment concerning the prevalence of Incoming cases of ISAs and whether such cases have increased in the past five years:

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Incoming cases of ISAs involving your State and / or whether this has increased in the past five years: No statistics are kept on the number of surrogate births in Germany. The German Embryo Protection Act (Embryonenschutzgesetz) prohibits surrogate births. Please refer to the response to Question 24 b).

60. Please list all the States in which intending parents resident in your State have engaged a surrogate mother (*i.e.*, entered into an ISA), insofar as you are aware:

Cases are known of surrogate births in Ukraine, India and the United States. Please also refer to the response to Question 59.

The procedure for Incoming cases of ISA

²⁹ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

61. Please explain the procedure, including any immigration and legal processes, which intending parents resident in your State need to undertake (before leaving your State, before returning to your State or upon return to your State, as applicable) in order to:

- a) Enter your State with a child born abroad as a result of an ISA:
See response to 61c
- b) Reside permanently in your State with the child:
See response to 61c
- c) Have their legal parentage recognised (or established) under the law of your State (*if* this is possible):
The intending father may, under certain conditions, acknowledge his legal parentage (section 1592 no. 2 of the German Civil Code; for exceptions see Question 11). The intending mother cannot do so, as the woman who gave birth to the child is always the legal mother (section 1591 of the German Civil Code). If the intending father is a German citizen who effectually acknowledges his legal parentage, the child has German citizenship and is entitled to a German passport, which may be required at an embassy.

Please include an estimate of the time it may take to complete each stage of this process:

- a)
- b)
- c) No answer possible, since this depends on the specific case.

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- i. The country in which the child was born: please explain
- ii. The particular document(s) produced by the intending parents to establish their legal parentage (*e.g.*, a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- iii. Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- iv. The nationality of the intending parents: please explain
- v. Any other factor: please explain A child acquires German nationality by dint of birth if one parent holds German nationality (section 4(1) of the Nationality Act (Staatsangehörigkeitgesetz)). However, the establishment of biological paternity by means of a DNA report is not sufficient to derive German nationality. Rather, the child must be legally descended from the parent. According to Article 19 para. 1, second sentence, of the Introductory Act to the Civil Code, descent in relation to each parent may also be determined by the law of the country of that parent's nationality (see response to Question 42). According to German law the child's father is that man who was married to the child's mother at the time of the child's birth (section 1592 no. 1 of the German Civil Code), that man who has effectually acknowledged the child's paternity (section 1592, no 2 and section 1594(2) of the German Civil Code) or whose paternity has been established by a court in accordance with 1600d of the German Civil Code or another provision (see response to Questions 9 and 11).

62. Have your State authorities engaged in cross-border administrative or judicial co-operation with the authorities in any other State in order to resolve an ISA case?

- Yes – please specify:

- a) Which authorities in each State were involved:
 - b) The nature of the co-operation:
 - c) Whether the co-operation resulted from legislation, guidelines or practice:
 - d) The result:
- No

63. In your experience, which documents are generally produced to your State authorities to substantiate the claim of the intending parents to an ISA to legal parentage?

Please tick all which apply:

- a) A birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these birth certificates originate and any other details necessary:
- b) An amended birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these amended certificates originate and any other details necessary:
- c) A pre-birth court order from the State of birth: please state from which countries these orders originate and any other detail necessary:
- d) A post-birth court order from the State of birth (*i.e.*, transfer of parentage): please state from which countries these orders originate and any other details necessary:
- e) An adoption order from the State of birth: please state from which countries these orders originate and any other details necessary, including whether use of the 1993 Convention³⁰ was attempted by either State³¹:
- f) Other: please specify

If possible, please state (using the relevant letter) which of the above documents your authorities are presented with most frequently in these cases: A (birth certificate); however, these documents cannot, by themselves, establish legal parentage (see answer to Question 49)

64. In general, what is the outcome of these cases in your State for the child:

Please tick all which apply and provide as much detail as possible:

- a) The child is able to travel to your State and reside there with the intending parents *and* the intending parents are recognised as the legal parents of the child.

