

**RAPPORT DE LA RÉUNION DU GROUPE D'EXPERTS SUR LA RECONNAISSANCE ET
L'EXÉCUTION TRANSFRONTIÈRES DES ACCORDS CONCLUS DANS LE CADRE DE
DIFFÉRENTS INTERNATIONAUX IMPLIQUANT DES ENFANTS
(DU 12 AU 14 DÉCEMBRE 2013)
ET RECOMMANDATION RELATIVE À LA POURSUITE DES TRAVAUX**

établi par le Bureau Permanent

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**REPORT ON THE EXPERTS' GROUP MEETING ON CROSS-BORDER RECOGNITION AND
ENFORCEMENT OF AGREEMENTS IN INTERNATIONAL CHILD DISPUTES
(FROM 12 TO 14 DECEMBER 2013)
AND RECOMMENDATION FOR FURTHER WORK**

drawn up by the Permanent Bureau

*Document préliminaire No 5 de mars 2014 à l'attention
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 5 of March 2014 for the attention
of the Council of April 2014 on General Affairs and Policy of the Conference*

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I. Introduction

1. The Council on General Affairs and Policy (the "Council") in 2012 mandated the establishment of "an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention."¹ Such work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area".²

2. In accordance with this mandate, a meeting of the Experts' Group on Cross-Border Recognition and Enforcement of Agreements (the "Experts' Group")³ took place in The Hague from 12 to 14 December 2013 which considered the legal and practical need as well as the feasibility for further work by the Hague Conference.⁴

3. The Experts' Group noted the increasing number of agreements in international family disputes involving children and identified the need to ensure "portability" of these agreements across borders, thus adaptable to the increasing mobility of families.⁵

4. The Experts' Group discussed legal and practical problems in relation to cross-border recognition and enforcement of these agreements, taking into account existing national, regional and international legal frameworks relevant to this subject. It considered in particular the impact of the 1996 and 2007 Conventions and their important role in facilitating the recognition and enforcement of administrative and judicial decisions. It recognized that the combined use of the existing instruments in many cases might offer a range of solutions which however remain difficult to implement in practice.

5. The Experts' Group identified specific areas where additional instruments, both soft law and binding, could facilitate the cross-border recognition and enforcement of agreements, especially those that address multiple matters of family law in (e.g. custody, contact, travel, maintenance, property) a "package" of the sort often agreed by parents when negotiating the terms of divorce, relocation, or post-abduction. The Experts' Group found areas of need, especially in connection with post-abduction and relocation.⁶

* The Permanent Bureau would like to thank Kerstin Bartsch, Senior Legal Officer at the Permanent Bureau, for carrying out the principal research and drafting of this document.

¹ For the purposes of this document, the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* is hereinafter referred to as the "1980 Convention", the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* as the "1996 Convention", and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* as the "2007 Convention".

² See Conclusions and Recommendations adopted by the Council of 2012 (17-20 April 2012), para. 7 (available at < www.hcch.net > under "Work in Progress" then "General Affairs").

³ The Experts' Group consisted of private international law experts from academia, courts, government authorities and private practice (attorneys and mediators) from various legal systems, acting in their private capacity. For a list of experts that attended the Experts' Group meeting, see Annex B.

⁴ To assist the Experts' Group, the Permanent Bureau prepared a Background Note (Annex C) providing, *inter alia*, relevant information on existing international and regional legal frameworks and trends as well as an overview of legal and practical issues illustrated by case examples.

⁵ See Conclusions and Recommendations of the Experts' Group ("C&R") No 8 (Annex A).

⁶ See C&R Nos 6 and 7 (*ibid.*).

6. This document describes the discussion and suggestions of the Experts' Group along with the Conclusions and Recommendations (Annex A) and is intended to facilitate Council's decision on further work and next steps for this project.

II. Experts' Group Meeting

1. Background

7. The subject of mediation, and in particular of the cross-border recognition and enforcement of mediated agreements, has been a constant component of the work of the Hague Conference in recent years. It has been discussed at various Special Commissions and Council meetings and elaborated in several studies and Guides to Good Practice.⁷

8. The increasing involvement of the Hague Conference in this area reflects the acknowledged importance that States attach to alternative dispute resolution mechanisms to bring about agreed solutions in international family disputes, including by adopting and implementing laws and procedures and actively promoting amicable solutions between parents. Moreover, relevant recent Hague family law Conventions explicitly encourage mediation and similar processes for finding appropriate solutions to cross-border family disputes.⁸

9. Previous work of the Hague Conference demonstrated, however, that while more and more parents conclude agreements to solve their cross-border family conflicts, there are complex legal and practical challenges that they face in rendering their agreement binding and enforceable in more than one State.⁹

10. At various Hague Conference meetings, States emphasised the importance of agreements in the area of international family law and the need to explore further the existing challenges and potential solutions regarding their recognition and enforcement.¹⁰ The decision of the Council of 2012 to establish an Experts' Group represents therefore a significant step forward to advance on this matter.

⁷ For an overview, see paras 11 *et seq.* in the "Report of the further work recommended by the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention" for the attention of the Council of 17 to 20 April 2012 (Prel. Doc. No 12 of March 2012), available at < www.hcch.net > (path indicated in note 2).

⁸ *E.g.*, Art. 7 *c)* of the 1980 Convention mandates that Central Authorities attempt to "secure the voluntary return of the child or to bring about an amicable resolution of the issues". The 1996 Convention requires Central Authorities in Art. 31 *b)* to take all appropriate steps to "facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child [...]". The 2007 Convention mandates in Art. 6(2) *d)* that Central Authorities "encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes". It requires Contracting States in Art. 34 to make available effective measures to enforce decisions under this Convention in their internal law; those measures may include "the use of mediation, conciliation or similar processes to bring about voluntary compliance".

⁹ This work and its outcomes are described in the Background Note at paras 4-26 (Annex C).

¹⁰ *E.g.*, in a letter prior to Part II of the Sixth meeting of the Special Commission (Jan 2012), Switzerland stated: "If amicable solutions are truly to be encouraged, parties must have the assurance that a mediated agreement can be endorsed by the courts and hence recognised and enforced abroad" (letter of 7 Nov 2011 distributed via L.c. ON No 37(11) of 9 Nov 2011). The importance of ensuring recognition and enforceability of agreements in all relevant jurisdictions was also stressed in a proposal by Israel for an international instrument on cross-border mediation of family disputes presented to the Council in 2009 (Work. Doc. No 1 of 31 March 2009). See also State responses provided to a questionnaire sent prior to Part II of the Sixth Special Commission where the area of recognition and enforcement of agreements was identified as one where private international law provisions may be of considerable use (see Annex II of the Background Note, *op. cit.* note 4).

11. In accordance with the Council's mandate, the Experts' Group was asked to assess *all* types of voluntary agreements, and not simply those reached through mediation; to identify the nature and extent of any *legal* problems and to consider any *practical* problems that may arise when seeking cross-border recognition and enforcement of an agreement; and to address the *need for*, and *desirability of*, an instrument, taking into account existing Hague Conventions and thus identifying "gaps" in current regimes.

2. Discussion and outcome

12. At the Experts' Group meeting, the experts shared information based on their various experiences and legal systems and discussed realities and trends related to the use of cross-border agreements.

13. The Experts' Group noted that the possibility and procedure of rendering an agreement legally binding in a foreign State differs greatly between jurisdictions and often requires significant crafting by parents, practitioners and others involved in structuring or obtaining amicable solutions.

14. It recognised the value of an amicable resolution of a family conflict and its benefits for the child,¹¹ the importance placed upon facilitating agreed solutions in the domestic family law of many States, and the growing support among all involved stakeholders in recent years.

15. The Experts' Group noted the increased promotion and use of out-of-court mediation (and other conflict resolution mechanisms) and of parental agreements that do not require the involvement of an authority but are considered a "private contract" between parties. Parents are considered best placed to know how to provide for their children and how to resolve their dispute amicably. Amicable solutions are considered to be in the best interests of their children. Therefore, parents are given more autonomy to decide on matters concerning their children and are permitted or encouraged,¹² to decide, for example, on a custody agreement or parenting plan, without intervention of an authority (*e.g.*, court approval or registration).¹³

16. In this context, the Experts' Group also considered that parents who decide to mediate or use forms of amicable solutions often do so with the express desire to avoid litigation and court processes, as well as to keep matters simple and limited to one comprehensive agreement with a view to bringing a certain degree of flexibility and lack of formality in the organisation of their family affairs.

17. In general, the Experts' Group noted a growing movement towards more party autonomy at national and regional levels in family law matters, which even extends to the choice of applicable law.¹⁴

¹¹ See C&R No 3 (Annex A).

¹² *E.g.*, in Australia, parents are encouraged to reach an informal agreement between themselves about matters concerning their children by entering into a parenting plan (see Part VII, Division 4, Sec. 63A of the Family Law Act).

¹³ See C&R No 3 (Annex A).

¹⁴ See the Background Note on party autonomy, paras 112-118 (Annex C).

