RECOGNITION OF A STATUS ACQUIRED ABROAD: BELGIUM

RECONOCIMIENTO DE UNA SITUACIÓN JURÍDICA RELATIVA AL ESTATUTO PERSONAL VÁLIDAMENTE CREADA O MODIFICADA EN EL EXTRANJERO: BÉLGICA

Sarah Den Haese
Researcher at the Institute for Private International law, Ghent University

Recibido:15.12.2021 / Aceptado:21.01.2022
DOI: https://doi.org/10.20318/cdt.2022.6742

Abstract: The case law of the CJEU and the ECtHR has the potential to enhance the recognition of a status acquired abroad. The Belgian courts have consequently reacted, especially in the field of international name law and cross-border surrogacy. This report describes how the aforementioned case law has changed and is changing the application and usage of private international law methodology and practice.

Palabras clave: estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, Derecho internacional privado belga.

Resumen: En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia ha cambiado y está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna. Este trabajo analiza los efectos de esta jurisprudencia europea sobre el Derecho internacional privado belga cuando este se enfrenta a una situación jurídica relacionada con el estatuto de la persona que ha sido válidamente creada en el extranjero y que se quiere hacer valer en Belgium.

Keywords: status acquired abroad, status recognition, international name law, Belgian private international law

I. Awareness in academia, politics, judicial and administrative practice

1. Academic awareness

1. The general awareness of the discussion regarding "recognition of status" in Belgium is high.[1] Almost every major PIL textbook in Belgium pays attention to the question if and how a (change in) personal status acquired abroad can be recognized in Belgium. Most textbooks, however, talk about the recognition of a foreign marriage, a name obtained abroad, a change in gender, a person's capacity, etc. The term '(personal) status' is seldom used as such. The textbook used at the University of Antwerp and the University of Ghent[2] deals with (among other things): capacity, name, transgender people, marriage, divorce, partnerships, natural affiliation and adoption. The question how a (change in) personal status can be recognized, is discussed in detail.

2. In addition to the general PIL textbooks, the matter of cross-border recognition of a (change in) personal status obtained abroad was discussed in great detail in the doctoral dissertation of prof. dr. Jinske Verhellen (University of Ghent) and the doctoral thesis of dr. Silvia Pfeiff. In her thesis, Verhellen examined the objectives of the Belgian legislator when drafting the 2004 Belgian Code of Private International Law[3] and compared them with the situation in practice.[4] She looked into the use and application of the Belgian Code of PIL by courts and administrations. Pfeiff examined the portability of personal status within the European Union. She focused on the case law of the European Court of Human Rights and the Court of Justice of the European Union and compared this "*European method of recognition*" with the Belgian, French, German and English rules on recognition.[5]

3. In August 2016, the author of this country report started a 4 year-research project at the University of Ghent, funded by the Special Research Fund of the University, where the cross-border recognition of people's personal status is examined from a private international law and human rights perspective.

4. In legal doctrine, the matter of cross-border recognition of a (change in) personal status is discussed by several PIL experts and is mentioned in most articles dealing with (international) family law.

With the entry into force of the new law on **transgender people** on 1 January 2018[6], Verhellen devoted an article on the impact of that law in an international context. In her article she examines the procedure in Belgium and the consequences in Belgium of a procedure completed abroad.[7]

In 2017, Verhellen also published an article where she examined the cross-border portability of **refugees' personal status**. Bearing in mind that in 2015 over a million asylum seekers and migrants crossed into Europe, she emphasised the need for policy makers to focus not only on short-time crisis

[1] This national report forms part of a comparative law research project which started in 2018. Preliminary results were presented and discussed at an internal meeting in Würzburg in spring 2019, at the JPIL conference 2019 in Munich and at the online conference "La famille dans l'ordre juridique de l'Union européenne" in autumn 2020. The overall comparative analysis, results and discussion are published in this issue in Gössl/Melcher, Recognition of a Status Acquired Abroad in the EU – A Challenge For National Laws, Cuadernos de Derecho Transnacional Vol. 14 N°1. The author would like to thank Professor Jinske Verhellen under whose supervision the report was drafted for her helpful comments.

[2] T. Kruger & J. Verhellen, Internationaal Privaatrecht: de essentie, Brugge, die Keure, 2016, pp. 225-276.

[3] Wet van 16 juli 2004 houdende het wetboek van internationaal privaatrecht, Belgian Official Journal 27 juli 2004.

[4] J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, 513 pages.

[5] S. Pfeiff, La portabilité du statut personnel dans l'espace européen. De l'émergence d'un droit fondamental à l'élaboration d'une méthode européenne de la reconnaissance, Brussel, Bruylant, 2017, 718 pages.

[6] Wet van 25 juni 2017 tot hervorming van regelingen inzake transgenders wat de vermelding van een aanpassing van de registratie van het geslacht in de akten van de burgerlijke stand en de gevolgen hiervan betreft, Belgian Official Gazette 10 juli 2017. (Accessibile via http://www.ejustice.just.fgov.be/cgi/welcome.pl)

[7] J. Verhellen, "De Belgische transgenderwet in een internationale context", in Tijdschrift@ipr.be 2018/3, pp. 185-198 (https://www.ipr.be/nl/archief).

management but to also pay attention to the long-term legal concerns such as the personal status of asylum seekers and refugees.[8]

With regard to the recognition in Belgium of **affiliation** established abroad, reference has to be made to an article written by Verhellen and Deschuyteneer.[9]

Throughout the years, the issue of cross-border **surrogacy** has received quite some attention in Belgian legal doctrine. In her doctoral thesis, dr. Liesbet Pluym focuses among other things on the cross-border aspects of surrogacy.[10] In the aftermath of the cases brought before the European Court of Human Rights (hereinafter 'ECtHR'), several articles have been published discussing the impact of the ECtHR's case law in Belgium.[11]

In order to be complete, Belgian legal scholars have also payed attention to the portability of a **name** acquired in a EU Member State[12], the (non-)recognition in Belgium of a **divorce** obtained abroad[13], **international adoption**[14], **registered partnerships**[15] and the child protection mechanism of ***kafala***[16].

5. To summarize: the matter of status recognition is not ignored by Belgian scholars. Almost every major PIL textbook elaborates on the recognition of a (change in) personal status obtained abroad. However, when looking at legal doctrine, we see that the matter is only discussed by certain scholars. The question whether this has to do with the complexity and the broadness of PIL (PIL deals with family relations, companies, contracts, liability, etc.) rather than a deliberate decision not to examine the matter cannot be answered.

2. Political/legislative awareness

6. The political discussion/awareness regarding status recognition is limited. Controversial topics like the recognition of birth certificates drawn up after surrogacy and the recognition of child marriages have reached the political agenda[17] but have (so far) not resulted in legislative changes. In the af-

[8] J. Verhellen, "Cross-Border Portability of Refugees' Personal Status", in Journal of Refugee Studies, Vol. 31, 2017, pp. 427-443 (Accessibile on https://doi.org/10.1093/jrs/fex026).

[9] L. Deschuyteneer & J. Verhellen, "Afstamming in het internationaal privaatrecht – III. Erkenning Wetboek Internationaal Privaatrecht", in: *X, Personen- en familierecht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, 2017, pp. 27-65.

[10] L. Pluym, Een familierechtelijk statuut voor draagmoederschap, Gent, Wolters Kluwer, 2015, 403 pages.

[11] See for example: G. Verschelden, "Pleidooi voor een familierechtelijke regeling van draagmoederschap in België", in Tijdschrift voor Privaatrecht 2011, pp. 1421-1510; G. Verhellen, "Draagmoederschap en de grenzen van het Belgisch IPR", in Tijdschrift voor Privaatrecht 2011, pp. 1511-1562; L. Pluym, "Het hobbelige parcours van grensoverschrijdend draagmoederschap en de moeilijke verhouding met het Europees Verdrag voor de Rechten van de Mens", in Tijdschrift Jeugd- en Kinderrechten 2015/1, pp. 48-66; L. Deschuyteneer, "De beoordeling van een draagmoederschapsovereenkomst uit Florida: alle wegen leiden naar erkenning", in Tijdschrift@ipr.be 2016/2, pp. 104-111; P. Wautelet, "Bébés papiers, gestation pour autrui et co-maternité: la filiation internationale dans tous ses états", in: A. Nuyts, L. Barnich, S. Pfeiff & P. Wautelet, *Le droit des relations familiales internationales à la croisée des chemins*, 2016, 179, 204-21; S. Den Haese, "Ommekeer in de rechtspraak van het EHRM: Intern verbod op draagmoederschap kan niet altijd omzeild worden door zich te beroepen op een draagmoeder in het buitenland", in Tijdschrift@ipr.be 2017/3, pp. 126-140.

