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Transborder Medically Assisted Reproduction: The Challenges for Conflict of Laws

Introduction

Parallel to fertility tourism\(^1\) of all kinds, including surrogate motherhood and genetic testing\(^2\), which has become international for reasons of legal prohibitions, cost, bureaucracy or effectiveness\(^3\), another significant commercial activity has made its appearance: that of the international sale of gametes, mostly sperm. Such an internationalization of many aspects of medically assisted reproduction, which in Europe seems to be on the increase\(^4\), brings forward a considerable number of questions that require solutions through conflict of laws. The limited time of this presentation does not allow me to deal with all relevant problems in this framework. I intend to pinpoint some of the most frequent or important ones, but I do not promise I can discuss the solutions, either because there are no settled answers for all questions or, mainly, because the clock is ticking and the private international law analysis, demanding as it always is, will tire those of you who are not conflicts lawyers. But I am satisfied if I manage to plant the issues in your mind and let them ferment.


\(^2\) In the form of pre-implantation genetic testing. See Press Release, ESHRE, Europe struggles to meet the legal, ethical and regulatory challenges posed by more patients travelling abroad for PGD (July 2, 2007).

\(^3\) Grammaticaki-Alexiou, op. cit. For example, both Spain and the UK show tolerance toward most types of assisted reproduction (with the exception of commercial surrogacy), allowing the use of third-party embryos or gametes and do not limit access to ART based on marital status or sexual orientation.

Allow me to begin referring to an old case, actually the first case of fertility tourism that received wide publicity: the Rios case in the 80’s. The Rios, a wealthy Californian couple, underwent in vitro fertilization using donor sperm at a fertility clinic in Australia. The wife did not get pregnant and two embryos were left in storage. Sometime later the couple adopted a child in Argentina and in 1983 the parents and the adopted child were killed in an air crash in Chile. Mr. Rios’ son from a previous marriage claimed sole heirship. But questions arose about the legal status of the frozen embryos: Were they persons who could inherit (especially if they were successfully implanted in another woman’s womb willing to gestate), or property that could be inherited? Should they be destroyed, donated, or cryopreserved for an indefinite time? Which law would provide the answers? These questions remained unresolved and all that was established was that probably the embryos were not viable.

The apparent issue in this case was a preliminary issue, the legal status of the frozen embryos. Such preliminary issues are basic and not always answered in the same manner by all legal systems. If they cannot be resolved, the main case cannot proceed.

Every time a foreign element (such as the nationality or habitual residence of the parties involved, the location of the artificial insemination, the place where the resulting baby is born, and several others) is present, the legal issues that may be brought before the courts will have to be examined through the filter of conflict of laws. Generally speaking and regarding conflict of laws there are matters, such as personal status, parenthood, succession, contracts and torts, public policy and human rights, where the choice of law problems may be quite acute and demanding, as the substantive solutions for the same issues are neither identical in the various legal systems nor easy to solve. Actually some of them touch very delicate questions,

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where strong religious, social, moral or ethical elements are apparent; the status of the cryopreserved embryo is one of them.\footnote{To allow the creation of babies using the DNA of three people in order to prevent potentially fatal diseases being passed on to children is another novelty. The British House of Commons has just passed such a bill, which most probably will receive the approval of the House of Lords. See http://www.latimes.com/world/europe/la-fg-britain-dna-vote-20150203-story.html}

Accordingly, I will attempt to describe several problems which, depending on their characterization -a complicated issue in itself, as each \textit{forum} will characterize the issue before it in accordance with its own law,\footnote{For example, are embryo cases “torts” or “property ”issues? Is a case about surrogacy one of contract or of family law?} belong in the areas of personal status, capacity, contracts, torts, family law, succession, public policy, EU law, and human rights law as well, as I have already mentioned. The answer to these problems as regards private international law depends on each forum.\footnote{It appears that the various substantive laws generally approach the issues in a different manner. See Grammaticaki-Alexiou, Fertility, p. 92.} So first, for every case, there are issues of international jurisdiction to be solved. Then the court seized will apply its country’s conflicts rules to find the law applicable. This second part of the process is usually the hardest one.