18. As a result, parental cross-border agreements in the area of custody, contact / access, child support and relocation have become more frequent in many States. In addition, there are an increasing number of agreements reached between parents in the context of wrongful cross-border removal or retention of children.¹⁵

19. The Experts' Group also noted the relevance of the *United Nations Convention on the Rights of the Child* in the context of these agreements and the need to consider the best interests of the child as stated in this Convention.¹⁶

20. The Experts' Group reflected in more detail on the existing national, regional and international legal frameworks for cross-border recognition and enforcement of agreements. It noted that when relevant instruments, especially the 1996 and 2007 Conventions, are applicable, and the agreement in question remains within their scope, the cross-border recognition and enforcement of the agreement might be possible under the conditions established in these instruments. Recognising the potential benefit of the 1996 and 2007 Conventions in this regard, the Experts' Group considered it desirable for States to join these conventions.¹⁷

21. Reflecting on specific case examples, both those where relevant legal instruments *are* applicable and those where they are *not*, the Experts' Group pinpointed however, legal and practical challenges that parents and other stakeholders¹⁸ face when seeking cross-border recognition and enforcement of an amicable agreement. The discussion focused here on parental agreements, sometimes in the form of "parenting plans", that are frequently concluded in divorce, custody or relocation proceedings involving children and that address *multiple* matters of family law, so-called "package agreements".

22. "**Package agreements**" are used by parents to solve the family dispute in a comprehensive way. When parties mediate or try to reach agreed solutions, they address in their agreement a number of issues as a "**package**", thus they negotiate a "package" of rights, conditions and terms such as return in an abduction case, custody, contact / access, maintenance, travel, education, property, even succession. Many parents are reluctant to reach an agreement regarding their child, for example, living in, and travelling between, different countries without first addressing contact or visitation rights.

23. The Experts' Group considered the prevalence of "package agreements" along with the legal and practical issues involved with their cross-border recognition and enforcement.¹⁹ Due to the increased mobility of families, these "package agreements" should be "portable" to foreign jurisdictions.²⁰ For example, parents may conclude an agreement covering the entire range of their continuing relationship and the well-being of their child when one parent is to live in State A and the other in State B with the child;

¹⁵ Although the 1980 Convention promotes amicable solutions, efforts to promote voluntary resolution initially developed primarily in relation to cases falling outside the Convention regime. But recognition of the value of seeking voluntary return or amicable resolution has increased in recent years. See Background Note (*ibid.*), para. 54.

¹⁶ See C&R No 4 (Annex A).

¹⁷ See C&R No 2 (*ibid.*).

¹⁸ The Experts' Group considered as other stakeholders, *e.g.*, grandparents or stepparents, and judges, lawyers, mediators and social workers.

¹⁹ See C&R No 6 (Annex A).

²⁰ See C&R No 8 (*ibid.*).

and subsequently, the parent in State B is moving to State C and the child is to receive schooling in State D and see grandparents now in State E.

24. The Experts' Group then discussed the question of whether a binding or non-binding instrument could assist in securing cross-border recognition and enforcement of agreements and in meeting the practical and legal issues that exist in the current international legal framework.

25. The Experts' Group concluded that there was a need for those concerned to be provided with a non-binding "navigation tool" to assist them in securing cross-border recognition and enforcement of "package agreements" within the existing legal framework, and noted the additional benefit of a binding instrument to provide recognition and enforcement of the complete "package" as a "one-stop shop".²¹

26. Finally, the Experts' Group noted the desirability and feasibility of new instruments and recommended that the Council authorise its continuation to further explore the nature and content of such instruments in greater detail, which would enhance the existing Hague Conventions.²² The Conclusions and Recommendations reached by the Experts' Group reflect the outcome of the discussion, stating in No 13:

"The Experts' Group noted the desirability and feasibility of new instruments and recommended that the Council authorise the continuation of the Experts' Group to further explore the nature and content of such instruments in greater detail, which would enhance the existing Hague Conventions. The Experts' Group should be invited to report back to Council in 2015 on its progress."

3. Practical and legal challenges facing cross-border recognition and enforcement of agreements and the need for a new instrument

27. In considering the mandate of the Council, the Experts' Group studied the nature and extent of the legal and practical problems, including jurisdictional issues, in connection with the cross-border recognition and enforcement of agreements reached in the course of international child disputes.

28. The Experts' Group identified case examples where a child has been abducted and parents agreed on the return or non-return of the child, and, more generally, where parents conclude an agreement on custody of or contact with their child, payment of child support and disposition of property, often covering multiple issues, sometimes even in connection with divorce. Another fact pattern is that of international family relocation where parents agree on the conditions of the relocation of one of them with the child to another State.²³

29. As with court orders, agreements in international family disputes often require recognition and enforcement in multiple States, especially in the State to which the child relocates or returns in the case of a wrongful removal or retention. The agreement would therefore need to be rendered legally binding and enforceable not only in the legal system in which it was concluded but also in any other relevant legal system. For example, parties to the agreement (in most cases parents) may

²¹ See C&R Nos 11 and 12 (*ibid.*). See *infra* paras 63-68.

²² See C&R No 13 (Annex A).

²³ The Background Note (Annex C) includes case examples to illustrate the legal and practical challenges concerning the enforceability of mediated agreements in paras 35 *et seq.*

(1) incorporate their agreement in a court order in the State where they concluded the agreement and seek recognition and enforcement of this court order in the other State (e.g., in accordance with the 1996 Convention, if within its scope²⁴), or

(2) take their agreement directly to a competent court in the foreign State requesting that it make an order incorporating the terms of the agreement.²⁵

30. Parties attempting to render an agreement enforceable by seeking to turn the agreement into a court order may be confronted with the question of which court has jurisdiction to make such a court order. In international family disputes, both *internal* and *international* jurisdiction will play a role when it comes to deciding whether a certain court can assume jurisdiction to make an order in the terms of an agreement. This question becomes particularly complex in the case of “package agreements” covering a range of matters which may be assigned to different courts.

31. Specific legal requirements may also need to be fulfilled (in the State in which the agreement was concluded and / or in the foreign State) to create an enforceable court order, such as hearing the child when appropriate and ensuring that the agreement is in the child’s best interests.

32. Since there may not have been an obligation for the parties to reflect in the agreement on the best interests of the child or act in line with his / her rights when the dispute remained in the private realm of the family negotiating the agreement terms, the ability of a court to assess subsequently whether the interests of the child have been sufficiently taken into account may offer some extra protection.

33. On the other hand, parties may perceive the need for turning their agreement into a court order and the eventual extra requirements as an additional or “unfair” burden, since they had opted for the conclusion of an amicable agreement *out of court*. This may discourage them from settling their dispute on an amicable basis – a consequence that could be counter-productive to the efforts of many States to promote and enable the conclusion of agreements in family matters. One benefit of these out-of-court agreements is the reduction of the workload of overburdened courts which may have significant delays and backlogs.

34. The Experts’ Group noted that, due to these and other aspects, the procedure for rendering an agreement legally binding and enforceable is often a lengthy, cumbersome and expensive process for the parties.²⁶

35. The Experts’ Group also found that parties may face complex legal challenges when seeking cross-border recognition and enforcement of a “package”. It noted that there is no comprehensive international legal framework for this in family matters *per se*. Even when there are applicable norms (at national, regional or international levels) that support cross-border recognition and enforcement, parties may not be able to render their “package agreement” legally binding since it may include matters outside existing enforcement regimes. For this reason, rendering the entire “package” legally binding in all States concerned, and not only selected parts of it, poses legal challenges and may sometimes not be possible at all.

²⁴ See in this regard *infra*, paras 42 *et seq.* and Background Note, paras 49-50 (Annex C).

²⁵ For more details, see Background Note, paras 40 *et seq.* (*ibid.*).

²⁶ See C&R No 6 (Annex A).

4. Application of Hague Conventions in cases of cross-border recognition and enforcement of agreements

36. As part of the examination of the legal and practical challenges and the potential need for a new instrument in the area of agreements in international family law, the Experts' Group considered existing instruments, particularly the 1980, 1996 and 2007 Conventions.

37. The **1980 Convention** emphasises amicable solutions for the return of a child after a wrongful removal or retention, and agreements between parents in situations of child abduction are increasingly promoted by Contracting States.

38. The 1980 Convention contemplates that the jurisdiction where the child is presently located, after he / she was wrongfully removed or retained from his / her habitual residence, shall take steps to secure the return of the child. If the competent court in this jurisdiction were to find that the child must be returned, that court would have no authority to hear the merits of the underlying custody case.²⁷

39. In international child abduction cases, when parents reach an agreement related to the child's return that goes beyond the return itself, *e.g.*, including custody and contact issues, there may be two possible scenarios:

(1) If parents reach an agreement related to the child's *return*, which includes custody and contact provisions, the court seised to hear the return application under the 1980 Convention would have no authority to incorporate the custody and contact terms into a court order and therefore would be unable to make an order corresponding to the agreement. For this reason, the agreement may not be rendered legally binding in that State. The agreement may also not be recognised and enforced in the State of the child's habitual residence if the court in that jurisdiction lacks competence to rule on the child's return.²⁸

(2) If parents reach an agreement including *non-return* of the child, the court seised with the return proceedings may approve, in a court order, the part of the agreement concerning the non-return *and* the part relating to custody and contact.²⁹ However, whether this is possible would depend on the internal and international jurisdiction of the court to determine such matters. The internal procedural law may not allow a court dealing with the return proceedings, following a formal termination of those proceedings, to proceed immediately to determine the

²⁷ The court would apply Art. 16 of the 1980 Convention: "After receiving notice of a wrongful removal or retention of a child [...] the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention [...]."