[12] See for example: J. De Meyer, "Europees gemeenschapsrecht doorkruist IPR-regels over naamrecht", in Juristenkrant 12 November 2008, p. 20; S. Eggermont, De houdbaarheid van het Belgische naamrecht, in Tijdschrift voor Privaatrecht 2009, pp. 1759-1849; W. Pintens, "Eén naam in Europa!", in I. Boone, J. Put, F. Swennen & G. Verschelden, *Liber amicorum Patrick Senaeve,* Mechelen, Wolters Kluwer, 2017, pp. 663-682 (836 pages).

[13] See for example: L. Deschuyteneer & S. Den Haese, "Overzicht van rechtspraak: erkenning en tenuitvoerlegging van buitenlandse beslissingen en akten inzake echtscheiding en onderhoudsverplichtingen (2010-17)", in Tijdschrift voor Familierecht, 2017, no. 8, pp. 204-225.

[14] See for example: S. Sarolea, »L'adoption internationale en droit belge à l'aune de la jurisprudence de la Cour européenne des droits de l'homme », in Revue trimestrielle de droit familial, 2009, no. 1, pp. 11-57.

[15] See for example: S. Gössl & J. Verhellen, "Marriages and other unions in private international law - separate but equal?", in International journal of law policy and the family, Vol. 31, 2017, pp. 174-190.

[16] See for example: Y. El Kaddouri & J. Verhellen, "De kafala in de Belgische rechtsorde: opent het Kinderbeschermingsverdrag nieuwe perspectieven?", in Tijdschrift Jeugd- en Kinderrechten 2016, no. 4, pp. 343-351.

[17] For child marriages, see for example the question of Barbara Pas directed to the State Secretary for Asylum and

termath of the Court of Justice of the European Union (hereinafter 'CJEU') decisions in *Grunkin-Paul*, *Garcia Avello* and subsequent cases, the Belgian legislator has decided to (only) change its PIL provisions regarding name.[18] No political attention has gone to the adoption of the EU Regulation 2016/1191 on the circulation of public documents nor its entry into force.

3. Judicial awareness

7. In Belgium, courts are often confronted with the question whether or not a (change in) personal status acquired abroad can be recognized in Belgium. Although every Belgian authority has the power (not) to recognize a foreign authentic instrument or judgment[19], Belgian courts can be asked to examine the matter if two or more authorities have taken conflicting decisions. For example: the civil registrar has recognized a Turkish marriage certificate while the Immigration Office refuses to recognize the foreign marriage certificate. In order to obtain a binding decision, the parties can start a proceeding before the family court.[20] In addition, Belgian courts can be confronted with a foreign document determining the personal status of (one of) the parties during another judicial procedure. For example: during a divorce and/or maintenance procedure in Belgium the question can arise whether the parties are actually married. In those cases, the seized court has to deal with the recognition issue.[21] As a consequence, Belgian courts often have to examine the validity of foreign documents.

8. According to Belgian law, foreign judgments are recognized in Belgium unless (a) ground(s) of refusal is present. The grounds of refusal can be found in Article 25 Belgian Code of PIL. For example: a foreign judgment will not be recognized if the decision violates the defence rights of one of the parties and/or if the result after recognition would be incompatible with our international public policy. Foreign authentic instruments, on the other hand, are recognized in Belgium after having conducted a conflict of laws test which takes into account the public policy exception and the notion of evasion of law.[22]

9. When looking at the cases published in the *Tijdschrift@ipr.be*[23] and the interviews conducted by Verhellen in her doctoral thesis, I am inclined to say that a judicial discussion is absent. Judges confronted with a foreign document establishing the personal status will apply the law and will often look for a fair solution. However, practice shows that not all judges are familiar with the specificities of PIL.

Migration on 30 September 2015. (https://www.dekamer.be/kvvcr/showpage.cfm?section=qrva&language=nl&cfm=qrvaXml.cfm?legislat=54&dossierID=54-b049-885-0300-2014201505174.xml) and the question of Nahima Lanjri directed to the the State Secretary for Asylum and Migration on 12 July 2016. (http://www.dekamer.be/kvvcr/showpage.cfm?section=qrva&language=nl&cfm=qrvaXml.cfm?legislat=54&dossierID=54-B086-885-0775-2015201611007.xml) On 12 June 2018, Nahima Lanjri submitted a bill with the aim of amending the Belgian Code of Private international law, as far as the recognition of foreign marriages is concerned. The goal of the bill is to combat child marriages. (The bill is accessible via www.lachambre.be/FLWB/PDF/54/3160/54K3160001.pdf)

[18] Articles 49 and 50 Wet van 6 juli 2017 houdende vereenvoudiging, harmonisering, informatisering en modernisering van bepalingen van burgerlijke recht en van burgerlijk procesrecht alsook van het notariaat, en houdende diverse bepalingen inzake justitie, Belgian Official Gazette 24 July 2017. This law is also known as 'Potpourri V'. (Accessible via http://www.ejustice.just.fgov.be/cgi/welcome.pl).

[19] For foreign authentic instruments see Article 27, §1, paragraph 1 Belgian Code of PIL, for foreign judgments see Article 22, §1, paragraph 2 Belgian Code of PIL. For more information: cf. *infra*.

[20] For foreign authentic instruments see Article 27, §1, paragraph 4 Belgian Code of PIL, for foreign judgments see Article 22, §2 Belgian Code of PIL.

[21] For foreign judgments see Article 22, §1, paragraph 3 Belgian Code of PIL. With regard to foreign authentic instruments there is no specific provision. In her doctoral thesis, Verhellen examines whether this is a sloppiness of the Belgian legislator rather than a deliberate choice. See J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, pp. 237-238.

[22] See Article 27, §1, paragraph 1 Belgian Code of PIL.

[23] Belgian case law published in the *Belgian Journal of Private International Law* ('*Tijdschrift@ipr.be*') can be consulted on www.ipr.be. It is important to bear in mind that not all Belgian cases are published. Editors of journals and databases in Belgium are dependent on the willingness of judges and lawyers to deliver judgments.

Sometimes judges expect documents that cannot be obtained in the country of origin[24] or they do not know how to deal with the absence of (legalized) documents. By not applying the law in a correct way and/or applying the law in a creative way, some families are left in a limbo.

10. Based on a selection of the case law available at *Tijdschrift@ipr.be*[25] with regard to the recognition of foreign birth certificates drawn up after surrogacy[26] and foreign marriage certificates[27], one could argue that **the CJEU and ECHR perspective is almost completely absent in Belgian case law**. Judges confronted with status recognition will focus on the PIL rules applicable in Belgium and emphasize the importance of the public policy exception and/or the prohibition to evade the applicable law. In two surrogacy cases, the Court of Appeal in Ghent[28] only briefly referred to Article 8 ECHR and the relevant case law of the ECtHR. The content of those cases nor its implications were at any time discussed.

III. (Substantive) Scope

1. Reception of the CJEU case law regarding names and companies in Belgium

1. The decisions of the CJEU (and the case law of the ECtHR) regarding **names** has inspired the former Minister of Justice (Koen Geens[29]) to change the Belgian PIL rules dealing with the name of people. The Law of 6 July 2017 ('Potpourri V') has changed the Articles 37 and 39 of the Belgian PIL Codes. In the bill of 16 January 2017, it is explicitly stated that the aim of the legislative changes is to bring the provisions of the Belgian PIL Code in line with the case law of the Court of Justice of the European Union.[30]

It is interesting to point out that the Belgian legislator has made the decision not to change the general rule on determining a person's nationality[31] but to only adjust the relevant provisions dealing

[24] In 2018, the Institute of PIL at the University of Ghent was confronted with the fact that the seized Belgian judge was unwilling to accept a legalized Irian wedding booklet and insisted on the submission of an authentic marriage certificate unknown in Iranian law.

[25] The case law of Belgian courts published in *Tijdschrift@ipr.be* was examined in the issues of 2017, 2018 and 2019.

[26] Case law available in Belgium after the Mennesson and Labassee decisions of the ECtHR: Family Court Brussels 15 February 2016, Tijdschrift@ipr.be 2016/2, pp. 58-68; Court of Appeal Ghent 20 April 2017, Tijdschrift@ipr.be 2017/3, pp. 71-86; Family Court Bruges 26 May 2017, Tijdschrift@ipr.be 2017/3, pp. 100-105 (Remark: appeal had been lodged against this decision. Appeal decision: Court of appeal Ghent 11 October 2018, No. 2017/FE/27, unpublished); Family Court Brussels 7 November 2017, Tijdschrift@ipr.be 2018/1, pp. 95-100 and Court of Appeal Ghent 10 August 2018, Tijdschrift@ipr.be 2018/4, pp. 15-21 (Remark: appeal against the decision of the Family Court Brussels 31 October 2016).