\textbf{a) Personal status}

Some weeks ago I was contacted by a Greek lady, living in Spain with her partner, an English lady, who, through ART,\footnote{For the various kinds of ART see S. Bychkov Green, Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law, 24 Wis. J.L. Gender & Soc’y (2009), p. 29 et seq.} had given birth to a baby girl. The baby was registered in Spain as the common child of the couple. Unfortunately she fell seriously ill and the mothers thought they should take her to the USA for treatment. When the English mother requested an English passport for the baby, her request was denied, because the UK would not recognize a baby having two mothers and not a mother and a father. The same complication occurred when the Greek birth mother requested a Greek passport for her child. Thus the child could not obtain the nationality of either country and was a stateless person.\footnote{See A. Conroy Harris, Foreign Surrogacy Arrangements, 33(1) Ad. & Fos. 2009, p. 84-85, on the issue of children born in Ukraine to a surrogate mother, who had been implanted with eggs from an anonymous donor and who had, in accordance with Ukrainian law but in breach of UK law, been paid beyond her reasonably incurred expenses. The children were rendered stateless due to the conflict between UK and Ukrainian law over the parents to be named on their birth certificates.}  

However regarding ART there is an even more basic issue: What is the status of a fertilized egg? Is it a human being? And if it is, can it be sold, donated,
cryopreserved or destroyed? There is no agreement on that among the various legal systems, especially when they are deeply influenced by philosophic and religious beliefs\textsuperscript{14}. So, depending on the country whose courts decide by applying the appropriate substantive law, a fertilized egg of a few days may be recognized as a being which has rights as soon as its cells start multiplying, or a thing, or something in between\textsuperscript{15}.

b) Capacity

By capacity I mean the capacity of a party to decide about one’s own life or, for example, capacity to make a contract. Accordingly, capacity is required in order to agree on IVF with a clinic. In most countries capacity depends on age, but the age of majority differs from country to country. For example, in Indonesia it is 15 years (for females), 16 in Nepal, Kyrgyzstan, and Turkmenistan, 17 in Tajikistan, 18 in most countries, 18 or 19 in Canada (depending on the province), 20 in Japan or Thailand, and 21 in Singapore, Argentina, Egypt and several other countries\textsuperscript{16}. If a Greek court had to decide on the issue of capacity of a 15 year old prospective mother from Indonesia to conclude an ART agreement, it would have to apply the law of her nationality, but would it accept the age of majority prescribed by Indonesian law and consider the consent of the girl alone, without the consent of her parents, valid? Most probably the acceptance of such a solution would be considered contrary to Greek public policy.

Here, also, we have a special problem concerning adolescents. During adolescence, cancer and cancer treatment, as well as other medical conditions threaten fertility: ovarian or testicular torsion in an adolescent with a solitary ovary or testis, and genetic conditions such as Turner's syndrome, resulting in impending premature ovarian failure in females. In such cases of threatened sterility, ART, including sperm, semen, and oocyte cryopreservation, as well as ovarian tissue banking, may help genetic procreation in the future. Or, adolescents who are healthy may want to serve as altruistic donors for ailing relatives who wish to parent. But since they are minors, do they have capacity to consent to such an endeavor? Do they need their parents’ or

\textsuperscript{14} The Catholic Church, for example, has influenced the state to pass the very restrictive Law 40/2004, Feb. 14, 2004, Gazz. Uff. No. 45 (Feb. 24.2004).