²⁸ It is possible that the court of habitual residence has jurisdiction to decide on the child's return (see, *e.g.*, Art. 6(1) of the Inter-American Convention on the International Return of Children: "Judicial or administrative authorities of the State Party in which the child habitually resided immediately before the removal or retention shall have jurisdiction to consider a petition for the child's return"). In this case, the court of habitual residence could turn the "package agreement" on, *e.g.*, the child's return, custody and contact into a court order.

If the court of habitual residence lacks jurisdiction to decide on the "package", one may consider a "mirror order". In some jurisdictions, especially common law ones, it is possible to obtain a "mirror order" from the competent court in the country of the child's habitual residence. This order could "mirror" the terms of the agreement. See "Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice", Jordan Publishing, 2008, Sections 3.4.3 and 8.4.

²⁹ Art. 16 of the 1980 Convention no longer "blocks" the jurisdiction on issues relating to custody since it has been determined that the child is not to be returned.

custody issues. It is possible that for custody matters, another court assumes jurisdiction.³⁰

40. The Experts' Group confirmed that both scenarios reveal challenges for the recognition and enforcement of the agreement. An option may be to limit the agreement in 1980 Convention cases solely to the question of return. This raises, however, the following concerns:

(1) Rendering the agreement on the return or non-return binding without immediately making the remainder of the agreement on custody and contact issues binding, may put the amicable solution of the dispute at risk due to the interdependence of the different parts of the agreement, especially in terms of the parties' negotiations.

(2) Parents may not be able or willing to make an agreement solely on return since in most cases the question of return is not the only problem between the parents and the return decision is closely linked to these other problems.

(3) Many supporters of mediation in child abduction cases view the particular benefit of mediation precisely in the fact that it can take other factors into account and lead to a "holistic" and thus more acceptable solution of the conflict. This benefit would be lost if mediation in child abduction cases were to focus solely on the question of the return of the child.

41. The Experts' Group concluded that in child abduction cases in which the 1980 Convention is applicable, the recognition and enforcement of "package agreements" in both involved States (the State in which the child is present and the State of habitual residence) may not be guaranteed, causing a lack of legal certainty and predictability for the parties and other involved stakeholders. Steps to render these agreements legally binding may involve a separate and lengthy process, or may not be possible at all.

42. The **1996 Convention** may assist parties in achieving cross-border recognition and enforcement of their agreed solution in all Contracting States concerned: if parties reach an agreement on "measures of protection for the person or the property of the child"³¹ under the 1996 Convention (e.g., on custody and contact), their agreement can, for example, be incorporated into a court order³² and will be recognised by operation of law in all Contracting States.³³ Parties may obtain a declaration of enforceability or register their order to effectuate the actual enforcement of the agreement's terms.³⁴

³⁰ In particular in the case of concentration of jurisdiction for child abduction proceedings, the court competent to rule on the child's return may not be the court that would later decide on the custody or other related matters after return proceedings have been terminated; the case may be transferred to a local family court.

³¹ Art. 3 of the 1996 Convention.

³² The 1996 Convention may also facilitate recognition and enforcement when the agreement is homologated or approved by an administrative or judicial authority. However, not all legal systems provide the opportunity for homologation or a judicial or administrative approval of an agreement on family matters. Thus, if the habitual residence of the child is in a State where the courts or authorities do not homologate or approve voluntary agreements, parents do not have the possibility of making their agreement legally binding. See Background Note, paras 65 *et seq.* (Annex C).

³³ Art. 23 of the 1996 Convention.

³⁴ Art. 26 of the 1996 Convention (requiring Contracting States to apply "a simple and rapid procedure").

43. According to Article 23(1) of the 1996 Convention “[t]he measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States”. If a parental agreement is not required to be registered or authenticated by an authority, but treated as a private contract between parents, additional steps may be necessary to make it legally binding and enforceable under this Convention.

44. When applying the 1996 Convention in international child abduction cases, it should be noted that the court in the State to which the child was removed or in which he / she was retained would not have jurisdiction to approve, in a court order, custody or contact matters that have been included in the agreement.³⁵ The parties (*e.g.* parents) would therefore need to seek a court order including the terms of their agreement in the State of the child’s habitual residence since it retains jurisdiction for these matters, before they can benefit from the 1996 Convention’s provisions on recognition and enforcement.

45. Alternatively, there could be a transfer of jurisdiction from the State of the habitual residence of the child to the State to which the child was wrongfully removed or retained with a view to rendering the agreement binding in the latter State by a court order, provided that the conditions for such a transfer are met.³⁶ A transfer of jurisdiction under the 1996 Convention may, however, only assist where the parties’ agreement includes a consensus on the *non-return* of the child.³⁷

46. The Experts’ Group discussed the recognition and enforcement of “packages”. Even if incorporated into a court order, these agreements may not fall completely within the scope of the 1996 Convention (with the consequence that the Convention would lack applicability), for example, when they contain terms not considered a measure of protection under the Convention, such as an application for divorce,³⁸ financial provision post-divorce, maintenance, travel costs, passport and visa issues.³⁹

47. The Experts’ Group noted in this respect that parties in an international family law case may need to address their situation in a comprehensive and detailed way and therefore be required to negotiate over a number of issues including some that might not be directly related solely to the child. They would usually negotiate “global issues” without being bound by the coverage of one specific convention.⁴⁰ A “holistic” and detailed organisation of the family affairs would also be in the child’s best interests.

48. The Experts’ Group concluded that the 1996 Convention helps with the recognition and enforcement of agreements in so far as they concern “measures of protection”, but legal and practical challenges persist if “packages” include other matters.

³⁵ Jurisdiction concerning the merits of custody and contact issues remains with the State of the child’s habitual residence unless certain conditions are satisfied which are stipulated in Art. 7 of the 1996 Convention.

³⁶ For transfer of jurisdiction, see Arts 8 and 9 of the 1996 Convention.

³⁷ In an abduction case, when the 1980 Convention is also applicable, Art. 16 of the 1980 Convention would need to be considered, see *supra* note 27.

³⁸ The 1996 Convention recognises the interrelationship of divorce proceedings and those concerning child measures of protection by providing for jurisdiction for the divorce court to take measures of protection for the person and the property of the child in Art. 10.

³⁹ See Art. 4 of the 1996 Convention.

⁴⁰ See C&R No 6 (Annex A).

49. The **2007 Convention** provides for the recognition and enforcement of maintenance decisions rendered by a judicial or administrative authority in respect of a maintenance obligation. The term "decision" also includes a settlement or agreement concluded before or approved by such an authority. The Convention also provides for the recognition and enforcement of maintenance arrangements.⁴¹

50. The 2007 Convention does not offer a solution to situations where parents agree on a "package" (including maintenance but also, *e.g.*, issues related to custody, property or succession) and request recognition and enforcement of the entire "package" since the effect of the 2007 Convention is limited to the part of the agreement dealing with maintenance⁴² without giving effect to other matters (that may or may not fall under the 1996 Convention) for which the 2007 Convention lacks applicability.

51. The Experts' Group concluded that in cases in which the 1996 and 2007 Conventions are applicable and in effect, parties could achieve recognition and enforcement of their agreed solution in other Contracting States (provided that all requirements, including those of scope or coverage in terms of who is covered and during what time are met⁴³): (1) If parties make an agreement including "measures of protection" as stipulated in the 1996 Convention, cross-border recognition and enforcement of the agreement could be achieved in line with Articles 23 *et seq.* of this Convention. (2) If parties agree on child support, recognition and enforcement of that portion of a package agreement would be guaranteed in accordance with Articles 19 *et seq.* of the 2007 Convention.

52. The Experts' Group found that legal and practical challenges may exist when a "package" includes matters falling under *both* Conventions since each of them may, as applied in the Contracting State in question, have different rules concerning jurisdiction, recognition and enforcement. The "combined" use of the two instruments might offer solutions in many cases but may be difficult and complicated to implement or to operate in practice.

53. Taking into account that parents do not negotiate along "convention lines", the Experts' Group considered that the "package" may include matters that fall *outside* the scope of both Conventions with the result that neither of them applies to the whole agreement.⁴⁴ It is therefore possible that in a specific case no legal framework is applicable to resolve *all* matters of jurisdiction, recognition and enforcement.⁴⁵ A "partial"

⁴¹ See Arts 3 e) and 30 of the 2007 Convention and Background Note, paras 81 *et seq.* (Annex C). Contracting States have the option of making a reservation for not being obliged to recognise and enforce maintenance arrangements (see Art. 30(8) of the 2007 Convention).

⁴² See Art. 19(2) of the 2007 Convention stating that the rules on recognition and enforcement apply only to parts of the decision which concern maintenance obligations, enabling States to recognise and enforce only the part of the decision dealing with maintenance without giving effect to other matters, as well as Art. 21 providing for severability and partial recognition and enforcement.

⁴³ The Experts' Group also noted that the two Conventions would not be of assistance in cases involving one or more non-Contracting States but acknowledged that this would improve when more States join, hence the need to encourage non-Contracting States to join these Conventions.

⁴⁴ This is, for example, the case when parents conclude an agreement containing provisions regarding inheritance of one or both parents' properties by the child in the case of one of the parent's deaths since succession is not covered by the 1996 Convention (see Art. 4 f)) nor by the 2007 Convention.