Please explain how this is achieved:

- b) The child is able to travel to your State and reside there with the intending parents *but* one or both of the intending parents is not able to be recognised as the child's legal parents: please explain If the intending father, under German law, acknowledges his legal paternity (section 1592 no. 2 BGB), he is the legal parent (provided that no paternity of another man is in effect, section 1594(2) of the German Civil Code; see response to Questions 11, 49, 66). The intending mother is not the legal mother, as the woman who gave birth to the child is the legal mother (section 1591 of the German Civil Code, see Question 8). However, the intending mother may adopt the child.
- c) The child is not able to travel to your State and has to remain in the State of his / her birth: please explain why and what has happened to the children in such cases
- d) Other: please explain

³⁰ Full title: the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "1993 Convention"). For further information, please see < www.hcch.net >, under "Intercountry Adoption Section".

³¹ See the Conclusions and Recommendations of the Special Commission meeting on the practical operation of the 1993 Convention (17-25 June 2010), which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate", paras 25-26.

If possible, please state which of the four outcomes above occurs most frequently in your State:

The challenges encountered

65. In general, which of your State authorities are involved in assisting those who encounter difficulties as a result of Incoming cases of ISA?

Please tick all which apply and provide information concerning their particular role:

- a) The embassies / consulates in the State of the child's birth
- b) The immigration authorities
- c) The judicial authorities (*i.e.*, the courts): please specify which Courts; they decide whether legal parentage is established in line with the fundamental principles of the German legal order (see Questions 31 b, 42 and 49)
- d) The Ministry of Justice (or equivalent)
- e) The Ministry of Foreign Affairs (or equivalent)
- f) The Ministry of Health (or equivalent)
- g) The Ministry of Social Affairs (or equivalent)
- h) Other: please explain

66. Please explain any legal problems your State has encountered in relation to Incoming cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved in the ISA. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave his / her State of birth:
- b) The child being able to enter your State:
- c) The child being able to reside in your State:
- d) The child's nationality: See response to Question 61 v)
- e) The child's legal parentage: See response to Questions 8 bis 15, 42 and 61 v)
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (*e.g.*, trafficking, sale of children, exploitation of women, etc.):
- g) The treatment of the surrogate mother in any State (*e.g.*, whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: *e.g.*, due to either of the parties reneging on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain

Please provide any further information you consider relevant concerning the above problems: Some German courts regard the father's acknowledgement of paternity of a child born to a surrogate mother as ineffective, especially if the surrogate mother is married (to a third party) (cf. Cologne Administrative Court, judgment of 20 Feb. 2013, file no. 10 K 6710/11).

67. Using the categories set out below, please provide any available information concerning the costs intending parents resident in your State have paid for an ISA. If, in your experience, costs have varied significantly depending upon the country in which the surrogate mother resided or gave birth, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
- c) Fees or other costs paid to an intermediary: *e.g.*, a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain No answer possible

Areas of concern

68. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your particular concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage: See responses to Questions 8 to 15, 42, 61 v) and 66 e)
- b) The nationality of children born to ISAs: The child generally does not acquire the genetic father's nationality by dint of birth (cf. Questions 61 v) and 66 d)).
- c) The right of children born to ISAs to know their (genetic and birth) origins: cf. response to Question 40
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (*e.g.*, in terms of age, criminal records, psycho-social suitability, etc.):
- k) Contractual matters: *e.g.*, issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) Other:

The prohibition of egg donation and surrogacy according to the Embryo Protection Act pursues the legitimate aim of protecting the child's best interests, as well as protecting the egg donor and the woman to whom the egg cell is to be transferred. The egg donation changes the biological relationships involved by splitting up the role of the mother, as a result of which a distinction is drawn between genetic, biological and social motherhood. The prohibition, by contrast, guarantees the unambiguousness of motherhood by preventing a genetic and a biological mother sharing in the creation of a child. As a child's relationship with his or her mother is very important with regard to establishing an identity and developing a stable personality, the Embryo Protection Act provides that this relationship must be exclusive. That means that, in the opinion of the German legislature, in the interests of protecting the child's best interests only one woman should be able to have a biological share in a child's existence.

The statutory prohibition also protects the other side of the mother-child relationship, namely the genetic and biological mother's psychological well-being. If two women are involved in conceiving a child, that can not only give rise to a conflict of interests between the two women, which could jeopardise the child's development. Above all, it can be more difficult for the biological mother to accept and care for the child if that child has a different genetic

background. The genetic mother may also seek to influence the child, which could likewise lead to psychological conflict in the child.