[27] Family Court Brussels 6 December 2016, Tijdschrift@ipr.be 2017/1, pp. 80-82; Family Court Ghent 15 December 2016, Tijdschrift@ipr.be 2017/3, pp. 96-99; Family Court Ghent 12 January 2017, Tijdschrift@ipr.be 2017/1, pp. 73-76; Family Court Liège 27 January 2017, Tijdschrift@ipr.be 2017/1, pp. 83-86; Family Court Brussels 7 March 2017, Tijdschrift@ipr.be 2017/2, pp. 64-68; Family Court Antwerp 20 April 2018, Tijdschrift@ipr.be 2019/4, pp. 45-49; Family Court Liège 25 May 2018, Tijdschrift@ipr.be 2018/2, pp. 94-98; Family Court Ghent 21 June 2018, Tijdschrift@ipr.be 2019/3, pp. 189-196; Family Court Liège 22 June 2018, Tijdschrift@ipr.be 2018/4, pp. 52-55; Family Court Liège 22 June 2018, Tijdschrift@ipr.be 2018/4, pp. 56-60; Family Court Ghent 20 September 2018, Tijdschrift@ipr.be 2019/3, pp. 178-182; Family Court Ghent 18 October 2018, Tijdschrift@ipr.be 2019/3, pp. 172-177; Family Court Liège 17 May 2019, Tijdschrift@ipr.be 2019/3, pp. 165-171 and Family Court Brussels 24 October 2019, Tijdschrift@ipr.be 2019/4, pp. 53-56.

[28] Court of Appeal Ghent 20 April 2017, Tijdschrift@ipr.be 2017/3, pp. 71-86 and Court of Appeal Ghent 10 August 2018, Tijdschrift@ipr.be 2018/4, pp. 15-21.

[29] 11 October 2014 – 10 December 2018.

[30] See: Wetsontwerp van 16 januari 2017 houdende vereenvoudiging, harmonisering, informatisering en modernisering van bepalingen van burgerlijk recht en van burgerlijk procesrecht alsook van het notariaat, en houdende diverse bepalingen inzake justitie, p. 3 and 30. (Accessible on https://www.koengeens.be/policy/tekst-ppv.) ("*L'objectif est de rendre notre Code conforme en cette matière, à la jurisprudence de la Cour de Justice de l'Union européenne.*" (page 3)) ("*L'origine de cette réforme est avant tout internationale. La Belgique doit aligner ses dispositions internes sur celles des Traités de l'Union européenne, de la Convention européenne des droits de l'homme et sur la jurisprudence qui les a interprétés. Cela implique de modifier les principes qui gouvernent jusqu'à aujourd'hui notre droit international privé lorsqu'il est question d'un nom ou d'un prénom.*" (p. 30))

[31] This general rule can be found in Article 3, §2 Belgian Code of PIL. ("*The references in the present statute to the nationality of a natural person, who possesses two or more nationalities, refer to:*

with the name. As of 1 January 2018, people possessing more than one nationality can choose freely which nationality should prevail for determining the applicable name law even if they also possess the Belgian nationality. Consequently, the concept of 'most effective nationality' no longer plays a role regarding names. By allowing all people, EU and non-EU citizens, to select the nationality of their choice, Belgium does not only guarantee the free movement of people within Europe but also allows non-EU citizens to choose the applicable name law allowing them to move with one single non-limping name.

12. The decisions of the CJEU regarding **companies** have also been picked up by the Belgian legislator. The bill[32] which lead to the establishment of a Code on Companies and Associations states that "*Ce projet vise à moderniser le droit des personnes morales. Les grandes lignes directrices du projet sont : […] 3) Adaptation aux évolutions européennes, comme réglementer le déplacement transfrontalier du siège statutaire des sociétés*."[33]

The Code on Companies and Associations[34], which entered into force on 19 May 2019, renounced the **real seat theory** enshrined in Article 4, §3 of the Belgian PIL Code and introduced the **incorporation theory**.[35] Article 2:146 Code on Companies and Associations clearly states that "*Le présent code est applicable aux personnes morales qui ont leur siège statutaire en Belgique*". As a result, the Belgian Code on Companies and Associations only applies to legal entities incorporated in Belgium, irrespective of where those entities have their real seat. Unfortunately, Article 4 of the Belgian PIL Code, which defines the notions domicile and habitual residence and entails the real seat theory, has not been changed.[36]

2. Reception of other international case law

13. The bill of 16 January 2017 which lead to the Law of 6 July 2017 ('Potpourri V') mentions the case law of the ECtHR (i.a. Henry Kismoun v. France) and the importance of Belgian legislation to adhere to the principles of equality and non-discrimination.[37] Potpourri V focuses on the simplification, harmonisation, informatisation and modernisation of provisions of civil law, civil procedural law and notarial law.

3. Reception of the EU Regulation 2016/1191 on the circulation of public documents

14. To the best of my knowledge, not much has been said about the adoption of the EU Regulation 2016/1191 nor its entry into force (see A.2. Political awareness). However, the 'Flemish Association of Civil Servants and Officers of the Births, Marriages and Deaths Registration Office'[38] has mentioned

---

1° the Belgian nationality, if it is one of the nationalities;

2° in the other cases, the nationality of the State with which that natural person, taking all circumstances and notably his habitual residence into account, has the closest connections.")

[32] Wetsontwerp van 4 juni 2018 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen . The bill is accessible on https://www.dekamer.be/flwb/pdf/54/3119/54K3119001.pdf

[33] See: Wetsontwerp van 4 juni 2018 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen, pp. 3-4. See also pp. 7-8 and 15-16.

[34] Wet van 23 maart 2019 houdende het wetboek van vennootschappen en verenigingen, Belgian Official Gazette 4 april 2019. (Accessible on http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2019032309.)

[35] See: Wetsontwerp van 4 juni 2018 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen, p. 16. ("*Pour renforcer la sécurité juridique et répondre à la réalité économique et juridique, le projet opte dès lors pour la théorie du siège statutaire.*")

[36] The bill which lead to the establishment of a Code on Companies and Associations payed attention to Article 109 of the Belgian Code of PIL but did not mention Article 4 Belgian Code of PIL. See: Wetsontwerp van 4 juni 2018 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen, p. 108.

[37] Wetsontwerp van 16 januari 2017 houdende vereenvoudiging, harmonisering, informatisering en modernisering van bepalingen van burgerlijk recht en van burgerlijk procesrecht alsook van het notariaat, en houdende diverse bepalingen inzake justitie, pp. 35-36. (Accessible on https://www.koengeens.be/policy/tekst-ppv.)

[38] *Vlaamse Vereniging van Ambtenaren en Beambten Burgerlijke Stand* ('Vlavabbs'). (www.vlavabbs.be)

the adoption of the Regulation on its website under the section 'news' and has organized a brainstorm session about the implementation of the Regulation in November 2016.[39]

4. Other areas of law

15. The case law of the ECtHR regarding **surrogacy** is well known among Belgian scholars but has not led to any changes in Belgian legislation. Until today, surrogacy is **not regulated** in Belgium. As a consequence, the matter is dealt with on a case by case basis. The last legislative initiative dates from 7 October 2014 and does not mention the case law of the ECtHR nor the impact of the ECHR.[40] A year later, in December 2015, the Senate adopted an information report on surrogacy condemning commercial surrogacy and insisted on a legislative framework.[41] Since then, no progress has been made whatsoever on the topic. As mentioned above, the Belgian judges seized to deal with the (non-)recognition of a foreign birth certificate drawn up after surrogacy seldom refer to the case law of the ECtHR and primarily focus on the best interests of the child and the general rules of PIL regarding recognition of a judgment/authentic instrument obtained abroad.

16. Taking into account that Belgium has regulations in place since 2003 allowing **same-sex couples** to get married[42] and its willingness to recognize same-sex marriages and registered partnerships[43], Belgian law is (currently) not influenced by the case law of the ECtHR[44] and/or the CJEU[45]. The fact that it could be difficult for a couple to have their same-sex marriage contracted in Belgium recognized abroad was discussed during the preparations of the Law of 13 February 2003. However, it was decided that there was no need to include a special provision in law obliging civil servants to inform the parties concerned about the risk of a limping legal relation when going abroad. Closely connected to the recognition of a Belgian marriage certificate is the recognition in Belgium of a registered partnership contracted abroad by two people of the same sex in a country where same-sex marriages are prohibited. In order to protect the family unity of people of the same sex, the Belgian Minister of Justice issued a Circular Letter in 2007 stating that certain foreign cohabitating relationships are to be considered equivalent to marriage.[46] The problems that can occur when people in a same-sex marriage or registered partnership move across borders is discussed in legal doctrine.[47]

17. In Belgium, it is possible since 1 January 2015 for the female partner of a woman, who gave birth or is going to give birth, to create a legal bond between her and the child of her partner/spouse by operation of law.[48] Since **co-motherhood** (term used in Belgium) is only provided for by law in two European Member States, namely Belgium and the Netherlands, the question arises whether other

---

[39] The attendance rate was, however, limited.

[40] Wetsvoorstel van 7 oktober 2014 houdende organisatie van centra voor draagmoederschap, submitted by Karin Jiroflée and Maya Detiège. (Accessible on https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=54&dossierID=0425)

[41] The information report accepted by the Senate and it preparations can be consulted on https://www.senate.be/www/?MIval=/dossier&LEG=6&NR=98&LANG=nl.