⁴⁵ As a regional instrument, the Experts' Group took note of, *i.a.*, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility providing for the possibility of cross-border recognition and enforcement of agreements in matters of parental responsibility. Its application being restricted to EU Member States, it does not provide assistance when a parent is relocating outside the EU or where recognition is sought outside the EU. It also does not provide a solution to the challenge that parties face when they negotiate a "package" and some of the issues included in the agreement fall outside the scope of the Regulation. See Background Note, paras 92 *et seq.* (Annex C).

recognition and enforcement of the “package” would not necessarily be what the parties perceive as sufficient protection of their interests.⁴⁶

54. This problem may well occur in **international relocation** cases where amicable solutions between parents are increasingly promoted.⁴⁷ Parents often conclude a detailed agreement on the terms of the relocation of one parent with the child and the content of this “package” may only partly be covered by the 1996 and 2007 Conventions. The agreement may cover a wide spectrum of subjects, including the organisation of the relocation, jurisdictional matters and choice of court, custody, including decision-making on specific matters, contact with the non-relocating parent, travel and visitation arrangements, spousal and child support, the possibility of further relocation and of revision of the custody agreement or parenting plan.

55. The Experts’ Group found that, as with disputes in child abduction cases (in particular agreements post-abduction), the area of international family relocation is particularly affected by the absence of a comprehensive legal framework for cross-border recognition and enforcement that accommodates the need to render the entire “package” legally binding in a foreign jurisdiction.⁴⁸

56. The Experts’ Group noted that there may also be legal and practical challenges related to internal or international jurisdiction, namely where different courts address different substantive areas, such as one court handling return applications, another custody, and yet another maintenance, all with different applicable laws and procedures.

57. The Experts’ Group found that these challenges present a lack of legal certainty and predictability and may lead to cumbersome and more expensive legal proceedings to render the agreement binding in a foreign State, hindering the effective use of agreements in cross-border situations.⁴⁹ As a result, parents may be discouraged from settling their disputes on an amicable basis. They may not be willing to rely on an agreement which constitutes a less effective and / or secure alternative to judicial proceedings since compliance with this agreement would depend on the goodwill of the parties due to problems related to its cross-border recognition and enforcement.

58. And yet, it is unquestionably in the child’s best interests when parents can reach an agreed, tailor-made and comprehensive solution as the relationship of all will have less friction and the resulting agreement is more readily honoured if achieved through amicable resolution.⁵⁰

⁴⁶ See in this regard *supra*, para 40.

⁴⁷ Aside from some States promoting amicable solutions between parents on this issue, the “Washington Declaration on International Family Relocation” states that “[t]he voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings”. The 1996 Convention is applicable to court orders related to international relocation provided that they constitute a “measure of protection” under the Convention, see Background Note, paras 72 *et seq.* (Annex C).

⁴⁸ See C&R No 7 (Annex A). See also *supra* paras 39-41 referring to disputes in child abduction cases.

⁴⁹ See C&R No 8 (Annex A).

⁵⁰ See C&R No 3 (*ibid.*).

59. The Experts' Group noted the controversial nature of the issue: while the existing international legal framework does permit, and even encourages parental agreements, it seems to lack the ability to respond adequately to situations when parties conclude "packages" that solve the family conflict in a comprehensive way (and that includes matters that go beyond the scope of the 1996 and 2007 Conventions).

60. It seems that States take the initial step of promoting alternative dispute resolution, amicable agreements and more party autonomy, without also taking the second step of making sure that parents can rely on their agreement in all relevant jurisdictions - a necessary step especially in light of the increasing mobility of families worldwide that demands a "portability" of the agreement for multiple jurisdictions other than just the one where the agreement has been concluded.⁵¹

61. The Experts' Group ultimately found it desirable to consider the development of a new instrument to assist in cross-border recognition and enforcement of agreements. It emphasised that such an instrument would likely encourage and further foster agreements in international family conflicts involving children.⁵²

5. Desirability of soft-law tools and new binding instruments

62. The Council as part of its mandate required that consideration be given to the desirability of a new instrument in this area. In addressing this issue, regard must then be given to the nature of any instrument - binding or non-binding - and its ability to bridge any existing "gap".

63. In addition to the aforementioned legal and practical challenges, the Experts' Group noted that parties would often need to fulfil a range of requirements to render their agreement legally binding in all relevant jurisdictions. These requirements differ for each jurisdiction involved and may vary depending on the content of the agreement. Aside from a lack of adequate information, the Experts' Group emphasised that there seems to be no mechanism available to "navigate" for parents, judges, lawyers, mediators and others involved in the process towards securing cross-border recognition and enforcement of an agreement.

64. The Experts' Group considered whether a "**navigation tool**" could be developed in the form of a non-binding instrument. Given the limited time and scope of this initial meeting, it did not explore in detail the nature of the soft-law instrument, be it principles or guidelines, or a guide to good practice or practical handbook.

65. On the more complex issue of agreements in the form of "packages", the Experts' Group discussed ways to accommodate the need for the cross-border recognition and enforcement of comprehensive agreements the content of which may involve issues that are covered by one or more, or none, of the existing Hague family law Conventions.

66. The Experts' Group noted that parents should not be restricted as to the extent and level of detail that they wish to apply in the regulation of their family situation (*e.g.*, in the case of international family relocation) to fit within one or more conventions. If forced to do so, it may prevent adequate consideration of the child's best interests.

⁵¹ See C&R No 8 (*ibid.*).

⁵² See C&R No 10 (*ibid.*).

67. The Experts' Group found that parents and other involved stakeholders⁵³ need a **"one-stop shop"** that enables the recognition and enforcement of the entire "package". This mechanism could be in the form of a binding legal instrument in the area of international family law with a view to responding to the lack of legal certainty and predictability that currently exists with regard to the cross-border recognition and enforcement of "package agreements".⁵⁴

68. Any new instrument should not replace or contradict existing international legal instruments, but rather enhance and reinforce the current legal framework,⁵⁵ including relevant Hague family law Conventions.

69. The Experts' Group did not discuss aspects of nature and content of these new instruments in greater detail but prepared a list of issues to be examined at a next meeting should the 2014 Council decide to continue this project. It was also suggested that the Experts' Group be expanded to include more practitioners and judges at a future meeting.

III. Conclusion

70. In accordance with the mandate provided by the 2012 Council, the Experts' Group explored the cross-border recognition and enforcement of agreements reached in the course of international child disputes. In this, it took into account *all* types of agreements between parents and other involved stakeholders, including, but not limited to, those reached in the process of mediation. The Experts' Group also considered the application of the 1996 Convention and other international family law conventions and identified the nature and extent of the legal and practical problems, including jurisdictional issues.

71. The Experts' Group evaluated the benefit of a new instrument, whether binding or non-binding, and concluded that, in view of the existing legal and practical challenges, a new instrument increasing "portability" may be *desirable* and *feasible*. Two suggestions were made in this regard:

- (1) the development of a "navigation tool" in the form of a non-binding instrument to assist parents and other stakeholders in securing cross-border recognition and enforcement of agreements, and
- (2) the development of a "one-stop shop" in the form of a binding instrument that accommodates "package agreements" and ensures that the whole "package" can be recognised and enforced in all jurisdictions involved.

72. The Experts' Group concluded that it would be desirable to explore further the nature and content of such instruments to provide cross-border recognition and enforcement, and enhance and support existing Hague Conventions.

73. In light of the above, the Council may wish to provide a further mandate authorising continuation of the work, including that of the Experts' Group, in connection with the nature and content of any such instruments with the Permanent Bureau reporting on the progress in 2015.

⁵³ See *supra*, note 18.

⁵⁴ See C&R No 12 (Annex A).

⁵⁵ See C&R No 13 (*ibid.*).

ANNEXES

**Experts' Group on Recognition
and Enforcement of Voluntary
Cross-Border Agreements**

12-14 December 2013



**CONCLUSIONS AND RECOMMENDATIONS OF THE EXPERTS' GROUP MEETING ON
CROSS-BORDER RECOGNITION AND ENFORCEMENT OF AGREEMENTS**

(from 12 to 14 December 2013, at The Hague)

1. In accordance with the mandate of the Council on General Affairs and Policy of the Hague Conference, the Experts' Group considered the nature and extent of the legal and practical problems, including jurisdictional issues, in connection with the recognition and enforcement of voluntary agreements reached in the course of international child disputes, including those reached through mediation.
2. The Experts' Group acknowledged the importance of amicable solutions in the 1980, 1996 and 2007 Hague Conventions and considered it desirable for States to join these Conventions. In particular, the 1996 and 2007 Conventions provide assistance in relation to the recognition and enforcement of voluntary agreements.
3. The Experts' Group noted the increasing role of party autonomy in international family law and the value of voluntary agreements in providing tailor-made and comprehensive solutions which are likely to be respected by the parties and which contribute to positive communication among the parties to the benefit of the child.
4. The Experts' Group acknowledged the relevance of the *United Nations Convention on the Rights of the Child* in the context of voluntary agreements.
5. The Experts' Group noted that many States increasingly encourage and facilitate the use of mediation and other forms of amicable resolution mechanisms in appropriate cases, resulting in an increase in the use of voluntary agreements in international child disputes.
6. The Experts' Group acknowledged that voluntary agreements often contain various components in a "package" – such as custody, contact, child support, property and other matters that may not be directly related to the child. These "packages" present difficulties because different components are subject to different private international law rules. For example, because these components may have to be addressed by multiple courts with limited jurisdiction, recognition and enforcement of these comprehensive agreements may be complex and prolonged.
7. The Experts' Group identified two primary areas in which the existing legal framework does not adequately accommodate voluntary agreements which often contain various components ("packages"). This creates particular difficulties in the areas of relocation and post-abduction disputes in connection with cross-border recognition and enforcement.