\textsuperscript{15} See the \textit{Davis v. Davis} judgment of the Supreme Court of Tennessee (842 S.W.2d 588), according to which frozen embryos are neither persons nor property, but an interim category that entitles them to special respect because of their potential for human life.

guardian’s consent, as, for example, Greek law requires for those under 15? Which legal system will decide and how strong the intervention of public policy will be?\textsuperscript{17}

c) Contracts

Let us suppose that a German woman and her Greek husband living in France sign a contract with a fertility clinic in New York, well known for its success rate, for an infertility treatment, whereby the clinic promises success. If the clinic does not deliver, the couple may sue it and ask for its money back, plus compensation for distress. Depending on the court that will have jurisdiction the results may vary. If the court is, for example, in New York, and the parties have not chosen the law applicable in their contract as they may, the court will apply the law of the state or country having the most connections with the contract, which may not be necessarily N.Y. But if the court seized were in France or any other EU country (except Denmark) it would apply article 4 of the Rome I Regulation, providing that the law of the habitual residence of the service provider is applicable, \textit{i.e.} the law of N.Y.

Many fertility centers advertise on the Internet that if pregnancy is not achieved the prospective parents can get their money back, but this may result to a dispute over contractual terms, and there may be questions whether the parties agreed on the law applicable to the contract, or whether it is for the court to indicate that law according to its conflicts rules.

Other relevant contracts may include the agreement between the intended mother, her husband/ biological father and the surrogate mother, which may contain various foreign elements leading to different applicable laws\textsuperscript{18}. Depending on which

\textsuperscript{17} According to art. 8 of the Greek Civil Code, capacity is governed by the law of nationality of the person concerned. If Greek courts decide, they will probably refuse to apply the Indonesian capacity provisions on grounds of public policy.

\textsuperscript{18} In the \textit{Hodas v. Morin} case, 814 N.E.2d 320 (Mass. 2004), a married couple from Connecticut had entered into a gestational surrogacy agreement with a New York resident surrogate and her husband, according to which the child would be born at a Massachusetts hospital for reasons of convenience. The implantation of the gametes took place in N.Y. The agreement specified that the child would be born at a Massachusetts hospital not only because it was halfway between the parties’ residences, but mainly because Massachusetts’ law provided for pre-birth orders naming the genetic parents as the child’s parents, so that they would avoid the subsequent adoption of the child. The law of Connecticut allowed for birth certificates to name a woman other than the birth mother. New York law had a strong policy against surrogate agreements. When the genetic parents went to court in Massachusetts to obtain such a pre-birth order, the judge dismissed their petition, concerned about forum shopping. The Supreme Judicial Court, upholding the parties’ choice of the applicable law (Massachusetts’ law) since it was also the law of the state where the baby was to be – and was - born, applied the approach of the Restatement 2d, vacated that order and remanded with directions that the genetic parents be named on the child’s birth certificate.
one will be applied, the contract may be valid or not, or some of the obligations of the parties may be null.

Same problems exist as regards other types of contracts, such as the sale of gametes or insurance contracts.19

d) Torts

In the field of medically assisted reproduction several torts may occur. Many cases of medical malpractice have been reported: Not cleaning the sperm according to safety protocols and thus causing serious illness to the inseminated woman20, implanting women with the wrong embryos (which happened in the USA) 21, or negligence in the preservation of fertilized eggs resulting in their destruction. Serious blunders have been made in fertility clinics, black babies have been born to white parents, or sperm has been mixed up.22

In surrogacy cases a surrogate mother may cause harm to the embryo because of negligent behaviour (e.g. does not quit smoking, although she has been told not to, or keeps taking drugs).

The negligent destruction of embryos or the implantation of the wrong embryos may be a considerable source of disputes. Such disputes may include claims for negligent loss of irreplaceable property, or wrongful death.

The law applicable will again depend on the court that has jurisdiction on the case. If it is a EU court (except a Danish one), it will use the conflicts rules of the Rome II Regulation and will apply the law of the place where the damage occurred (locus damni), unless both parties are habitual residents of the same country, in which case that country’s laws will apply.24 But if the case is manifestly more closely connected to another country, the latter’s law will be applicable.25 The Regulation

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20 In the Chambliss v. Health Sci. Found., 626 S.E.2d 791 (N.C. Ct. App. 2006) the plaintiffs were awarded punitive damages as well, an unusual award for such cases.
24 Article 4.1 of Regulation 864/2007 (Rome II).
25 Article 4.2 of same Regulation.
also authorizes the parties to choose, by mutual agreement after the occurrence of the event giving rise to the damage, the law that will be applicable to their obligation. This may happen in a surrogacy agreement that went wrong. If a court of another country, outside the EU, takes the case, the end result may be different, depending on the law applicable, which, for example, may be the lex loci delicti or the law most closely connected to the tort.