[42] See: Wet van 13 februari 2003 tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek, Belgian Official Gazette 28 februari 2003. (Accessible via http://www.ejustice.just.fgov.be/cgi/welcome.pl).

[43] Article 27 Belgian Code of PIL j° Articles 46 and 47 Belgian Code of PIL.

[44] Think: ECtHR 14 December 2017, *Orlandi and Others v. Italy.*

[45] Think: CJEU 5 June 2018, C-673/16, *Coman and Others v. Romania*, ECLI:EU:C:2018:385.

[46] See: Circulaire van 29 mei 2007 tot wijziging van de circulaire van 23 september 2004 betreffende de aspecten van de wet van 16 juli 2004 houdende het wetboek van internationaal privaatrecht die betrekking hebben op het personeelstatuut, Belgian Official Gazette 31 mei 2007. (Accessibile via http://www.ejustice.just.fgov.be/cgi/welcome.pl).

[47] S. Gössl & J. Verhellen, "Marriages and other unions in private international law - lost in distinction?!", in International journal of law policy and the family, Vol. 31, 2017, pp. 1-17.

[48] Wet van 5 mei 2014 houdende de vaststelling van de afstamming van de meemoeder, Belgian Official Gazette 7 juli 2014. (Accessibile via http://www.ejustice.just.fgov.be/cgi/welcome.pl).

(EU-Member) States will recognize the parenthood of the co-mother. This matter was not discussed during the drafting of the law on co-motherhood.[49] Both Belgian family law scholars[50] and Belgian PIL scholars[51], however, have pointed out the risk of limping legal relations. The question if and how foreign administrations and courts deal with co-motherhood established in Belgium can (at the moment) not be answered since no information is available.

III. Methods of recognition/acceptance

1. General

18. This section focuses on the reasons why a status acquired abroad is accepted in Belgium. In her doctoral thesis, Verhellen pointed out that the aim of the Belgian legislator, while drafting the Belgian Code of PIL, was to **be open** and create **international harmony**. The idea was to generate judicial continuity in the life of people.[52] The preliminary works, however, show that this openness and the idea of cross-border harmony and continuity has its limits.[53] It was stated by the legislator that rights validly acquired abroad must, *to the extent possible*, be recognized in the Belgian legal order.[54] Consequently, a personal status acquired abroad will be recognized in Belgium unless a ground of refusal can be invoked[55] or the document does not pass the conflict of laws test (including the evasion of law-principle and the public policy-exception)[56].

19. The research done by Verhellen shows that the legal basis for not having to recognize a foreign document is applied considerably different depending on the matter. When confronted with a foreign birth certificate drawn up after surrogacy, judges tend to be more creative compared to when they have to deal with a foreign marriage certificate which may oblige Belgium to issue a family reunification visa.[57] In surrogacy cases, the concept of the 'best interests of the child' seems to trump the *mater semper certa est*-principle and the fact that the intended parents have gone abroad to circumvent Belgian law. Bearing in mind that Article 3 CRC protects the best interests of the child, one could argue that children's rights considerations are capable of setting aside the general principles of PIL or are at least capable of attenuating its result.

20. The doctoral dissertation of Pfeiff[58] illustrates that the CJEU aims at guaranteeing the right to freely move within the EU while the ECtHR focuses on the protecting of the right to respect to private

---

[49] Attention was only briefly paid to the question of applicable law in case the co-mother does not possess the Belgian nationality. See *Parl.St.* Kamer 2014-15, nr. 54-538/5, pp. 7-8. (Accessible on http://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=nl&cfm=flwbn.cfm?db=FLWB&legislat=54&dossierID=0538)

[50] See for example: F. Swennen & M. Croce, "The symbolic power of legal kinship terminology: an analysis of 'co-motherhood' and 'duo-motherhood' in Belgium and the Netherlands", in Social and Legal Studies, 2015, p. 1, p. 14.

[51] See for example: P. Wautelet, « Bébés papiers, gestation pour autrui et co-maternité: la filiation internationale dans tous ses états », in: A. Nuyts, L. Barnich, S. Pfeiff and P. Wautelet, *Le droit des relations familiales internationales à la croisée des chemins*, 2016, p. 179, pp. 196-204.

[52] J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, pp. 201-202 and 348.

[53] See also J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, p. 202.

[54] See *Parl.St.* Senaat, BZ 2003, nr. 3-27/1, p. 6. (Accessible on https://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=3&NR=27&VOLGNR=1&LANG=nl)

[55] The grounds of refusal can be found in Article 25 Belgian Code of PIL and only apply to foreign judgments.

[56] This far-reaching substantive review only applies to foreign authentic instruments (see Article 27 Belgian Code of PIL).

[57] J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, pp. 353-354 and 276-289.

[58] In her doctoral thesis, S. Pfeiff examines in great depth the recognition of marriages contracted abroad between hetero- and homosexual couples, the recognition of foreign registered partnerships and the way national authorities deal with the establishment of and change in a person's name.

life. Consequently, both courts promote the swift recognition of a (change in) personal status validly obtained abroad. The research done by Pfeiff, however, demonstrates that the Belgian rules on PIL – like the French, German and English rules on PIL – do not (always) serve that goal. The fact that a (change in) personal status obtained abroad can be refused by invoking fraud or the absence of proximity prevents the swift recognition of a foreign document. According to Pfeiff, the use of the "*European method of recognition*" – which only allows the non-recognition of a foreign document by applying the European public policy exception – is the only way to meet the needs of people who have the right to freely move within the EU.[59]

21. The principle of mutual trust has – to the best of my knowledge – never been successfully invoked to obtain the recognition of a personal status acquired abroad. When confronted with a request for recognition, the seized administration or court will always refer to and apply the relevant PIL provisions.

2. Importance/role of the country of origin

22. In Belgium, acceptance is not limited as far as the origin of the status is concerned. Although the State of origin is decisive in order to identify the applicable instrument (e.g. (Hague) Convention, Treaty, EU-Regulation or Belgian Code of PIL), it will not – on its own - determine whether or not the foreign document can be recognized. The Belgian administrations and courts have to justify their decision (not) to recognize by referring to the principles in the applicable PIL instrument.

23. The State of origin can be identified by looking at the submitted (legalized/apostilled[60]) documents. A personal status can only be recognized if the formal and substantive validity has been established. The formal validity of a document is proven by a series of signatures ('legalization') or a certificate/sticker ('apostille'). In practice, however, it is not always possible for people to submit (authentic) documents.[61] Research of Verhellen shows that, in Belgium, there is no uniform way of dealing with this issue. Depending on the judge, copies, verbal statements, testimonies, earlier administrative decisions, etc. will (not) be accepted in order to prove a certain personal status.[62] Even if an authentic document is presented, research shows that certain administrations systematically disregard documents originating from certain African countries. Bearing in mind that Somalia is a failed State, the decision not to award any consequences to documents drawn up their cannot be contested. The same attitude, however, cannot be upheld for decisions emanating from other, non-failed, African States. A case brought before court in 2009[63] demonstrates the unwillingness of the Belgian Immigration Office to recognize two birth certificates drawn up in Ghana. According to the Immigration Office, the birth certificates could not be recognized since it has been established by means of a DNA test that the two children were not biologically linked to their legal father. According to the Immigration Office, the birth certificates were the result of fraud.[64] Belgian court are often also confronted with the refusal of the Belgian Immigration Office to recognize foreign birth certificates drawn up years after the child was born. In March 2018, for instance, the family court in Ghent was asked to examine the validity of a Ghanaian birth certificate drawn up 25 years after the applicant's birth.[65] Although no (comprehensive) research has been done on

[59] S. Pfeiff, La portabilité du statut personnel dans l'espace européen. De l'émergence d'un droit fondamental à l'élaboration d'une méthode européenne de la reconnaissance, Brussel, Bruylant, 2017, pp. 631-636.

[60] If necessary.

[61] See on this topic: J. Verhellen, "Cross-Border Portability of Refugees' Personal Status", in Journal of Refugee Studies, Vol 31, 2017, 17 pages. (Accessibile on https://doi.org/10.1093/jrs/fex026)

[62] See for example: J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, pp. 243-249.

[63] Court of first instance Liège 12 June 2009, Revue trimestrielle de droit familial 2010/4, p. 1112.

[64] For more information on the case, see: J. Verhellen, "Schijnerkenningen: internationale families opnieuw in de schijnwerpers", in Tijdschrift@ipr.be 2016/2, p. 98.

[65] Family Court Ghent 15 March 2018, Tijdschrift@ipr.be 2019/3, pp. 205-208.

the matter, it is safe to say that national authorities do make a distinction based on the country of origin. When presenting documents from a country were the administration cannot be 'trusted', people can expect difficulties/problems. In those cases, it is wise to turn to the competent court. In general, courts will take a decision taking into account all the relevant elements and are often capable of providing a suitable solution.[66]

3. Principles used to justify/deny status recognition: a case study

24. In order to identify the principles used to justify or deny status recognition, a small case study was carried out. The case law of Belgian courts published in the Belgian Journal for Private International Law (*Tijdschrift@ipr.be*) was examined in the period 2017-f.