8. The Experts' Group noted that the increase in mobility of families requires that voluntary agreements be "portable" which means that they receive recognition and enforcement in States other than the State of origin. The legal framework as described previously shows that there is complexity and a lack of legal certainty and predictability which hinder the effective use of voluntary agreements in cross-border situations.

9. The Experts' Group discussed the legal and practical challenges that interested parties face when seeking recognition and enforcement of voluntary agreements within the context of existing instruments, both those of the Hague Conference and of regional organisations. In this respect, the Experts' Group referred to the Background Note prepared by the Permanent Bureau.

10. The Experts' Group noted that further instruments are likely to encourage and foster voluntary agreements in international child disputes.

11. The Experts' Group recognised the need for those concerned, including parents, mediators, lawyers and judges, to be provided with a "navigation tool", *e.g.*, non-binding principles or guidelines, to assist them in securing cross-border recognition and enforcement of "package agreements" in the existing legal framework.

12. The Experts' Group noted the additional benefit of a binding instrument that could provide a "one-stop shop" to accommodate the "package" that parents in particular conclude. Such "packages" raise complex practical and legal issues including those described in paragraph 6.

13. The Experts' Group noted the desirability and feasibility of new instruments and recommended that the Council authorise the continuation of the Experts' Group to explore further the nature and content of such instruments in greater detail, which would enhance the existing Hague Conventions. The Experts' Group should be invited to report back to Council in 2015 on its progress.

THE HAGUE, 14 December 2013

**Experts' Group on Recognition
and Enforcement of Voluntary
Cross-Border Agreements**

12-14 December 2013



**PARTICIPANTS IN THE FIRST MEETING OF THE EXPERTS' GROUP ON
RECOGNITION AND ENFORCEMENT OF
VOLUNTARY CROSS-BORDER AGREEMENTS**

The Experts' Group consisted of private international law experts from academia, courts, government authorities and private practice (attorneys and mediators) from various legal systems, acting in their private capacity. Aside from those included in this list, other international family law experts were invited but unable to attend. Should the Council on General Affairs and Policy approve the continuation of this project, the composition of the Experts' Group might be expanded to incorporate a broader spectrum of legal systems and expertise in the future and include more judges and practitioners.

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Experts' Group on Recognition and Enforcement of Voluntary Cross-Border Agreements

12-14 December 2013



BACKGROUND NOTE ON RECOGNITION AND ENFORCEMENT OF VOLUNTARY CROSS-BORDER AGREEMENTS

I. Introduction

1. The purpose of this Background Note is to assist the Experts' Group in meeting the mandate of the Council on General Affairs and Policy of the Hague Conference (hereinafter "Council") to "carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention.^[1] Such work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area".² It is designed to provide some relevant information and suggest possible issues for experts to reflect on in preparation for the meeting. In addition, the Background Note includes a study of existing approaches, through the inclusion of Annexes I, II, and III which illustrate the practices of a number of States, but it does not seek to be comprehensive. The information shared by the experts based on their various experiences and legal systems will serve to enrich the discussion and illuminate possible approaches as models for consideration.

2. The Background Note first describes recent work that has been undertaken by the Hague Conference on Private International Law (hereinafter "Hague Conference") in the area of mediation with specific focus on the subject of the recognition and enforcement of mediated agreements. It then presents information on the Experts' Group's mandate and the tasks that it is asked to accomplish. To prepare the discussion for the upcoming Experts' Group meeting, the Background Note provides information on the legal and practical challenges that may arise in relation to the recognition and enforcement of

*The Permanent Bureau would like to thank Kerstin Bartsch, Senior Legal Officer at the Permanent Bureau, for carrying out the principal research and drafting of this Note. The Permanent Bureau would also like to thank and acknowledge the work of the following persons in providing assistance in carrying out research: Melissa Kucinski (Consultant to the Permanent Bureau), Kristina Duffy (Intern), and Lukas Rass-Masson (Legal Officer).

¹ For the purposes of this Background Note, the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* is hereinafter referred to as the "1980 Convention", the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* is hereinafter referred to as the "1996 Convention", and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* is hereinafter referred to as the "2007 Convention". Status tables for each of the Conventions are available at < www.hcch.net >.

² See Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012), para. 7 (available at < www.hcch.net > under "Work in Progress" then "General Affairs").

voluntary agreements, including by reflecting on the application of certain relevant Hague Conventions. The last part of this Background Note provides areas for consideration by the experts in preparation for and during the meeting.

3. The Background Note includes several annexes which experts may find useful, which are drawn from prior work carried out by the Hague Conference:

- **Annex I** summarises the responses that Contracting States to the 1980 Convention have submitted to the Hague Conference in their Country Profiles and which concern mediated agreements. Contracting States to the 1980 Convention are requested to complete a Country Profile to assist with the fulfilment of their obligations under Article 7 of the 1980 Convention. The Country Profile provides information of a general character on the law of a State in connection with the application of the Convention and keeps States and their Central Authorities informed regarding the operation of the Convention in other States. Annex I only contains selected responses relevant to the Experts' Group and does not reproduce the (complete) Country Profiles submitted by Contracting States.³
- **Annex II** summarises responses to a questionnaire⁴ sent to Contracting States to the 1980 and 1996 Conventions in 2010 prior to the Sixth Meeting of the Special Commission to review the operation of the 1980 Convention and the 1996 Convention that took place in 2011 and 2012 (hereinafter "Sixth Special Commission"). The summary in Annex II includes the responses provided in relation to Part I No 1 entitled "Mediation, conciliation and other similar means to promote the amicable resolution of cases under the Convention".
- **Annex III** summarises responses to a questionnaire sent in 2009 to the members of the Working Party on Mediation in the context of the Malta Process (hereinafter "Working Party on Mediation"). The questionnaire focused on the enforceability of mediated agreements. The input received was used, in part, to prepare the "Principles for the Establishment of Mediation Structures in the context of the Malta Process" and the Explanatory Memorandum.⁵
- **Annex IV** is the "Report of the further work recommended by the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention" (Prel. Doc. No 12 of March 2012) for the attention of the Council on General Affairs and Policy that took place in from 17 to 20 April 2012.

³ The complete Country Profiles are available on the Hague Conference website at < www.hcch.net > under the "Child Abduction Section".

⁴ "Questionnaire of December 2010 on the desirability and feasibility of a Protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 2 of December 2010 (available at < www.hcch.net > under the "Child Abduction Section"). This questionnaire is also called "Questionnaire II" since it was the second questionnaire sent out in preparation of the Special Commission, the first one being the "Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*", Prel. Doc. No 1 of November 2010 for the attention of the Special Commission of June 2011.

⁵ The responses provided by 10 members of the Working Party to "Questionnaire II of the Working Party on Mediation in the Context of the Malta Process" of August 2009, the "Principles for the Establishment of Mediation Structures in the context of the Malta Process" and the Explanatory Memorandum are available at < www.hcch.net > under the "Child Abduction Section".

- **Annex V** is the "Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the Desirability and Feasibility of further Work in Connection with the 1980 and 1996 Conventions" (Prel. Doc. No 13 of December 2011) for the attention of the Sixth Special Commission of January 2012.

II. Recent work in the area of mediation, especially with regard to the recognition and enforcement of mediated agreements

4. The Hague Conference has a long history of working in the field of cross-border mediation in international child disputes. This work has been undertaken both in relation to the operation of the 1980 Convention, but also, more generally, at the request of the Council, on the broader topic of cross-border mediation in family matters outside of the 1980 Convention.⁶

5. The involvement of the Hague Conference in this area reflects the increasing importance of mediation and other alternative dispute resolution ("ADR") methods to bring about agreed solutions in international family law cases. Most of the modern Hague Family Conventions explicitly encourage mediation and similar processes for finding appropriate solutions to cross-border family disputes. For example, Article 7 c) of the 1980 Convention mandates that Central Authorities attempt to "secure the voluntary return of the child or to bring about an amicable resolution of the issues". The 1996 Convention contains a provision which is more specific than that of the 1980 Convention: Article 31 b) requires Central Authorities, directly or through public authorities or other bodies, to take all appropriate steps to "facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies". The 2007 Convention mandates in Article 6(2) d) that Central Authorities "encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes".⁷

6. To date, most of the work of the Hague Conference on voluntary agreements has focused on achieving such agreements through the dispute resolution process of mediation. Research, documentation and publications from the Hague Conference will therefore frequently refer to "*mediated* agreements".⁸ Such agreements are achieved

⁶ A brief overview of the work of the Hague Conference in the area of mediation is included in Prel. Doc. No 12 (Annex IV), paras 11 *et seq.*

⁷ The 2007 Convention, in Art. 34, also requires Contracting States to make available effective measures to enforce decisions under this Convention in their internal law and suggests that those measures may include "the use of mediation, conciliation or similar processes to bring about voluntary compliance".