Further, the prohibition of egg donation protects the egg donor from the health and psychological consequences of the operation involved. The healthy, fertile egg donor is exposed to health risks on account of donating her egg cells although she herself has no medical benefits from the operation. The health risks include hormonal stimulation, which can cause a life-threatening over-stimulation syndrome, and the risks associated with the removal of the egg cells during an operation (risk of adverse reaction to anaesthesia, risk of bleeding and infection).

The prohibition of egg donation and of surrogacy also protects the donor from her eggs possibly being put to commercial use or other commercial transactions being made. The danger is believed to be high that young, healthy women will be exploited or tempted to donate their eggs or become surrogate mothers through financial incentives.

(For further aspects see Question 86.)

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

Legal developments

69. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents resident in your State engaging in ISAs?

Yes: please explain

No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

70. Please provide any other information you consider relevant concerning your State's experience of Incoming cases of ISA: In general an ISA which is not able to generate legal parentage for one or both of the intending parents must not be "repaired" by an international adoption following the rules of the Hague Adoption Convention 1993 or other international adoption regulations.

B. Outgoing cases³²

This Section is inapplicable – there have been no "Outgoing cases" of ISA in this State. Go to Part IV.

Basic empirical data

71. Do you have any information concerning:

a) The number of **Outgoing cases** of ISA which have required the assistance of your State authorities in recent years?

Yes – please provide any figures available:

Pre-2009

2009

2010

2011

³² *I.e.*, those cases where your State is the State in which the surrogate mother gives birth and from which the child has to leave to travel to the place of residence of his / her intending parents.

2012
2013 (so far)

No information is available

b) How many children have been born to surrogate mothers in your State as a result of ISAs involving intending parents resident in another State?

Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Outgoing cases of ISA involving your State³³ and, further, please provide a general comment concerning the prevalence of Outgoing cases of ISAs and whether such cases have increased in the past five years:

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Outgoing Cases of ISAs involving your State and / or whether this has increased in the past five years?

72. Please list any States in which intending parents, engaging a surrogate mother in your State by way of ISA, have been resident:

The procedure for Outgoing cases of ISA

73. In general, which of your State authorities are involved in assisting those who undertake an ISA with a surrogate mother in your State?

Please tick all which apply and provide information concerning their particular role:

- a) The immigration authorities: please specify
- b) The judicial authorities (*i.e.*, the courts): please specify which
- c) The Ministry of Justice (or equivalent)
- d) The Ministry of Foreign Affairs (or equivalent)
- e) The Ministry of Health (or equivalent)
- f) The Ministry of Social Affairs (or equivalent)
- g) Other: please explain

74. Do foreign-resident intending parents require a visa or any other immigration document(s), or do they have to meet any other conditions, to *enter* your State to be able to undertake the necessary meetings and medical procedures to enter into an ISA in your State?

Please tick all which apply:

- Yes, they have to meet the following conditions – please specify:
- Yes, they have to obtain a visa or other immigration document(s) – please specify what type of document is required, the conditions for obtaining it and the procedure:
- No

³³ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

- It depends upon the State of residence or nationality of the intending parents: please specify

75. Is the law of the State of the habitual residence of the intending parents taken into account in any way when considering whether intending parents are permitted to undertake an ISA in your State (e.g., where this law forbids surrogacy arrangements).³⁴

- Yes – please explain how this law is taken into account:
 No
 It depends upon the State of residence or nationality of the intending parents: please explain

76. How do foreign-resident intending parents, who are party to an ISA, obtain legal parentage for a child born to a surrogacy arrangement in your State?