Let me make this clearer through an example: Let us see what happens with the artificial insemination of a French woman, living in Belgium, who travels to Indiana, U.S.A., for that purpose. The treatment results to the birth of a problematic child, due to medical malpractice. Which law will govern the relevant tort case if the woman sues the medical center or the doctor? Will it be Belgian law or the law of Indiana? If the case is brought before a Belgian court, the latter will apply the law of the place where the damage occurred, according to art. 4 of the Rome II Regulation, i.e. most probably Belgian law. An Indiana court will probably apply the law most closely connected to the tort, which may not necessarily be that of the place where the damage occurred.

e) Family law

Parenthood is a core issue in all cases involving ART, mainly -but not always- when a third person is involved (sperm or egg donors, or surrogates). Every time nationality, habitual residence, or any other element connects the case with another jurisdiction, private international law is called to offer solutions as to the applicable law. The issues may be, for example, the relationship of the child with the sperm donor, or its surrogate mother; or the relationship of the dead biological father with the posthumously born child through IVF with the father’s preserved sperm. Another

26 Article 14.1 of same Regulation.
27 S. Symeonides, Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should, 61 Hastings L.J. 2009, p. 337 et seq., analyzing the legal regime in the USA, where various solutions are adopted by state laws.
29 In re K.M.H., 169 P.3d 1025 (Kan. 2007), a Kansas, USA, case involving Kansas and Missouri law, the mother of twins, living in Kansas, who underwent artificial insemination in Missouri with the sperm of a friend, also Kansas resident, sought termination of the donor’s parental rights. The donor, on the contrary, acknowledging his parental responsibility, claimed joint custody, visitation rights and other parental rights. According to the mother Kansas law should apply because most connections were with that state, while the donor argued that Missouri law should apply, because it was more favorable for him, providing that paternity is presumed when the unmarried woman knows the sperm donor. The court found that Kansas law applied because not only it was the law of the place of the contract, but also because all the significant connections pointed to Kansas law.
issue may concern parentage of a child born through ART to a same-sex couple. Can the partner of the woman having the baby be legally accepted as the other parent of the child? Belgium, for example, as from January 1, 2015, allows the female spouse or partner of the biological mother to acquire the status of a legal parent of the child in the same way, as it would be possible for a male spouse or partner. Will that status be recognized if the issue arises before the courts of Greece? Or, can a male same-sex couple be recognized as parents of a child that was born through surrogacy with the sperm of one of them? This may seem out of the question in our country so far, but is it so in other parts of the world? Such issues are important, especially for jurisdictions that allow same-sex marriage.

The approaches of States to legal parentage established abroad vary, depending on whether a foreign authentic act, for example a birth certificate, or a voluntary acknowledgement, or a foreign court decision is being considered.

In Greek law an agreement on surrogacy can be made if either the prospective mother or the surrogate is a domiciliary or a temporary resident of Greece. This mandatory rule cannot prevent conflicts issues on the matter and, of course, does not preclude disputes brought before Greek courts on issues of surrogacy that did not occur in Greece, or concern women coming from different countries at the time of the surrogacy agreement, with differing rules.

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30 Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006). A lesbian couple, Lisa and Janet, living in Virginia, entered a civil union in Vermont, where such unions are allowed. Lisa gave birth to a baby girl through artificial insemination using sperm of an anonymous donor. When the union ended a legal battle began concerning the visitation rights of Janet and later the custody of the child. Petitions were filed before the courts in both Vermont and Virginia and, besides the issues of jurisdiction, each court had to face the issue of the law applicable.


32 Although not related to a conflicts issue, there is a very interesting opinion of the Greek Council of State (number 261/2010), which accepts that a single man may receive the permission of the court (a permission that is required by the law for a woman only) to become father through gestational surrogacy.