25. When confronted with a foreign default judgment, the Belgian rules on private international law require that the person seeking the recognition of the foreign judgment submits a document proving that the act that introduced the proceedings or an equivalent document was served or brought to the attention of the defaulting party in accordance with the law of the State where the decision was rendered.[67] When the person seeking recognition is unable to prove that the other party was duly informed about the proceedings, recognition will be denied.[68]

26. When confronted with the dissolution of a marriage that could only be obtained by the husband, the Belgian Code of PIL has specific rules in place.[69] If it has been established that (one of) the spouses had the nationality of a country that does not allow this manner of dissolving the marriage, for example Belgian nationality, at the time the marriage was dissolved, the dissolution of the marriage cannot be recognized in Belgium.[70]

27. In case the recognition of a marriage contracted abroad is sought, the Belgian authorities will examine the validity of the foreign document.[71] The seized court/authority will start by examining the formal validity of the document. Article 47, §1 Belgian Code of PIL stipulates that: "*The formalities regarding the celebration of the marriage are governed by the law of the State on the territory of which the marriage is celebrated*". In practice, this means that a marriage contracted by proxy could be recognized in Belgium if the law of the State where the marriage was contracted allows this and the rules regarding marriages by proxy have been respected. In a case brought before the family court of Brussels, the court decided that although Moroccan law allows a marriage by proxy, the marriage contracted in Morocco could not be recognized in Belgium since the reason invoked by the wife allowing her not to be present at her own wedding were false. The womartdn had stated that she could not be present in Morocco due to professional obligations while it was clear that she was unemployed and residing illegally on Belgian territory.[72] In another case, the Belgian judge saw no reason not to recognize a marriage since the spouse, who had been represented at his wedding, had been honest to the judge in Morocco about his inability to be personally present to contract his marriage.[73]

After it has been established that the formal requirements have been met, the Belgian authority or court will examine the substantive requirements. With regard to the latter, the Belgian Code of PIL uses the nationality of the spouses as connecting factor. Consequently, a marriage contracted in Morocco

[66] See for example: Family Court Ghent 15 December 2016, Tijdschrift@ipr.be 2017/3, pp. 96-99 and Court of first instance Hasselt 25 February 2008, http://www.agii.be/rechtbank-van-eerste-aanleg-van-hasselt-2008-02-25.

[67] See Article 24, 2° Belgian Code of PIL.

[68] This was the case in Court of first instance Ghent, 25 November 2010, Tijdschrift@ipr.be 2017/2, p. 50.

[69] Article 57 Belgian Code of PIL.

[70] See for example: Court of first instance Ghent, 25 November 2010, Tijdschrift@ipr.be 2017/2, p. 51.

[71] Article 27 j° Articles 46 and 47 Belgian Code of PIL.

[72] Family Court Brussels, 6 December 2016, Tijdschrift@ipr.be 2017/1, pp. 80-82.

[73] Family Court Brussels, 7 March 2017, Tijdschrift@ipr.be 2017/2, p. 67.

between a Belgian national and a Moroccan national can be subjected to Belgian law. However, since both Moroccan and Belgian law have a provision in place requiring of spouses to create a sustainable community of life, the recognition of a marriage contracted abroad cannot be refused on the sole basis that foreign law was applied to the marriage.[74] In addition, the fact that one of the spouses had previously divorced the same woman twice, be it in two different countries with a time interval, does not allow Belgium to refuse the recognition of the first divorce, and to conclude that the subsequent marriage of the man was polygamous, if the first divorce met all the requirements to be recognized.[75]

The sole fact that one of the spouses attains a right of residence due to the marriage is, in itself, insufficient to refuse the recognition of the foreign marriage certificate. If it has been made clear that obtaining a right of residence was not the sole factor to conclude the marriage, the marriage has to be recognized.[76]

With regard to marriages contracted when (one of) the spouses had not attained the age of majority (also know as child-marriages), a Belgian court decided that the marriage had to be recognized taking into account the fact that both spouses had attained the age of majority at the time they requested the recognition of their marriage and the fact that there was only an age difference of 3 years and 3 months between the applicants.[77]

28. Foreign adoption orders are recognized in Belgium if they have been created in line with the 1993 Hague Adoption Convention.[78] In case the requirements of the 1993 Hague Adoption Convention have not been met, recognition is not possible.[79] A case brought before the Court of Appeal in Brussels illustrates that when it has been established that local family care is possible, for example by the grandparents, the international adoption cannot be accepted in Belgium.[80] However, if its considered in the best interests of the child and the requirements of Article 365-6 Belgian Civil Code have been met, the foreign adoption can be regularized in Belgium.[81]

In practice, problems have occurred when the adopted child has reached the age of majority during the proceedings necessary to obtain recognition/regularization. In a case brought before the Court of Appeal in Brussels, the judge relied on Article 8 ECHR, the right to respect for private and family life, to pronounce the regularization of a child aged 20 at the time. The judge took into account the regularization of the adoption of the younger sister, who was still a minor, and the fact that a family life existed between the two sisters which needed to be protected.[82]

29. In case of international surrogacy, the examined case law illustrates that Belgian courts often invoke (1) the best interests of the child and (2) the fact that the filiation has been established in accordance with the law of the country where the surrogacy took place to recognize the filiation established abroad between the child and the intended parents.[83] In a case brought before the Court of Appeal in Ghent, the judge also briefly referred to the importance of Article 8 ECHR and the case law of the Eu-

[74] Court of first instance Ghent, 12 January 2017, Tijdschrift@ipr.be 2017/1, pp. 75-76.

[75] Court of first instance Ghent, 12 January 2017, Tijdschrift@ipr.be 2017/1, p. 75.

[76] Family Court Brussels 7 March 2017, Tijdschrift@ipr.be 2017/2, p. 66; Family Court Antwerp 20 April 2018, Tijdschrift@ipr.be 2019/4, pp. 47-48; Family Court Ghent 21 June 2018, Tijdschrift@ipr.be 2019/3, p. 193; Family Court Liège 22 June 2018, Tijdschrift@ipr.be 2018/4, p. 54; Family Court Liège 22 June 2018, Tijdschrift@ipr.be 2018/4, p. 59; Family Court Ghent 20 September 2018, Tijdschrift@ipr.be 2019/3, pp. 181-182; Family Court Ghent 18 October 2018, Tijdschrift@ipr.be 2019/3, p. 176 and Family Court Liège 17 May 2019, Tijdschrift@ipr.be 2019/3, p. 168.

[77] Family Court Liège 25 May 2018, Tijdschrift@ipr.be 2018/2, p. 97. See also: Family Court Liège 17 May 2019, Tijdschrift@ipr.be 2019/3, p. 168.

[78] This is of course only the case if the 1993 Hague Adoption Convention is applicable.

[79] See for example: Court of Appeal Brussels, 22 May 2017, Tijdschrift@ipr.be 2017/4, p. 45 and Court of Appeal Brussels, 23 June 2017, Tijdschrift@ipr.be 2017/4, p. 25.

[80] Court of Appeal Brussels 23 June 2017, Tijdschrift@ipr.be 2017/4, p. 30.

[81] See for example: Court of Appeal Brussels 22 May 2017, Tijdschrift@ipr.be 2017/4, p. 46.

[82] Court of Appeal Brussels 22 May 2017, Tijdschrift@ipr.be 2017/4, pp. 48-49.

[83] See for example: Court of first instance Brussels 13 May 2014, Tijdschrift@ipr.be 2017/3, pp. 89-90; Court of Appeal Ghent 20 April 2017, Tijdschrift@ipr.be 2017/3, pp. 84-85 and Court of Appeal Brussels 10 August 2018, Tijdschrift@ipr.be 2018/4, pp. 15-21.

ropean Court of Human Rights.[84] In a case brought before the family court of Brussels, the judge stated that the Indian birth certificate could not be recognized but allowed the intended father and mother, who were not genetically linked to the child and had the Belgian nationality, to recognize the child in line with Belgian law. Consequently, the Indian birth certificate was labelled as an act establishing the will of the intended parents to acknowledge the child.[85]

Although Belgian substantive law is silent on the matter of surrogacy, the Belgian case law regarding international surrogacy shows the willingness of Belgian courts to recognize parent-child relationships validly established abroad. This is also illustrated by a decision of the court of appeal of Brussels were the court recognized the validity of an American judgement establishing filiation with regard to both the intended fathers, a homosexual couple of which only one had a biological link with the child.[86] However, Belgian case law is not unanimous. A case brought before the family court of Bruges illustrates that it cannot be guaranteed that a foreign birth certificate drawn up after surrogacy will always be (partially) recognized in Belgium. In that case, the court had a problem with the fact that the Mexican birth certificate did not mention the name of the mother. Only the name of the intended father was recorded. According to the Belgian judge, the absence of the mother's name was contrary to Belgian public policy. The court also stated that the Mexican birth certificate could not be recognized as an act recording the acknowledgment of the child by the intended father since it had not been ascertained that the mother of the child had given her consent.[87] The decision of the family court of Bruges was, however, overturned by a decision of the court of appeal in Ghent.[88] Taking into account the best interests of the child, the case law of the ECtHR and the fact that the Mexican birth certificate was already recognized by the Italian authorities, the court decided that the Mexican birth certificate had to be recognized as an authentic instrument demonstrating the paternal acknowledgment.

