Principles on Business and Human Rights should seek to develop truly international and effective standards of duty of care that European multinationals should respect in their domestic and overseas operations.

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THE DIFFICULTY OF ENFORCING SURROGACY REGULATIONS

OVER the past 15 years, international surrogacy has grown from a niche practice catering only to a few adventurous couples, to a convenient response to infertility for those who would otherwise be hindered by restrictive national regimes. While the Hague Conference Permanent Bureau continues to debate the desirability, and indeed viability, of an international convention in this area, governments and courts around the world have been confronted by the difficult question of whether to recognise an agreement that takes place legally in another jurisdiction, but which is contrary to their own laws. In this, England is no exception. With approximately 25%. of all surrogacy arrangements now taking place outside its borders, English courts are regularly being asked to confer parenthood on commissioning parents in circumstances in which the statutory requirements have not only not been met, but in some cases flagrantly breached. The latest development in this regard is *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), where the tension between public policy as evinced in the legislation, and the welfare of the child who will bear the burden of any refusal to recognise parenthood, once again came to a head.

The statutory requirements under English law for the transfer of parentage from the surrogate mother (and her husband, if applicable) to the commissioning parents are numerous. Under s. 54 of the Human Fertilisation and Embryology Act 2008 (HFEA), a court can only make a parental order within six months of the child's birth (s. 54(3)), and he or she must already be living with the applicant parents (s. 54(4)(a)), who must be domiciled in the UK (s. 54(4)(b)). Furthermore, the child must be genetically related to one of the applicant parents (s. 54(1)). A parental order can also only be made with the consent of the surrogate mother, and her husband if he has consented to the insemination (s. 54(6)), unless she or he cannot be found, or is incapable of giving consent (s. 54(7)). Finally, s. 54 reinforces the altruistic nature of surrogacy by requiring that no money has been given or received, except for reasonable expenses, unless authorised by the court (s. 54(8)).

In 2010, the Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provision) Order imported into

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s. 54 applications the provisions of s. 1 of the Adoption and Children Act 2002. As a result, when deciding whether to allow the parental order, the child's welfare is the paramount consideration (as opposed to the primary consideration, as was originally the case). While the reasons behind the inclusion of this provision are clear, it has meant an undermining of the ability of the courts to refuse a parental order. As Hedley J. emphasised in the case of *Re L (Commercial Surrogacy)*: "it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations supports its making" ([2010] EWHC 3146 (Fam), at [10]). Indeed, in an earlier case he had admitted that "it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order" (*Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030, at [24]).

The concept of the child's best interests has not only shaped the jurisprudence of the court on s. 54 (and the equivalent s. 30 under the HFEA 1990), but has dictated it. This was established very early on in relation to s. 54(8), and the question of whether the court should exercise its power to authorise payments outside reasonable expenses. Since 2008, when the first international surrogacy case came before the courts, payments to surrogate mothers have been authorised ranging from US$53,000 in California (*J v G* [2013] EWHC 1432 (Fam)), around £3,000 in India (*Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2012] EWHC 3147 (Fam)), £8,812 in Russia (*Re C (Parental Order)* [2013] EWHC 2413 (Fam)), and over €25,000 in Ukraine (*Re X and Y (Foreign Surrogacy)*), despite the fact that these were all commercial relationships. No application for a parental order has been refused on the grounds of payments contrary to s. 54(8).

However, while s. 54(8) explicitly provides for the court to authorise payments outside the statutory framework, the President of the Family Division of the High Court has now indicated that even where a statutory requirement appears to be mandatory, the welfare of the child may demand that this too be ignored.

Re X (A Child) (Surrogacy: Time Limit) concerned, as the name suggests, the statutory time limit in s. 54(3) requiring an application for a parental order to be made within six months of the child's birth. The case involved a child born under a surrogacy agreement in India in December 2011, but the commissioning parents failed to seek a parental order until July 2013. As is common in these cases, the commissioning parents claimed that they were not aware of the requirements of the HFEA 2008, and were thus ignorant of the need to obtain a parental order, let alone the time limit imposed on making an application.

In *Re X and Y (Foreign Surrogacy)*, Hedley J. had addressed the six-month time limit in s. 30(2) (as it then was), describing it as "non-

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extendable", while as recently as March 2014 – a mere six months before *Re X* – King J. ruled that a parental order was not an option where the application was lodged when the child was 33 weeks old (*JP v LP* [2014] EWHC 595 (Fam)). However, in *Re X*, Munby P. held that these decisions had been misconceived, and the courts not only had the power to extend the time limit on the basis of statutory wording, but were obliged to do so if the child's welfare so required.