*Your response to this question will likely depend upon your answer to **Questions 26 to 27** above.*

Please tick all which apply:

- a) They will be the legal parents by operation of law and therefore their names will be placed immediately on the child's birth certificate: please explain
 b) They can obtain an amended birth certificate: please explain
 c) They can obtain a *pre*-birth court order confirming their legal parentage: please explain any conditions for obtaining such an order
 d) They can obtain a *post*-birth court order (i.e., a transfer of parentage): please explain any conditions for obtaining such an order
 e) They can adopt the child: please explain, including whether use of the 1993 Convention has been attempted in this regard³⁵
 f) Other: please specify

Please explain the procedure for any of the options ticked above and any specific requirements which apply to *foreign*-resident intending parents:

Please further specify whether the surrogate mother's consent, and her husband or partner's consent where applicable, is required for any of these procedures and the consequences if this consent is not forthcoming at the relevant time:

77. Please explain the procedure, including any immigration and legal processes, which foreign-resident intending parents need to undertake in order to *leave* your State with a child born to a surrogacy arrangement:

Please state the time it may take to complete this process:

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

³⁴ E.g., see clause 34(19) of the *Indian Assisted Reproductive Technologies (Regulation) Bill 2010* still pending, explained in Prel. Doc. No 10 of March 2012 (note 1) at para. 45. In addition, the recent Indian visa requirements now impose on foreign nationals visiting India to undertake a surrogacy arrangement, a condition to similar effect: i.e., that the intending parents must have a letter from the embassy of their State of residence indicating that the State recognises surrogacy and that the child born will be permitted to enter this State. See also the Ukrainian Draft Law No 0989 (former No 8282) on the restrictions pertaining to the use of assisted reproductive technology (rejected by the Parliament of Ukraine on 21 March 2013). This bill also envisaged, in particular, restrictions on the use of surrogacy arrangements for nationals of those States where surrogacy is prohibited by law.

³⁵ See note 31 above concerning the 2010 Special Commission meeting on the practical operation of the 1993 Convention which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate".

Please tick all which apply:

- a) The country in which the intending parents live: please explain
- b) The particular document(s) produced by the intending parents to establish legal parentage (e.g., a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- c) Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- d) The nationality of the intending parents: please explain
- e) Any other factor: please explain

78. Have your State authorities engaged in cross-border administrative or judicial co-operation with authorities in any other State in order to resolve an ISA case?

- Yes – please specify:
 - a) Which authorities in each State were involved:
 - b) The nature of the co-operation:
 - c) Whether the co-operation resulted from legislation, guidelines or practice:
 - d) The result:

No

79. In general, what is the outcome of these cases in your State for the child?

Please tick all which apply:

- a) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *and* the intending parents are recognised as the legal parent(s) of the child.
Please explain how this is achieved:
- b) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *but* one or both of the intending parents are not able to be recognised as the child's legal parents: please explain
- c) The child is able to leave your State but is not able to travel to the State of residence of the intending parents and has to remain in your State: please explain what has happened to the children in such cases
- d) The child is not able to leave your State: please explain why and what has happened to the children in such cases
- e) Other: please explain

If possible, please state which of the five outcomes above occurs most frequently in your State:

The challenges encountered

80. Please explain any legal problems your State has encountered in relation to Outgoing cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave your State:
- b) The child being able to enter the State in which his / her intending parents are resident:
- c) The child being able to reside in the State in which his / her intending parents are resident:

- d) The child's nationality:
- e) The child's legal parentage:
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (*e.g.*, trafficking, sale of children, exploitation of women, etc.):
- g) The treatment of the surrogate mother in any State (*e.g.*, whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: *e.g.*, due to either of the parties renegeing on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain

Please provide any further information you consider relevant concerning these legal problems:

81. Using the categories set out below, please provide any information you have concerning the costs intending parents resident abroad have paid for an ISA in your State. If, in your experience, costs have varied significantly depending upon the country in which the intending parents resided, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
- c) Fees or other costs paid to an intermediary: *e.g.*, a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain

Areas of concern

82. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (*e.g.*, in terms of age, criminal records, psycho-social suitability, etc.):
- k) Contractual matters: *e.g.*, issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) Other:

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

Legal developments

83. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents or surrogate mothers engaging in ISAs in your State?

- Yes: please explain
 No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

84. Please provide any other information you consider relevant concerning your State's experience of Outgoing cases of ISA:

Part IV: Current bilateral or multilateral instruments in the field

85. Please list any bilateral, regional or multilateral instruments which currently, or may in future, bind your State concerning:

- a) Any matters related to the establishment, recognition or contestation of the legal parentage of children;

Civil status issues are generally excluded from the scope of application of existing bilateral and multilateral legal instruments.