⁸ The "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation", 2012 (hereinafter referred to as "Guide to Good Practice on Mediation"), provides an explanation of the term "mediated agreement" in its Terminology Section (see p. 10) and draws attention to the fact that in some jurisdictions, the term "memorandum of understanding" is preferred to refer to the immediate outcome of mediation to avoid any assumption as to the legal nature of the mediated result. The Guide is available at < www.hcch.net > under the "Child Abduction Section").

voluntarily by the parents, using the process of mediation.⁹ This Experts' Group will, however, focus more broadly on *all voluntary agreements*, which may be reached through other processes as well, such as negotiation, conciliation, collaborative law, and facilitation, among others.¹⁰

7. A first "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980"¹¹ was prepared by the Permanent Bureau for the 2006 Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006). Noting that "[f]or mediation to have a positive effect on Hague Convention applications, it is vital that agreements reached are capable of being enforced in both States", the note gave an insight into how the cross-border enforceability of mediated agreements is handled in different States.¹²

8. In April 2006, the Permanent Bureau of the Hague Conference was mandated¹³ by its Member States to "prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject". The Feasibility Study¹⁴ provided an overview of the developments in family mediation on a national and international level and dedicated one section to the "enforcement and enforceability" of a mediated agreement. The Feasibility Study noted that in practice, it may be felt that as a mediated agreement is reached voluntarily, it is usually complied with and therefore enforcement is not an issue. It drew attention however to the need to secure the enforceability of the agreement, in particular if it is intended to have an ongoing effect (such as the regulation of contact between a child and a non-resident parent) since the degree of compliance may weaken as time goes by. The Study also raised the problem of the subject matter of the mediated agreement which may affect its enforceability.¹⁵

9. In its conclusions, the Feasibility Study reflected on the role of private international law in the field of mediation, in particular in regard to the mediated agreement: "Private international law rules may have importance in relation to the following matters:

⁹ The Guide to Good Practice on Mediation (*ibid.*) notes on p. 7 that definitions of "mediation" vary significantly. The Guide attempts to provide a definition of "mediation" by drawing together the common features in these various definitions.

¹⁰ See the Terminology Section of the Guide to Good Practice for a definition and explanation of some of these terms, pp. 7-9.

¹¹ Prel. Doc. No 5 of October 2006 for the attention of the 2006 Special Commission (available at < www.hcch.net > under the "Child Abduction Section").

¹² *Ibid.*, Section 3.5, pp. 13-14.

¹³ Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference, Prel. Doc. No 11 of June 2006 for the attention of the Council of April 2007, Recommendation No 3 (available at < www.hcch.net > under "Work in Progress" then "General Affairs").

¹⁴ "Feasibility study on cross-border mediation in family matters", Prel. Doc. No 20 of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference is (available at < www.hcch.net > under "Work in Progress" then "General Affairs").

¹⁵ *Ibid.*, Section 2.6, pp. 10 *et seq.*

- a) the question of the law applicable to certain aspects of agreements made in the context of divorce or the breakdown of a relationship concerning such matters as child custody and contact, maintenance and child support, and the distribution of family assets;
- b) the question of the circumstances in which a mediated agreement made in one jurisdiction may be recognised and enforced in another;
- c) the question of the jurisdiction of courts or other authorities to review, approve, register, place on the record of the court, or otherwise formalise mediated agreements.”¹⁶

10. The Feasibility Study further reviewed the extent to which existing Hague Conventions provide answers to these questions. It acknowledged that there was no single Hague Convention dealing in a general way with agreements in the area of family law and concluded that there are “some gaps in the treatment of mediated agreements in family matters within the overall regime established by the Hague Conventions”.¹⁷

11. Finally, the Feasibility Study explored possible directions for the Hague Conference’s future work in this field, among which were:

- “Further work, including consultations [...] on the question whether the lack of a fully comprehensive regime of private international rules concerning agreements in the family law area gives rise to any practical disadvantages or impediments for the mediation process [and] would justify the development of a private international law instrument”;
- “Consultations [...] with Member States to explore the desirability of developing an instrument designed to [...] provide for closer co-operation between States in facilitating the use of mediation and in giving effect to mediated agreements”; and
- “[T]he development of a code of practice or a guide to good practice to be applied and used by mediators in cross-border family mediation”.¹⁸

12. In April 2007, the Feasibility Study was presented to the Council which invited Members to provide comments.¹⁹ While almost all Member States that responded to this request strongly supported further work of the Hague Conference in the field of mediation, different views were presented as to whether the next steps should explore the desirability of developing an instrument or focus on the development a guide to good practice.²⁰ A few States welcomed the idea of further examination of whether an instrument should be developed.²¹ Preference was however expressed for the

¹⁶ *Ibid.*, Section 5.5, p. 24.

¹⁷ *Ibid.*, Section 5.5, pp. 24 *et seq.*

¹⁸ *Ibid.*, Section 5.11, p. 29.

¹⁹ The 2007 Council on General Affairs and Policy invited Members to “provide comments, before the end of 2007 [...] with a view to further discussion of the topic at the spring 2008 meeting of the Council”, Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (2-4 April 2007), at para. 3 (available at < www.hcch.net > under “Work in Progress” then “General Affairs”).

²⁰ The responses are included in Prel. Doc. No 10 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference (available at < www.hcch.net > under “Work in Progress” then “General Affairs”).

²¹ Germany commented: “The German delegation would welcome an examination of whether an instrument should be developed or measures initiated to improve the flow of information and to provide for closer co-operation between Member States. This could facilitate the use of cross-border family mediation and improve the efficiency of agreements reached in the course of such mediation.”, *ibid.*, p. 4. Lithuania mentioned that the “development of an instrument which could [...] provide for closer co-operation between States in facilitating the use of mediation and in giving effect to mediated agreements would also be desirable”, *ibid.*, p. 13. Israel noted: “To promote [cross-border mediation] and assure its elements in a private international law instrument, it should be legislated in an international Hague Convention. This Convention will provide access to justice through mediation in the private international law”, *ibid.*, Addendum No 1, p. ii.

development of a Guide to Good Practice.²² The European Union noted in this regard: "The European Community and its Member States are of the opinion that work could be launched on a good practice guide which could be of benefit to the parties and the mediators in different countries. [...] On the basis of the experience gained in preparing the guide it could be useful to re-examine whether working on an instrument in this field would be a feasible option."²³

13. In response to these comments, the Council asked the Permanent Bureau in April 2008 as a "first step", to commence work on a Guide to Good Practice on Mediation to be submitted for consideration at the Sixth Special Commission in 2011.²⁴

14. After this, the importance of ensuring recognition and enforceability of mediated agreements in all relevant jurisdictions was brought up, for example, in a proposal by Israel for an international instrument on cross-border mediation of family disputes presented to the Council in 2009.²⁵ The proposal mentioned that a private international law instrument "could be used to promote cross-border mediation and make it accessible and reliable for parties to a dispute" and included a preliminary draft of a convention whose Article 7 on the enforceability of the settlement agreement stated:

- "1. A settlement agreement made in a Contracting State shall be entitled to enforcement in every Contracting State provided that it is enforceable in the State of the mediation and when in that State a settlement agreement is enforceable by a court order shall be entitled to recognition and enforcement.
2. Recognition and enforcement of a settlement agreement may be refused if enforcement is manifestly incompatible with the public policy of the Contracting State addressed."

15. Furthermore, the Working Party on Mediation in the context of the "Malta Process"²⁶ identified the enforceability of mediated agreements as a crucial centre-piece. In 2009, the Working Party sent a questionnaire to its members to compile information on the

²² For example by Argentina, Germany, Lithuania, Malaysia, Turkey, United States of America as well as the European Union.

²³ Prel. Doc. No 10 of March 2008 (*op. cit.* note 20), p. 12.

²⁴ Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), at p. 1 (available at < www.hcch.net > under "Work in Progress" then "General Affairs").

²⁵ "Developing an International Instrument for Cross-Border Mediation in Family Disputes – Proposal of the State of Israel", Work. Doc. No 1 of 31 March 2009.

²⁶ The "Malta Process" was launched in 2004 as a dialogue between Contracting States to the 1980 Convention and non-Contracting States with Sharia-based or influenced legal systems. In March 2009, the participants at the third Malta Conference acknowledged the need to give individuals involved in cases to which no international legal framework applies some assistance, in the interim, by encouraging the development of mediation structures. They recommended the establishment of a Working Party to draw up a plan for the development of mediation services to assist in the resolution of cross-frontier disputes concerning custody of and contact with children. This suggestion was approved by the Council, see Conclusions and Recommendations of the Council (31 March – 2 April 2009), p. 2. (available at < www.hcch.net > under "Work in Progress" then "General Affairs"). Information on the Malta Process and the Working Party on Mediation is available at < www.hcch.net > under the "Child Abduction Section".

enforceability of mediated agreements in their jurisdictions.²⁷ The information compiled through this questionnaire and other sources contributed to the development of the “Principles for the Establishment of Mediation Structures in the context of the Malta Process” and an Explanatory Memorandum that were finalised in 2010.²⁸ The Principles encourage mediators to work closely with the parties’ legal representatives in order to make any agreement binding and enforceable prior to its implementation, and encourage States to introduce legislation to help with the enforceability of mediated agreements.²⁹

16. In June 2011, the draft Guide to Good Practice on Mediation, prepared with the assistance of a group of experts, was presented and discussed in Part I of the Sixth Special Commission.³⁰ Although the Guide to Good Practice on Mediation primarily addresses “mediation” as one of the most widely promoted methods of ADR in family law, it also refers to good practices with regard to other processes that facilitate agreed solutions, such as conciliation, “parenting co-ordination” and models of conflict resolution advocacy such as the “collaborative law” or “co-operative law” approaches.³¹

17. The Guide notes that an agreed solution reached in mediation should meet the requirements for obtaining legal effect in the States concerned and be rendered legally binding and enforceable in these States before commencing with its practical implementation. It emphasises that the enforceability in all legal systems concerned is particularly crucial where the agreed solution involves the cross-border exercise of parental responsibility.³² The Guide mentions that the legal effect of the mediated agreement may be dependent on the involvement of judicial or administrative authorities since many legal systems restrict party autonomy in family law to a certain extent, in particular when it comes to parental responsibility. It points out that difficulties may arise when an agreement contains a variety of issues, such as custody, access, and child support, each of which may independently affect the enforceability of the agreement and may require different jurisdictional rules to obtain recognition and enforceability.³³

18. While the Part I of the Sixth Special Commission welcomed the draft Guide as providing helpful general assistance in relation to the use of mediation in the context of the 1980 Convention, the discussions pointed to the specific issue of the recognition and enforcement of agreed solutions, both in the context of applications under the 1980

²⁷ See Annex III.