34 Art. 17 L. 4272/2014. Interestingly the legislator did not choose the connecting factor of habitual residence or mere residence, as it is the now established trend even in Greek conflict of laws.

35 Mandatory rules are those which cannot be departed from by the agreement of the parties concerned.

36 For the attitude of the various countries as regards surrogacy, and the problems created in the international arena see Vijay, M., Commercial Surrogacy Arrangements: The Unresolved Dilemmas, UCL J.L. and J. 2014, p. 200 et seq., N. Gamble, Children of Our Time, 81 Fam. L.J. 2008, p. 11-13,
f) Succession

The Rios case mentioned in the beginning offers an example of succession issues. Depending on the characterization by each legal system of the zygote as *nasciturus* or not, it may inherit or not. Depending on the recognition by the various legal systems of the relationship between a surrogate mother and the child she has gestated, the child may or may not be her heir.

Greek law provides, under certain conditions, for the inheritance rights of a child born by artificial insemination after the death of its father, but we cannot be certain that this solution is acceptable by all legal systems – on the contrary. In Nebraska, USA, for example, a baby conceived after her father’s death was denied survivor benefits.

g) Public Policy

Medically assisted reproduction is one of the few fields where public policy has an important role to play. The solutions a foreign court may adopt may not necessarily be accepted in the country where its judgment arrives for recognition and enforcement, for reasons of public policy, if the application of the foreign rule of law causes results unacceptable to the social, economic, ethical, religious etc. beliefs and conditions in that country. We have such an example as regards the judgment of a Greek Court concerning the refusal of recognition of a foreign adoption judgment (a grandmother wanted to adopt her four grandchildren born through surrogacy abroad with her dead son’s sperm). So far this is the basic tool that fences away undesirable effects, but for how long? Besides, public policy considerations should not overlook the interests of the child, which are of paramount importance.


37 An issue often discussed is whether sperm may be inherited. See, for example, the French case Parpalaix v. CECOS, T.G.I. de Creteil, 1 ch. civ., Aug. 1, 1984, Gaz. Pal. 1984, p. 561-564.

38 I.e. an unborn child.

39 Art. 1711 CC.


42 See, for example, In re X and another, [2009] 2 W.L.R. 1274. For the various legal issues arising in the case of cross-border international surrogacy arrangements and public policy, as well as human rights issues, see K. Trimmings/P. Baumont, (Eds), International Surrogacy Arrangements: An Urgent
h) Human rights

Natalie Evans and Howard Johnston became engaged in June 2000. A year later Ms Evans was diagnosed with ovarian cancer and before her cancer treatment she was offered a cycle of IVF treatment. In November 2001 eleven of Ms Evans’ ova were produced and fertilized using Mr Johnston’s sperm. As a result six embryos were created, frozen, and put to storage, because after the removal of her ovaries Ms Evans was told to wait for two years before the embryos were implanted to her uterus. In May 2002 the couple separated and in the summer of the same year Mr Johnston wrote to the clinic, where the embryos were stored, and asked for them to be destroyed. English IVF law states that both parties must give their consent for IVF to continue; otherwise the embryos must be destroyed. Ms Evans, upon receipt of the news from the clinic, initiated court proceedings, alleging that, as treatment was under way, the man should not have the right to stop it. She argued that if she had got pregnant and the embryos were already in her body, her ex-partner could have no say at all. The English courts did not accept Ms Evans’ views. However the embryos were kept in storage until Ms Evans lodged an appeal with the European Court of Human Rights. In April 2007 the Grand Chamber of the Court heard the case and ruled against Ms Evans.

Human rights cannot be overlooked. For example, sperm donors’ anonymity is usually safeguarded in order to avoid unpleasant situations. However, is there a violation of the human rights of the child, if it is not allowed to have access to the identity of his/her biological parent? The issue has been raised and discussed...
extensively. Some jurisdictions, Greece among them, have passed laws that allow the disclosure of the medical records of the biological father, but not his identity. Of course this practice solves part of the problem, because it cannot help the descendant who wishes to know his biological origin. Or, in the case of surrogate motherhood, can the surrogate mother, who has also provided the ova, as it is allowed in some countries, be excluded from the life of her child? The answer is not just moral or sociological, it is also legal, if one jurisdiction considers her a parent and another one does not. Last, but not least, one must not forget issues of discrimination that may arise in the context of uncertainty over a child’s parentage or nationality. By adopting mandatory rules a legal system can impose the observance of human rights or violate human rights itself.