Cf. response to Question 57 regarding the European Commission's preliminary considerations regarding facilitating the recognition of the legal effects of civil registration documents.

In addition, mention should be made of the ICCS Convention (No. 16) concerning the issuing of multilingual extracts from civil status records. According to the Convention, extracts from civil status records in which births, marriages and deaths are notarised are to be accepted without legalisation, certification or similar formalities in the sovereign territory of each of the states bound by this Convention if they were issued on the basis of forms A, B and C enclosed with the Convention. The Convention was revised in the course of last year and a follow-up convention (No. 34) will presumably be available by the end of this year. This follow-up convention will presumably relate to the acknowledgement of paternity/maternity.

- b) Any matters specifically related to surrogacy arrangements;

No special bilateral or multilateral legal instruments exist regarding surrogacy.

Please provide any detail you consider necessary:

Part V: Thoughts on possible future work

86. What, if any, are the **needs** you consider ought to be addressed by any possible future global work in this area?

Please specify: The prohibition of surrogacy in Germany is based on the following considerations, which should be taken into account when working on an instrument to regulate surrogacy (at international level):

The following concerns of those involved and the effects of a surrogate birth justify the prohibition of surrogacy and the applicable rule on maternity (section 1591 of the German Civil Code):

(a) The child's best interests are at risk if no account is taken of the psychosocial relationships between the child and the women carrying the child. Separating the mother and the child after birth and possibly even the mother's knowledge that she will have to leave the child in the care of others after the child is born can have a negative impact on the child's development. The fact that the mother carrying the child (who need not necessarily be the biological mother) and the social mother are not the same person can make it much harder for the child to forge his or her identity.

(b) Surrogacy can be linked to all those involved feeling insecure and can lead to psychological conflicts, especially if the surrogate mother wishes to keep "her" child and the child is taken away from her – possibly by force – on the basis of a contract effective under a foreign law.

(c) The surrogate mother can be exposed to health risks, especially if she needs to take medications, for instance hormones, without any medical indication during the fertility treatment.

(d) Artificial insemination always involves the consumption of a certain amount of human "material", which is ethically problematical – and also has relatively little prospect of success.

(e) In addition, there is the fear that this will lead to the increasing commercialisation of extracorporeal insemination and embryo transfers.

(f) Especially women in situations of hardship might be prepared to engage in surrogacy merely for economic reasons without being fully aware of, most especially, the psychological consequences.

For further aspects, see Question 68 I).

87. Please provide your thoughts concerning the **approach** that should be taken in relation to any possible future regulation of any of the matters mentioned in this Questionnaire.

In this response, you may wish to consider and comment upon the thoughts set out in Section VIII of Preliminary Document No 11 of March 2011 and Section IV of Preliminary Document No 10 of March 2012.

*You may also wish to comment upon the **nature** of any possible future regulation: e.g., whether a binding instrument should be considered or whether approaches such as a model law, non-binding principles or guidance, etc. would meet the needs you identified in **Question 86** above.*

Regulation of the issue of the extent to which surrogacy legally practiced under a foreign law abroad can be recognised in Germany, i.e. the intended parents are recognised as the child's parents without any problems although surrogacy is prohibited in Germany.

88. If the Hague Conference were to develop a global instrument on the private international law issues surrounding the status of children (in particular, the cross-border recognition of legal parentage), which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage: please comment See e) below
- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party, in compliance with the instrument's rules, in all other States Parties: please comment See e) below

Safeguards

- c) The establishment of safeguards (minimum standards) to ensure that any procedures for the establishment, recognition and contestation of legal parentage take place with respect for the fundamental rights and welfare of all parties involved, in particular the child(ren) concerned: please comment See e) below

Co-operation

- d) The establishment of a system for co-ordination, communication and co-operation between States in relation to the establishment, recognition and contestation of legal parentage. Such a system may include a clear division of responsibilities between States, as well as the establishment of defined channels for communication between the relevant authorities.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system: See e) below

Other

- e) Other: please specify No conclusive answer can be provided at this point in time and the issue needs to be further examined. In particular, the advantages and disadvantages of the various models need to be carefully considered.

At first glance, however, priority should be given to harmonising private international law rules (regarding the law of descent). Based on those harmonised private international law rules the second step could then be to develop an instrument on procedural recognition (primarily pertaining to court decisions).