In a transformative judgment, he reasoned that given the "transcendental importance" of the parental order, with its consequences reaching many decades into the future, Parliament could not have intended that an application could be forever barred on account of being lodged even one day late. To construe the legislation any other way, he argued, would be "the very antithesis of sensible; it is almost nonsensical" (at para. [55]).

He emphasised that a parental order goes not just to status, but to the identity of the child as a human being, and its impact will extend throughout his or her entire lifetime. The court is concerned "not just with the impact on the applicant whose default in meeting the time limit is being scrutinised but also with the impact on the innocent child, whose welfare is the court's paramount concern" (at para. [64]). Therefore Munby P. found that the court was not just entitled, but was *bound*, to adopt a "more liberal and relaxed" approach to the interpretation of the time limit.

If, however, this was to take statutory interpretation a step too far, Munby P. justified his conclusions in the alternative by having regard to the requirements of Article 8 ECHR: the statute must be read down to ensure that the essence of the protected right is not impaired. In this way, a purposive construction of s. 54(3) was required so that the child's identity is preserved, and his or her private life protected.

There is little doubt that this judgment is correct in terms of the child's welfare, and, as Munby P. made clear, none of the parties to the dispute would suffer if the application were allowed to proceed. However, these are not the only persons with whom we must be concerned. This decision will almost certainly have significant repercussions for the wider regulation of international surrogacy, and particularly for other surrogate mothers and commissioning parents who will know that the legal requirements carry little weight, despite being expressed in a mandatory manner. Although Munby P. emphasised that this judgment did not create a general rule, and instead relied on the particular facts of the case, there was nothing unique about this case that would make it distinguishable from the many hundreds of other surrogacy cases that go through the courts each year.

The decision strikes another blow to statutory regime in England, and throws into sharp relief the difficulty, indeed near impossibility, of trying to regulate surrogacy through reassigning parenthood after the fact. For this reason, there is an urgent need to review the regulation of surrogacy, both in this country, and internationally. Until this occurs, the courts will

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continue to have little choice but to stretch, manipulate, or even disregard the statutory wording in order to achieve justice for the child.

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THE EFFECT OF ROME II ON NATIONAL PROCEDURAL LAW

AT common law, in cases where the substantive claim is governed by foreign law, questions of procedure are nonetheless governed by the *lex fori*. In the context of damages, although the existence of damage is a question for the *lex causae*, its quantification and assessment is determined according to the law of the forum (*Boys v Chaplin* [1971] A.C. 356). The distinction between substance and procedure is preserved by Article 1(3) of Council Regulation (EC) No 864/2007 ("Rome II") which provides, with certain exceptions, that Rome II "shall not apply to evidence and procedure". That rule is, however, qualified by Article 15, which requires the law applicable under the Regulation (i.e. "the law applicable to non-contractual obligations") to govern, inter alia, "the existence, the nature and the assessment of damage or the remedy claimed" (Article 15(c)). The decision of the Court of Appeal in *Wall v Mutuelle De Poitiers Assurances* [2014] EWCA Civ 138; [2014] 3 All E.R. 340 concerns the definition of "procedure" in Article 1(3) and the meaning of "applicable law" in Article 15(c). It raises the important question of how far Rome II has encroached on the traditional view of national procedural autonomy in the conflict of laws.

Mr. Wall was seriously injured in a traffic accident whilst on holiday in France. He brought a substantial personal injury claim in England against the French insurer of the other driver involved. The parties disputed how expert evidence should be adduced in the case. The French insurer argued that, because French law applied under Rome II, the French rules on the presentation of expert evidence were applicable. Significantly, this would have entailed the appointment of one or two medico-legal experts, who would then have produced a single expert report for the judge. The Court of Appeal disagreed, holding that expert evidence should be adduced in accordance with the rules of English law. The court also opined, *obiter*, that the term "applicable law" included judicial conventions and practices which fell short of "hard law" (Longmore L.J.'s terminology, at para. [24]). It is submitted that the court was correct in both respects.

On this point, Longmore L.J. had "no doubt" (at para. [12]) that the insurer's arguments failed. Longmore L.J. rejected even the "starting point" that to ensure certainty and discourage forum shopping through

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