²⁸ The Principles and the Explanatory Memorandum are included in Prel. Doc. No 6 of May 2011 for the attention of the Special Commission of June 2011 (available at < www.hcch.net > under the “Child Abduction Section”).

²⁹ See Section C of the Principles, *ibid.*

³⁰ Recognising that the subjects to be covered in the Sixth Special Commission were too extensive for one meeting, it was decided to hold the Special Commission in two separate parts. Part I (in June 2011) addressed primarily the practical operation of the Conventions, including the draft Practical Handbook on the 1996 Convention and the draft Guide to Good Practice on Mediation. Part II (in January 2012) focused, among others, on areas where there appeared to be support for further work including cross-border recognition and enforcement of mediated agreements, see “Conclusions and Recommendations of Parts I and II, and Report of Part II (April 2012)”, paras 1-4 (available at < www.hcch.net > under the “Child Abduction Section”).

³¹ See Chapter 15 (pp. 88-89) of the Guide (*op. cit.* note 8) which is dedicated to these other methods and the Terminology Section for their definition and explanation (in particular pp. 7-9).

³² See Chapter 12 (pp.79-83) “Rendering the agreement legally binding and enforceable”.

³³ *Ibid.*, paras 290-292 and paras 296-304.

Convention and in the context of cross-border disputes concerning children more generally, taking into account relevant provisions of the 1996 Convention.³⁴ One expert highlighted for example that, as a judge, she would see the biggest problems in those cases where the parties agreed to a bigger package, over part of which the judge in the return proceedings did not have jurisdiction. She gave the example of parents agreeing on the return of the child and at the same time on sharing parental responsibility in a certain way following the return. She explained that the only choice the parties had in such situations was to trust the court in the other State to respect their agreement. The option of rendering the agreement binding in the other State would often mean lengthy proceedings, for which the Hague return proceedings could not be stayed due to the need for expeditiousness.³⁵

19. In its letter concerning Part II of the Sixth Special Commission, Switzerland stated: "If amicable solutions are truly to be encouraged, parties must have the assurance that a mediated agreement can be endorsed by the courts and hence recognised and enforced abroad".³⁶

20. At Part II of the Sixth Special Commission, the matter was discussed in more detail. Experts considered that in cross-border disputes concerning children, the agreements would often need to be rendered legally binding in multiple jurisdictions, for example, in the State of the habitual residence of the child as well as in the State where contact with the child is to be exercised, if this is to take place in another jurisdiction. Moreover, when parents arrive at a voluntary agreement, it often includes multiple issues falling outside the scope of any Hague Convention, and therefore causes logistical problems, particularly concerning jurisdiction and the recognition and enforceability of the voluntary agreement in part or in whole.³⁷

21. In view of the responses provided to a questionnaire sent to the Contracting States to the 1980 and 1996 Conventions prior to Part II of the Sixth Special Commission, the area of recognition and enforcement of agreements resulting from mediation or other similar amicable processes was furthermore identified as one where private international law provisions may be of considerable use.³⁸ The discussion in Part II therefore also focused on the desirability and feasibility of further work in this field, and in particular in

³⁴ Conclusions and Recommendations and Report of Part I of the Sixth Special Commission, Prel. Doc. No 14 of November 2011, paras 245 *et seq.* (available at < www.hcch.net > under the "Child Abduction Section").

³⁵ *Ibid.* para. 251. Related issues of jurisdiction and applicable law were furthermore raised during the discussions on the draft Practical Handbook on the operation of the 1996 Convention. See the "Revised draft Practical Handbook on the operation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children*", Prel. Doc. No 4 of May 2011 for the attention of the Special Commission of June 2011 (available at < www.hcch.net > under the "Child Abduction Section"). The Practical Handbook is expected to be published over the course of the next months.

³⁶ Letter from Switzerland dated 7 November 2011 (distributed with L.c. ON No 37(11) on 9 November 2011).

³⁷ Report of Part II of the Sixth Special Commission (*op. cit.* note 30), para. 14.

³⁸ *E.g.*, Armenia, Australia, Israel, Panama, Switzerland and Ukraine, see Annex II.

connection with the development of private international law rules. The majority of experts recommended the establishment of an exploratory expert group on mediated agreements.³⁹

22. While much of the discussion among experts focused on agreements achieved through mediation, it was understood that practical challenges related to the recognition and enforcement of agreed solutions in cross-border disputes concerning children would not be unique to “mediated agreements” only, but applicable to a broader range of voluntary agreements.⁴⁰

23. As a result, the Conclusions and Recommendations of Part II of the Sixth Special Commission included the following:

“Recognising that, in the course of international child disputes, the parties may enter into agreements settling their dispute, the Special Commission recommends that exploratory work be undertaken to identify legal and practical problems that may exist in the recognition and enforcement abroad of such agreements, taking into account the implementation and use of the 1996 Convention.

To this end, the Special Commission recommends that the Council on General Affairs and Policy consider authorising the establishment of an Experts’ Group to carry out further exploratory research, which would include identification of the nature and extent of the legal and practical problems in this area, including, specifically, jurisdictional issues and would evaluate the benefit of a new instrument in this area, whether binding or not.”⁴¹

24. It should also be noted that in addition to the 2012 Guide to Good Practice on Mediation, several of the Hague Conference’s Guides to Good Practice, published between 2003 and 2010 and drafted to support the effective implementation and operation of the 1980 Convention, have highlighted the importance of promoting agreed solutions.⁴² Some of these mention the need for recognition and enforcement of agreements. For example, the Guide to Good Practice on Transfrontier Contact, published in 2008, mentions that “[a]n agreement based on mediation, which is intended by the parties to be legally binding, should be made enforceable in both States concerned” and that “[t]his also applies to agreements achieved through other means of alternative dispute resolution”. Recognising that the “many advantages of mediation agreements can become irrelevant if there is no supporting legal framework”, the Guide recommends that a “legal framework [...] be provided, which gives effect to agreements on contact reached between the parents in both countries in which the parents live”.⁴³

³⁹ Report of Part II of the Sixth Special Commission (*op. cit.* note 30), para. 20 and paras 25-27.

⁴⁰ *Ibid.*, para. 23. See also Prel. Doc. No 12 (Annex IV), paras 18-19.

⁴¹ Conclusions and Recommendations of Part II of the Sixth Special Commission, paras 76-77 (available at < www.hcch.net > under the “Child Abduction Section”).

⁴² *E.g.*, Guide to Good Practice on Central Authority Practice, Jordan Publishing, 2003, Section 4.12 on “Voluntary return”, pp. 49-50; Guide to Good Practice on Preventive Measures, Jordan Publishing, 2005, Section 2.1.1 on “Voluntary agreements and mediation”, pp. 15-16; “Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice”, Jordan Publishing, 2008, Chapter 2 on “Promoting Agreement”, pp. 6-11; Guide to Good Practice on Enforcement, Jordan Publishing, 2010, Section 5 on “Promoting voluntary compliance”, pp. 25-27 (all available at < www.hcch.net > under the “Child Abduction Section”).

⁴³ Guide to Good Practice on Transfrontier Contact (*ibid.*), p. 11, para. 2.52.

25. At its meeting in April 2012, the Council welcomed the successful outcome of the Sixth Special Commission and supported the recommendation to establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements.⁴⁴

26. In conclusion, it can be noted that the subject of mediation and especially of mediated agreements and their recognition and enforcement in relevant (foreign) jurisdictions has been a constant component of the work of the Hague Conference over the past years. The issue was elaborated in several studies and Guides to Good Practice, and discussed at various Special Commission and Council meetings. The decision of the 2012 Council to establish an Experts' Group represents a significant step forward to address this matter further and an opportunity to bring about solutions for the legal and practical challenges that exist for governments, courts, practitioners, and parents worldwide.

III. The Experts' Group mandate as decided by the 2012 Council

27. The Council decided to "establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention. Such work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area".⁴⁵ Two aspects of this mandate are crucial:

1. The Experts' Group is specifically tasked with assessing all types of voluntary agreements, and not simply those reached through the process of mediation.
2. The Experts' Group is to address the *need for* and *desirability of* an instrument, taking into account existing Hague Conventions, especially the 1996, and thus identifying "gaps" in existing regimes.