At any rate, it would be very important to introduce adequate safeguards and common minimum standards. One necessary safeguard would be the public policy clause; in addition, the need for further safeguards would also have to be examined. In particular, adequate account would have to be taken of those aspects addressed in Questions 68 I) and 86.

In order to coordinate cooperation between the competent offices in the country of birth and the recognising state it could also be examined to what extent the establishment of a central authority would be expedient.

89. If the Hague Conference were to develop a global instrument specifically on international surrogacy arrangements,³⁶ which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage, limited to legal parentage arising following a surrogacy arrangement: please comment See i) below
- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party following a surrogacy arrangement, in compliance with the instrument's rules, in all other States Parties: please comment See i) below
- c) Provisions concerning the child(ren)'s nationality: please comment

Safeguards

- d) The establishment of safeguards (minimum standards) to ensure that such arrangements take place with respect for the fundamental rights and welfare of all parties involved, *i.e.*, the child(ren) to be born, the surrogate mother and intending parents: please comment, including in relation to which elements you consider there ought to be such minimum standards (*e.g.*, the surrogate mother's free and informed consent, the child's right to know his / her origins, etc.) See i) below
- e) Safeguards (minimum standards) specifically in relation to the intermediaries involved in such arrangements (*e.g.*, surrogacy agencies, lawyers, etc.). These standards may be combined with a system of licensing and supervision to ensure compliance: please comment See i) below
- f) Safeguards (minimum standards) specifically in relation to medical institutions undertaking the procedures connected with international surrogacy arrangements: please comment See i) below

Co-operation

- g) The establishment of a system for co-ordination, communication and co-operation between States in relation to such arrangements. This may include a clear division of responsibilities between States, for example, such that: (a) the competent authorities of the State of the habitual residence of the intending parents would be responsible for determining that the intending parents are eligible to enter into the arrangement, and that any child born as a result will be permitted to enter and reside in their State;³⁷ and (b) the competent authorities of the State in which the surrogate mother habitually resides would be responsible for determining that the surrogate mother is eligible and suitable to enter into the arrangement and that the child will be entitled to leave this State following his / her birth. The co-operation system could also include the creation of defined procedures which must be complied with by the parties to such arrangements.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system: See i) below

Other

³⁶ See **Part III** of the Questionnaire above.

³⁷ Following the trend in some States in which international surrogacy arrangements are regularly entered into to take into account the legal position in the State of the habitual residence of the intending parent(s) before permitting the surrogacy arrangement to proceed: see note 34 above.

- h) Provisions concerning the financial aspects of international surrogacy arrangements: please comment
 i) Other: please specify

Likewise in regard to surrogacy, at first sight priority should be given to harmonising private international law rules (relating to the law of descent). Based on those harmonised private international law rules, the second step could then be to consider introducing an instrument regarding the procedural recognition of court decisions.

At any rate, it would be very important to introduce adequate safeguards and common minimum standards. Mention should here especially be made of the public policy clause. In particular, adequate account would have to be taken of the prohibition of surrogacy resulting from those aspects addressed in Questions 68 l) and 86. It should also be mentioned that the safeguards referred to in letters d), e) and f) are only not referred to separately because a restrictive approach already appears preferable or promising from the outset.

In order to coordinate cooperation it could also be examined to what extent the establishment of a central authority would be expedient.

90. What priority would you give working towards a future instrument on the private international law issues concerning the status of children (in particular, the cross-border recognition of legal parentage) generally?

- a) High priority / urgent
 b) Medium priority – desirable but not urgent
 c) Low priority – possibly desirable but other projects should take priority
 d) No priority – no further work should be done in this field
 e) Other: please specify

91. What priority would you give working towards a future instrument specifically on the challenges occurring as a result of international surrogacy arrangements?

- a) High priority / urgent
 b) Medium priority – desirable but not urgent
 c) Low priority – possibly desirable but other projects should take priority
 d) No priority – no further work should be done in this field
 f) Other: please specify

92. Please provide any other comment(s) you may have concerning the possible future global regulation of matters contained within this Questionnaire:

Thank you for your time: this information will greatly assist the work of the Permanent Bureau.