IV. Process of recognition/acceptance

1. Methodology

30. In this section, I will elaborate on how national law and institutions recognize a foreign status. In Belgium, a foreign status can be accepted after having applied the relevant PIL rules. The idea in Belgium is to recognize foreign judgments and authentic instruments *de plano*, meaning without any judicial interference. The fact that every authority in Belgium has the capacity to recognize a foreign document does not mean that every document is accepted without control. The seized authority has to qualify the content of the document[89] and determine which authority has drawn up the document[90] in order to determine the applicable PIL rules. For example: the recognition of a divorce decree pronounced in another EU Member State (with the exception of Denmark) is regulated by the Brussels II*bis* Regulation while the recognition of divorce decrees from outside the EU and Denmark fall under Article 22 et seq. Belgian Code of PIL.

31. When confronted with for example a foreign marriage certificate, birth certificate, pre-birth order or divorce decree from outside the EU or Denmark, the rules enshrined in the Belgian Code of PIL start to come into play. As mentioned above, the Belgian Code of PIL makes a distinction between the recognition of foreign judgments/judicial decisions and foreign authentic instruments. The decisive factor being the authority that has issued the document.

[84] Court of Appeal Ghent 20 April 2017, Tijdschrift@ipr.be 2017/3, p. 71, pp. 85-86.
[85] Family Court Brussels 7 November 2017, Tijdschrift@ipr.be 2018/1, pp. 98-99.
[86] Court of Appeal Brussels 10 August 2018, Tijdschrift@ipr.be 2018/4, pp. 15-21.
[87] Family Court Bruges 26 Mai 2017, Tijdschrift@ipr.be 2017/3, p. 100, pp. 103-104.
[88] Court of Appeal Ghent 11 October 2018, No. 2017/FE/27, unpublished.
[89] Marriage certificate, birth certificate, adoption order, divorce decree, etc.
[90] The Belgian Code of PIL makes a distinction between the recognition of foreign judgments and foreign authentic acts.

32. Articles 22 et seq. Belgian Code of PIL apply when the foreign document has been pronounced by a foreign judge. Article 22, §1, paragraph 4 Belgian Code of PIL stipulates that "*the judgment may only be recognized [...] if it does not violate the conditions of article 25*". Consequently, the Belgian civil registrar or judge confronted with a foreign judgment cannot accept the (content of the) foreign decision if:

- the result of the recognition would be manifestly incompatible with public policy;
- the rights of the defence were violated;
- the judgment is only obtained to evade the application of the law designated by the Belgian Code of PIL (in a matter in which parties cannot freely dispose of their rights);
- the foreign judgment is not yet final;
- the judgment is irreconcilable with a Belgian judgment or an earlier foreign judgment that is amenable to recognition in Belgium;
- the claim was brought abroad after a claim which is still pending between the same parties and with the same cause of action was brought in Belgium;
- the Belgian courts had exclusive jurisdiction to hear the claim;
- the jurisdiction of the foreign court was based exclusively on the presence of the defendant or the assets located in the state of such court, but without any direct relation with the dispute; or;
- the recognition or enforceability would be contrary to the grounds for refusal provided for in articles 39, 57, 72 and 95 Belgian Code of PIL.[91]

Under no circumstances may the foreign judgment be reviewed on the merits.[92]

33. The recognition of foreign authentic instruments is fundamentally different from the recognition of a foreign judgment since the Belgian legislator has opted for a far-reaching substantive review for the former. Article 27 Belgian Code of PIL states that "*a foreign authentic instrument is recognized by any authority in Belgium without the need for any procedure* ***if the validity is established in accordance with the law applicable by virtue of the present statute*** *and more specifically with due regard of articles 18 and 21*". In practice, this means that the Belgian public servant or judge confronted with a foreign authentic instruments has to determine the applicable law in accordance with the Belgian Code of PIL. Belgian authorities will only accept the (content of the) foreign document after having established that the foreign document respects the requirements imposed by the Belgian conflict of laws rules. The fact that the foreign authority has not applied the law assigned by the Belgian Code of PIL is not in itself a problem as long as the provisions of the applied law are similar. In addition to this conflict of laws test, recognition is only possible if the foreign document is not contrary to the Belgian international public policy (Article 21 Belgian Code of PIL) and it has been accepted that there has been no evasion of the application of the law designated by the Belgian Code of PIL (Article 18 Belgian Code of PIL).

2. Formal requirements

A) Official document

34. The Belgian Code of PIL only provides rules regarding the recognition of foreign judgments/judicial decisions and authentic instruments.[93] In practice, this means that only documents pro-

[91] Article 25, §1 Belgian Code of PIL. For the English translation of the 2004 Belgian Code of PIL: see C. Clijmans & P. Torremans, Law of 16 July 2004 Holding the Code of Private International Law (Belgian Official Journal 27 July 2004 – in fore as from 1 October 2004) in: P. Sarcevic, P. Volken & A. Bonomi, Yearbook of Private International Law Vol. VI, 2004, p. 319, pp. 328-329. An updated version of this translation can be found on: https://www.ipr.be/nl/wetgeving.

[92] Article 25, §2 Belgian Code of PIL.

[93] Private status decisions fall outside the scope of the Belgian Code of PIL. As a consequence, recognition cannot be coerced even if the legal requirements have been met.

nounced by a court or issued by an official authority, like a civil registrar or notary, can be recognized in Belgium. A document drawn up between two parties recording a (change in) personal status without the involvement of a judge, notary or civil registrar cannot be accepted in Belgium.

B) Legalisation

35. Article 30 Belgian Code of PIL requires that the submitted document is legalized. In line with the 1961 Hague Apostille Convention, legalization can be replaced by an apostille. The aim is to gain certitude on the formal authenticity of the document. Consequently, copies and uncertified originals are not accepted. However, legalization is not always possible due to war and/or ongoing conflicts in the country of origin. When confronted with a document from such a country, Belgian judges show (some) flexibility. For people from for example Somalia[94] and Iraq[95], the inability to submit a (legalized) document did not prevent them from getting their marriage or birth recognized.

36. For people seeking international protection, the registration of their personal status runs a bit differently. Taking into account that a lot of people were forced to leave their home without having the time to collect official documents, Belgian asylum authorities – like the Belgian Immigration Office and the Office of the Commissioner General for Refugees and Stateless Persons – record the personal status of people based on declarations made during their asylum procedures. For example: two Syrian citizens can be registered as 'married' solely based on their oral statements. In practice, problems can occur when (one of) the spouses later initiate(s) divorce proceedings.[96]

C) Relationship between the case and the foreign legal system where the status was acquired?

37. No specific relationship between the case and the foreign legal system where the status was acquired is required. On the contrary, in cases concerning international surrogacy (some) Belgian authorities seem to have no problem with the fact that the intended parents went abroad with the sole intention of having their desire to have a child fulfilled while other Belgian authorities base their decision not to recognize a foreign marriage certificate on the fact that one of the spouses also had the Belgian nationality.

D) Language

38. Foreign documents not available in Dutch, French or German submitted to Belgian authorities and/or courts often need to be translated.[97]

With regard to administrative authorities, the Laws on the use of languages in administrative matters of 18 July 1996[98] and the Flemish Decree of 30 June 1981[99] regulate the use of languages be-

[94] Family Court Ghent 15 December 2016, Tijdschrift@ipr.be 2017/3, pp. 96-99.

[95] Family Court Bruges 13 January 2017, Tijdschrift@ipr.be 2017/2, pp. 59-63.

[96] For more information on the solutions in practice, see J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, pp. 243-249 and J. Verhellen, "Cross-Border Portability of Refugees' Personal Status", in Journal of Refugee Studies, Vol. 31, 2017, 17 pages. (Accessible on https://doi.org/10.1093/jrs/fex026)

[97] The author would like to thank Jonathan Bernaerts, Ph.D. Candidate at the Max Planck Institute for Social Anthropology, for his helpful comments.

[98] Accessible on http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1966071831.