Undoubtedly, as it has been recently stressed by The Hague Conference on Private International Law, “children left with ‘limping’ legal parentage (and, of course, children left stateless) are at risk of suffering serious legal disadvantages throughout their lives due to the myriad of legal consequences which flow from a determination of legal parentage in most States. Indeed, the exercise of children’s fundamental rights may be impeded in this situation and they may be in a position in which they are, in effect, discriminated against because of the circumstances of their birth (contrary to multiple international human rights treaties).”

i) European Union law

By now you must be familiar with the Blood case. In the 90’s in England Diane Blood and her husband had begun planning to have children, when the husband suddenly fell ill with meningitis and died. At Diane’s request the doctors extracted the husband’s sperm as he lay in a coma and stored it. The widow sought permission from the Human Fertilization and Embryology Authority to be inseminated by her dead husband’s sperm, but her request was denied so she sued. The court said that, since there was no consent of the husband for the posthumous use of his sperm,

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47 Id.
48 Art. 1460 CC.
49 Tobin, p. 334.
insemination was not allowed. The issue then became whether Blood had the right to export the sperm and travel to Belgium where, in the absence of similar legal obstacles, she could receive treatment in a Brussels clinic. It was decided that she had indeed such a right under European Community law\textsuperscript{52}. Blood ultimately gave birth to two sons and later she won the battle to change the law so that her dead husband’s name could appear on her children’s birth certificates\textsuperscript{53}.

**Conclusions**

Answers to issues like the ones I mentioned and several more may vary, depending on the law applicable, which, in its turn, depends on the court that has jurisdiction. Inevitably *forum shopping*, *i.e.* the effort to bring the case before a court that will apply favourable rules, is often present in situations where some jurisdictions show an open-mindedness and others are negative. However, at the end of the line, a foreign judgment may not be recognized in the country that matters on grounds of public policy. The latter, when used wisely, may prevent unwanted results in a case.

To these problems one should add the issues that are likely to occur, when not only international sperm trade but also international embryo banking and trading becomes a more generalized practice. For the time being at least human cloning is out of the picture.

Undoubtedly ART is a fast growing practice and fertility tourism is becoming a billion dollar market\textsuperscript{54}. Inevitably it raises issues of poor and wealthy, of exploitation, of the law applicable in each component issue, of ethical matters and of public policy. Nevertheless, considering the desire of infertile individuals to become parents, and notwithstanding any legal drawbacks, the practice will keep thriving.

A lawyer is always saddened when she realizes that science runs at high speed and the legislator crawls panting much behind. Not paths, it is avenues that are opened; biotechnology has changed the map of nature as we knew it, and new types of


\textsuperscript{53}http://www.theguardian.com/science/2003/sep/19/genetics.uknews.

relationships are making their presence known. I hope that soon legislators will realize that a certain international uniformity of rules on medically assisted reproduction is necessary. I am of the opinion, although I know the difficulties before a consensus is reached, that at least in the USA and as well as in the European Union (which so far displays no much activity on the matter), a central and consistent regulation of the issue will definitely be beneficial for all and prevent sad situations, especially those that harm the interests of children born thought ART. A Project of The Hague Conference on Private International Law is a promising sign that the international community is moving towards the promulgation of international instruments which will solve basic problems in a uniform manner, thus achieving the protection of the rights of all parties involved in ART and mainly those of the child, whose interests are considered paramount.

55 In the USA the American Bar Association House of Representatives, after long discussions, in February 2008 passed the ABA Model Act Governing Assisted Reproductive Technology ("ART Act") available at www.abanet.org/family/committees/artmodelact.pdf.