[99] Vlaams Decreet van 30 juni 1981 houdende aanvulling van de artikelen 12 en 33 van de bij koninklijk besluit van 16 juli 1966 gecoördineerde wetten op het gebruik van de talen in bestuurszaken wat betreft het gebruik van de talen in de betrekkingen tussen de bestuursdiensten van het Nederlandse taalgebied en de particulieren, Belgian Official Gazette 10 november 1981. (Accessible on http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1981063036&table_name=wet.)

tween the Government and private people.[100] In principle, local authorities have to use the language of their language area in interactions with private individuals.[101] The Flemish Decree obliges inhabitants of the Dutch language area to use Dutch when addressing these authorities. With regard to documents drawn up in a foreign language in case of a notification of a marriage and acknowledgment of a child, the Belgian Civil Code makes it clear that if the civil servant receives a document in a foreign language, for example a Spanish birth certificate, he may request a certified translation of that document.[102] Depending on where the document is presented in Belgium, the civil servant may ask the document to be translated in Dutch, French or German. Research of Jonathan Bernaerts illustrates that in practice, some Flemish municipalities do ask for a sworn translation in Dutch while other municipalities are more willing to accept documents drawn up in other languages, including English.[103] In sum, the question whether or not a foreign document needs to be translated depends on the origin of the document, its function in the proceedings and the administration's approach.

The Belgian Language Law of 15 June 1935[104] and the Belgian Judicial Code grant Belgian courts the same right. Consequently, courts can ask for foreign documents to be translated by a sworn translator in Dutch, French or German (depending on the location of the court).

3. Substantive requirements

39. In Belgium, the recognition of a foreign judgment can be refused if the seized authority or judge is of the opinion that the result of the recognition is manifestly incompatible with our public policy.[105] With regard to authentic instruments, the refusal to recognize the document cannot solely be based on the public policy exception. When confronted with a foreign provision manifestly incompatible with our public policy exception during the conflict of laws test, that provision will be replaced by an acceptable provision in foreign law or Belgian law.[106]

40. When looking at the published case law published in *Tijdschrift@ipr.be*, the Belgian courts only invoked the public policy-exception once to refuse the recognition of a Mexican birth certificate drawn up after surrogacy. According to the judge in Bruges, the application of Mexican law was manifestly incompatible with the Belgian international public policy since it is impossible in Belgium to register a child without the name of the mother being mentioned in the birth certificate and for the woman who gave birth to the child to renounce her parenthood.[107] The court of appeal in Ghent[108] shared this opinion but decided that the Mexican birth certificate had to be recognized as an authentic instrument demonstrating the paternal acknowledgment in order to safeguard the best interest of the child (cf. *supra*).

---

[100] The Flemish Decree only regulates the use of languages on the Dutch language area.

[101] In 27 'municipalities with facilities' there is special language regime obliging authorities to use a protected language in some cases.

[102] See for example Article 64, §2 Belgian Civil Code (marriage notification) and Article 327/2, §2 Belgian Civil Code (acknowledgment of a child). The Law of 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing – which entered into force on 1 January 2019 – upholds the right to ask for sworn translations. See: (new) Articles 164/2, §7 and 327/2, §7 Belgian Civil Code.

[103] For more information: bernaerts@eth.mpg.de; T. De Pelsmaeker, L. Deridder F. Judo, J. Proot & F. Vandendriessche, Taalgebruik in bestuurszaken. Administratieve rechtsbibliotheek, Algemene reeks nr. 15., Brugge, die Keure, 2004; F. Gosselin, L'emploi des langues en matière administrative. 2nd, rev. Ed., Pratique du droit 73, Mechelen, Wolters Kluwer, 2017.

[104] Article 8 Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, Belgian Official Gazette 22 juni 1935. (Accessible via http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1935061501) and Article 1254, §1 Belgian Judicial Code (divorce proceedings). The Law of 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing – which entered into force on 1 January 2019 – upholds the right to ask for sworn translations. See: (new) Articles 1254, §2 and 1288*bis*, §§2 Belgian Judicial Code.

[105] Article 25, §1, paragraph 1 Belgian Code of PIL.

[106] Article 27, §1 j° Article 21 Belgian Code of PIL.

[107] Family Court Bruges 26 May 2017, Tijdschrift@ipr.be 2017/3, p. 103.

[108] Court of Appeal Ghent 11 October 2018, 2017/FE/27, unpublished.

4. Revision

41. Revision refers to any sort of control mechanism which the recognizing or accepting State sets up in order to ascertain that the status was created in a way that is in accordance with the applicable law. As such, the recognizing State does not trust the mere existence of the status but aspires to ensures its legal validity. In Belgium, a distinction must be made between a personal status enshrined in a judicial decision and a personal status registered in an authentic instrument. With regard to the former, any revision is ruled out by Article 25, §2 Belgian Code of PIL (cf. *supra*). For authentic instruments, however, the Belgian legislator has opted for a far-reaching substantive review, the so called conflict of laws test, see Article 27, §1 Belgian Code of PIL. In case a result has been obtained abroad which could not have been acquired by the law appointed by the Belgian Code of PIL, recognition will be refused (cf. *supra*).

A) Conflict of laws test

42. The law applicable to **marriage** can be found in Articles 46 and 47 Belgian Code of PIL. For the formal requirements, the law of the State were the marriage took place will be applied. For the substantive requirements, the authority or judge will look at the law of the State of which the spouses have the nationality at the time the marriage was celebrated. In case (one of) the spouses have dual or multiple citizenship, Article 3, §2 Belgian Code of PIL will determine the applicable law. Article 3, §2 stipulates that "*the references in the present statute to the nationality of a natural person, who possesses two or more nationalities, refer to: 1° the Belgian nationality, if it is one of the nationalities; 2° in the other cases, the nationality of the State with which that natural person, taking all circumstances and notably his habitual residence into account, has the closest connections*".

43. The law applicable to **filiation** can be found in Article 62 Belgian Code of PIL. Article 62 uses the nationality of the parent(s) as a connecting factor. In case the parent(s) have more than one nationality, Article 3 Belgian Code of PIL (cf. *supra*) will determine which law is applicable.

B) Competence of the foreign authority

44. In Belgium, the competence of the foreign authority/court is not verified. However, with regard to the **name of people**, a specific situation/problem pops up for people with only the Belgian nationality. Article 36 Belgian Code of PIL makes it clear that only the Federal Public Service for Justice is competent to change the (sur)name of Belgian nationals. As a consequence, a change in surname validly obtained abroad by a Belgian person – for example due to a marriage with a non-Belgian citizen – will not be recognized in Belgium.[109] If the Belgian person concerned, wishes to carry the surname of his or her spouse, he or she has to start a proceeding before the Federal Public Service for Justice.[110]

5. Conflicts

45. In Belgium, there are no specific PIL rules in place which aim at solving limping legal relationships. It is up to the courts to deal with those issues on a case by case basis. An example:

In a case brought before the Court of first instance in Ghent[111], the Belgian judge was confronted with the refusal of a Belgian civil registrar to recognize a marriage contracted in Morocco between

[109] Article 36 j° 39 Belgian Code of PIL.

[110] Article 370/3, §2 Belgian Civil Code.

[111] Family Court Ghent 12 January 2017, Tijdschrift@ipr.be 2017/1, pp. 73-76.

a Belgian-Moroccan woman and a Moroccan man.[112] According to the civil registrar, the Moroccan marriage certificate could not be recognized due to polygamy. Although the man divorced his first wife in Morocco[113] before marrying the Belgian-Moroccan national, the Belgian civil registrar invoked a Spanish divorce decree pronounced after the man second's marriage to conclude that the man was still married to his first wife.[114] For unknown reasons, the man was considered divorced in Morocco since 13 June 2013 but considered married in Spain until 15 September 2015. The question arose whether the man was considered (un)married at the time he concluded his second marriage. The Belgian judge stated that the there was no reason not to recognize the divorce decree pronounced in Morocco. Consequently, the second marriage of the man could not be regarded as polygamous. The Belgian judge saw no reason to examine the Spanish divorce decree and explicitly stated that the possible administrative benefits in Spain were not relevant.[115]

V. Effect/result of the recognition or acceptance of a foreign status in Belgium

46. In this section, the value of a foreign authentic instrument or judgment entailing a (change in) personal status in Belgium is examined.

1. Degrees of effect in Belgium

47. In Belgium, a distinction is made between the **factual effect**, external and internal **evidence** and **recognition** of foreign judgments and authentic instruments.[116] They have to be classified from offering weak to strong acceptance of the content of a foreign document. When the Belgian authorities or courts accept the mere existence of a foreign judgment or authentic instrument without having accepted the content of the document, the document solely has a 'factual effect'.[117] This means that we accept that two people are for example considered married in State X without accepting that marriage in Belgium. In order for a foreign judgment or authentic instrument to obtain factual effect in Belgium, no requirements have to be fulfilled.[118]

48. One step further is the external and internal evidence of foreign judgments and decisions. When a foreign document is legalized or bears an apostille, Belgium accepts the formal authenticity of the document (= 'external evidence'). When certain requirements are met[119], it is possible to accept some facts of the document (= 'internal evidence'). This means for example that it is possible for Belgian authorities or courts to accept that a person was present in a certain country on a certain date but not for instance that that person is lawfully married.

49. In order for a foreign judgment or authentic instrument to be fully recognized in Belgium, the requirements in Articles 22 et seq. (judgments) or Article 27 (authentic instruments) Belgian Code of PIL must be fulfilled. If it has been established that the foreign document can be recognized, the (change in)

[112] The wedding took place on 19 September 2013.

[113] The competent Family Court in Morocco pronounced the divorce on 13 June 2013.

[114] For unknown reasons, the Moroccan man also initiated divorce proceedings in Spain. On 15 September 2015, the competent Spanish court delivered a divorce decree.

[115] Family Court Ghent 12 January 2017, Tijdschrift@ipr.be 2017/1, p. 75.

[116] T. Kruger & J. Verhellen, Internationaal privaatrecht: de essentie, Brugge, die Keure, 2016, pp. 162-166; J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, p. 217.

[117] See Article 29 Belgian Code of PIL.

[118] J. Verhellen, Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk, Brugge, die Keure, 2012, p. 218.

[119] For foreign judgment see Article 26 Belgian Code of PIL, for foreign authentic instruments see Article 28 Belgian Code of PIL.

personal status obtained abroad is fully recognized in Belgium. At this point, no distinction is made between a (change in) personal status obtained in Belgium and a (change in) personal status acquired abroad.

50. Since Belgium allows **same-sex couples** to get married, problems do not occur when the Belgian authorities or courts are confronted with a foreign same-sex marriage. When people present a registered partnership from a country that does not allow same-sex marriages, it is possible for the Belgian authorities to recognize the foreign registered partnership as a marriage (cf. *supra*).

51. With regard to **surrogacy**, things are different. As mentioned above, Belgium has no rules in place with regard to surrogacy. Consequently, when (a) Belgian national(s) present a foreign birth certificate drawn up after surrogacy, recognition is not guaranteed.[120] In most cases, administrative authorities will refuse recognition forcing the (intended) parents to go to court. Depending on the facts of the case and the willingness of the seized court in Belgium, the filiation validly established abroad will be recognized, partly recognized or not recognized.

On 20 April 2017, the Court of Appeal in Ghent[121] decided to recognize the filiation between the two children (twins) and their intended fathers of which only one was biologically linked to the children. Taking into account the biological link with one on the intended fathers, the intention of both individuals to become parents, the best interests of the children and the their right to respect for private and family life, the court saw no reason not to recognize the filiations validly established abroad between the children and the intended parents.[122] [123]

A foreign birth certificate drawn up after surrogacy is rarely fully recognized in Belgium. In most cases, the foreign birth certificate will only be recognized with regard to the (biological) intended father in line with the case law of the ECtHR. As a result, the filiation validly established abroad between the child and the intended mother or same-sex partner of the (biological) intended father is not accepted. In some cases, however, the birth certificate is not accepted as such and is requalified as a document demonstrating the willingness of the (biological) father to acknowledge the child. Consequently, until the intended mother or same-sex partner of the (biological) intended father finds a way to validly establish a filiation with the child (for example through adoption), only the (biological) intended father is (in Belgium) considered the parent of the child.[124] However, in Belgium, not all courts are willing to give full or partial effect to a filiation established abroad through surrogacy.[125]

2. Transposition of a foreign status

52. The recognition of a foreign *kafala* arrangement in Belgium is an apt illustration of how the technique of transposition is sometimes used in Belgium. Due to the fact that *kafala* is an unknown institute in the Belgian legal order, *kafils* often ask the (Belgian) courts to convert the *kafala* agreement

[120] G. Verschelden & J. Verhellen, "National Reports on Surrogacy". Belgium, in: K. Trimmings & P. Beaumont, *International Surrogacy Arrangements. Legal Regulation at the International Level*, Oxford, 2013, pp. 49-83.

[121] Court of Appeal Ghent 20 April 2017, Tijdschrift@ipr.be 2017/3, pp. 71-86.

[122] In its decision, the court emphasized that its decision cannot be viewed as a precedent. The court's task is to look at the best interest of the children concerned. Only the legislator can define the best interest of children born through surrogacy in general. See: Court of Appeal Ghent 20 April 2017, Tijdschrift@ipr.be 2017/3, p. 85 (§40).

[123] In 2014, the court of first instance in Brussels had come to the same conclusion in a different case. In this case, the court accepted the filiation established in America between a child born in 2004 and a child born in 2006 and their intended fathers of which one had the American nationality and the other one the Belgian nationality. See: Court of first instance Brussels 13 May 2014, Tijdschrift@ipr.be 2017/3, pp. 87-91. In 2018, the court of appeal in Brussels followed the same reasoning. See: Court of Appeal Brussels 10 August 2018, Tijdschrift@ipr.be 2018/4, pp. 15-21.

[124] In 2017, the family court in Brussels did not accept an Indian birth certificate drawn up after surrogacy as such but was willing to accept the filiation between the child and the biological intended father and non-biological intended mother by requalifying the Indian birth certificate as a document demonstrating the willingness of the biological father **and** the intended mother to acknowledge the child. See: Family Court Brussels 7 November 2017, Tijdschrift@ipr.be 2018/1, pp. 95-100.

[125] See for example: Family Court Bruges 26 May 2017, Tijdschrift@ipr.be 2017/3, pp. 100-105. The decision of the family court was, however, overturned in appeal (cf. *supra*).

into an adoption.[126] Having a foreign *kafala* agreement converted into an adoption has multiple benefits. Unlike *kafala*, adoption does grant the child with a right to legally reside on Belgian territory. Belgian courts, however, have shown little willingness to convert *kafala* agreement into (simple) adoptions. In 2015, two Belgian nationals went all the way up to the Court of Cassation to contest the decision of the Court of Appeal in Ghent to dismiss the applicants' request to allow the full and/or simple adoption of a child placed in *kafala* care. The Court of Cassation, however, dismissed the applicants' appeal. Legal doctrine, however, illustrates that the legal framework in Belgium – before the entry into force of the 1996 Hague Convention – did not prevent the conversion of *kafala* into adoption.[127]

Since the entry into force of the 1996 Hague Convention, foreign *kafala* arrangements should be recognized in Belgium by operation of law.[128] A decision of the Court of Appeal in Antwerp illustrates this.[129] Problems, however, still occur with regard to the residence status of the child. Only time will tell whether the decision of the CJEU in the SM v. Entry Clearance Officer, UK Visa Section[130] will be followed by the Belgian authorities.

3. Status registration in Belgium

53. Foreign judgments and authentic instruments can be registered in the National Register and/or the register of births, marriages and deaths. Registration is only possible if the requirement in Articles 22 et seq. or Article 27 Belgian Code of PIL are fulfilled. From 31 March 2019, however, Belgian civil servants are obliged to register foreign judgments and authentic instruments establishing a (change in) personal status of **Belgian** citizens in the 'Database Personal Status Records'[131].[132] In case a Belgian judge has declared a foreign document recognizable, the Belgian civil servants have to register the (change in) personal status as accepted by the Belgian court in the National Register and/or the register of births, marriages and deaths. The Law of 18 June 2018 makes it clear that it is the task of the registrar/court clerk to register the (change in) personal status using the Database system.[133] In some cases, the Database will automatically inform the Belgian Immigration Office.[134]

4. Responsibility of the citizen

54. Unless the person concerned informs the Belgian authorities or courts about a change in civil status which took place after the recognition of the original document, no modifications will be made in Belgium. The same applies for a change in personal status that took place in Belgium. If the person concerned does not inform the competent foreign authority or court, everything will stay the same abroad. Belgium authorities and courts will not contact foreign authorities on their own. The responsibility to have a (change in) personal status recognized, lies with the people themselves.

---

[126] Gent 13 maart 2013, Nieuw Juridisch Weekblad 2014 (No. 298), pp. 225-228.

[127] See Y. El Kaddouri & J. Verhellen, "De kafala in de Belgische rechtsorde. Opent het Kinderbeschermingsverdrag nieuwe perspectieven?", in Tijdschrift Jeugd- en Kinderrechten 2016 no. 4, pp. 345-346.

[128] Article 1, §1, d) j° Article 3, e) and Article 23, §1 of the 1996 Hague Child Protection Convention.

[129] Court of Appeal Antwerp 25 May 2016, Tijdschrift@ipr.be 2017/3, pp. 17-21.

[130] CJEU 26 March 2019, C-129/18, *SM v. Entry Clearance Officer, UK Visa Section*, ECLI:EU:C:2019:248.

[131] Term used by the Belgian legislator: '*Banque de données d'actes de l'état civil*' and '*Databank Akten Burgerlijke Stand*'.

[132] See new Article 31, §2 Belgian Code of PIL and Articles 68, 69 and 70, §1, 4° Belgian Civil Code introduced by Article 85 and Article 4 Wet van 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing, Belgian Official Gazette 2 juli 2018. (Accessible via http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2018061803).

[133] See for example new Articles 31, §1 and 193*ter* Belgian Civil Code and new Articles 1275, §2 and 1303 Belgian Judicial Code.

[134] This is for example the case if the Belgium judge annulled a marriage with a non-national or annulled the acknowledgment of a child by a non-national. See new Article 193*ter*, last paragraph and Article 330/2, 2 Belgian Civil Code introduced by Article 27 and 39 Wet van 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing, Belgian Official Gazette 2 juli 2018.