28. The task of the Experts' Group is not only to identify the nature and extent of any *legal* problems but also to consider any *practical* problems that may arise when seeking cross-border recognition and enforcement of an agreement. Case examples that have been used to reflect on the challenges arising in the context of the recognition and enforcement of agreements referred to situations in which a child has been abducted and parents agreed on the return or non-return of the child, or, more generally, to situations in which parents conclude an agreement on custody of or access to their child, or on the payment of child support. Another example is the case of international family relocation where parents agree on the conditions of the relocation of one of them with the child to another State.

⁴⁴ See *supra* para. 1.

⁴⁵ See *supra*, note 2.

29. The fact that many parents may agree on a “package”, for example on the issue of the return of the child together with issues such as custody, access and maintenance, would need to be taken into account since these multiple issues could cause challenges, especially as to the question of jurisdiction, both internal and international, of different courts.

30. The issue of cross-border recognition and enforcement of agreements may also arise in situations where none of the Hague Conventions, such as the 1980 or 1996 Convention is applicable. It is in particular in these non-Convention cases that parents may conclude an agreement to settle their cross-border family dispute.

31. In the context of the Experts’ Group mandate, it is therefore necessary to consider a range of case examples by taking into account the scope and application of existing Hague Conventions or other international or regional legal instruments that could be applicable in these cases. The Experts’ Group should also identify areas where there is a “gap” in the interaction of these instruments.

32. The Experts’ Group is asked to evaluate the benefit of a new instrument, whether binding or not. In this regard, it should be considered whether an instrument concerning agreements in international child disputes could be of use in abduction situations or could assist families more generally, for example in international custody or relocation cases. It is also important to take into account whether such an instrument could offer an efficient way to render agreements containing a “package” of issues, thus a combination of different family law areas, in a cross-border situation legally binding and enforceable in the different jurisdictions concerned. The Experts’ Group is requested to explore the feasibility and desirability of a new instrument (binding or not) in light of the application of the existing Conventions of 1980, 1996, and 2007 and to consider the compatibility of any new instrument with these Conventions.⁴⁶

33. In this context, the Experts’ Group could also assess the attractiveness of a new instrument to particular groups of States, such as States whose legal systems are based on or influenced by Sharia. While some of these States may be reluctant or not yet ready to join the 1980 and / or 1996 Conventions, they might be willing to consider joining an international family law instrument dealing with the recognition and enforcement of agreement-based solutions to cross-border family disputes.⁴⁷

34. It should be noted that the general issue of cross-border recognition and enforcement is currently under consideration and will be discussed by the Council at its next meeting in 2014 in the civil and commercial context in connection with the ongoing Judgments Project.⁴⁸ It has also been the subject of research in connection with the

⁴⁶ The Sixth Special Commission stressed the need for the Experts’ Group to assess how any next steps in this area could be designed in a way to be compatible with existing Hague Conventions, namely the 1980, 1996 or 2007 Conventions, so as not to undermine these Conventions, see Prel. Doc. No 13 (Annex V), para. 54.

⁴⁷ Prel. Doc. No 12 (Annex IV), paras 36-37.

⁴⁸ See “Ongoing work of international litigation and possible continuation of the Judgments Project”, Prel. Doc. No 5 of February 2012 for the attention of the Council of April 2012, and the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (9-11 April 2013), para. 8 (both available at < www.hcch.net > under “Work in Progress” then “General Affairs”).

recognition and enforcement of foreign civil protection orders.⁴⁹ Future instruments in the area of cross-border recognition would therefore be at the core of the unification work of the Hague Conference and would facilitate cross-border relations and co-operation.

IV. General issues related to cross-border recognition and enforcement of agreements

35. The following examples may help illustrate the legal and practical challenges concerning the enforceability of mediated agreements.

36. Example 1 (in the context of a wrongful removal / retention):

It is assumed that State A and State B are Contracting States to the 1980 and 1996 Conventions and that the Conventions have entered into force between them.

Beth and Alex, a married couple, have been living for several years in State A where their child was born. After they decided to divorce, Beth takes the child to her home country, State B, for what she states is a holiday. Once they have arrived in State B, she informs Alex that she and the child will not return to State A. Alex immediately contacts the Central Authority in State A which sends a request for return under the 1980 Convention to State B. The Central Authority in State B (where the child is present) starts return proceedings but also contacts Alex and Beth to see if they are interested in undertaking mediation and they accept. The mediation process takes place in State B.

Beth and Alex reach an agreement that Beth will return to State A with the child on the condition that (1) the child will live with Beth in the former matrimonial home (from which Alex moves out); (2) the child will stay with Alex every weekend, and (3) Alex will pay Beth spousal and child support.

In State B, in order for such an agreement to be binding, it has to be embodied in a court order. The court seized with the return proceedings under the 1980 Convention states that it is able to make an order for return by consent, but it cannot make any orders relating to custody, contact or child support since it does not have international jurisdiction in relation to these issues. The court considers Article 16 of the 1980 Convention as blocking jurisdiction and adds that the requirements of Article 7 of the 1996 Convention are not met since the child is not habitually resident in State B.

The parties are advised that they can institute custody, access and child support proceedings in State A but mother and child would need to return for these proceedings in order to be heard in person. The court of State B would stay the return proceedings while this is done.

Beth refuses to return to State A with the child until she is assured that the entire agreement as a "package" will be adhered to once she is back in State A with the child and that she can enforce the provisions of this agreement if it is not adhered to by Alex.

⁴⁹ See "Recognition and Enforcement of Foreign Civil Protection Orders: a Preliminary Note", Prel. Doc. No 7 of March 2012 for the attention of the Council of April 2012 (available at < www.hcch.net > under "Work in Progress" then "General Affairs") and the Conclusions and Recommendations adopted by the Council of April 2013 (*ibid.*), para. 9.

The local competent courts in State B consider a request for a transfer of jurisdiction under the 1996 Convention but only in respect to the custody and access provisions of the agreement, not in respect to the child support matter. They inform Beth however that the process may become both long and cumbersome. The court seised with the return proceedings in State B is also concerned about the length of the transfer proceedings in view of its duty to decide on the return of the child in an expeditious way.

37. Example 2 (in the context of a wrongful removal / retention):

In this example, the scenario is the same as in Example 1, but Alex and Beth reach a different agreement.

Alex and Beth conclude an agreement in State B that Beth can remain in State B with the child under the condition that (1) both parents have joint custody of the child; (2) Alex can speak to the child by phone whenever he wishes and visit the child up to twice in a month at week-ends; (3) the child will spend half of the summer vacation and the entire Christmas vacation with Alex, and (4) Alex will pay Beth spousal and child support.

Alex realises that this agreement could be interpreted by the court seised with the return proceedings under the 1980 Convention as a subsequent acquiescence in the wrongful retention of his child by Beth. Before signing the agreement, he wants to be assured that the custody and access provisions of the agreement are adhered to in State B and that he can enforce those provisions in State B, if necessary.

Beth wants to ensure that the provisions in the agreement concerning spousal and child support will be recognised and enforced in both States A and B.

Beth and Alex ask the court seised with the return proceedings in State B to make an order reflecting their agreement. The court responds that it has *internal* jurisdiction only to rule on the return or non-return of the child but not on custody or support matters. It will therefore only rule on the non-return of the child and conclude the return proceedings. The court is also of the view that it has no *international* jurisdiction to make such an order since it considers the child to be habitually resident in State A. It states that the requirements of Article 7 of the 1996 Convention have not been met and therefore the child has not acquired habitual residence in State B.

Beth and Alex wonder whether they would need to ask the competent court in State A to make an order reflecting their agreement with regard to custody, access and child support. They consider this option as long, cumbersome and expensive.

38. Example 3 (not in the context of wrongful removal / retention):

In a different scenario, in which it is assumed that the 1996 Convention is applicable between State A and State B, Beth wants to relocate with the child to her home country, State B. Alex would agree to this under a few conditions. They decide to agree on the details of the relocation using mediation in State A.

Their agreement reached in State A contains provisions on custody, access, as well as on child and spousal support. Alex wants to be assured that the agreement is legally binding and enforceable in State B, before the relocation.

They are advised that the agreement would need to be turned into a court order in State A. When approaching a court, the court says it has (internal) jurisdiction only for the custody matter but not for the support arrangement, this would be another court. The court also states that it will review the agreement on whether it is in the best interests of the child and decide on the relocation. Beth and Alex are disappointed that they would now need to start a lengthy and expensive court procedure although they had voluntarily agreed on all terms.

The next question for Beth and Alex is whether the court order in State A would be recognised and enforced in State B. They could make use of Article 24 of the 1996 Convention to resolve any doubts in this regard and request “advance recognition” of the order. A question may, however, arise concerning the support provisions since they fall outside the scope of the 1996 Convention.⁵⁰

Due to these difficulties, Beth and Alex inquire about the possibility of concluding an agreement in State B. The courts in State B, however, do not believe that they have jurisdiction since State B is not the State of the habitual residence of the child.

39. These case examples illustrate that the process of rendering an agreement in a cross-border family dispute may give rise to legal questions and be a lengthy, cumbersome and expensive process.⁵¹ While these examples focus on the need or possibility to render an agreement into a court order, the Experts’ Group might also reflect on the possibility that a voluntary agreement cannot or does not need to be turned into a court order in the rendering jurisdiction, including situations in which the agreement may be homologated, registered or subject to a notarial act.⁵²

40. In general, there are two separate issues which must be considered when discussing the issue of rendering agreed solutions legally binding and enforceable in cross-border disputes, and hence in multiple legal systems:

1. the need to render the agreement legally binding and enforceable in the legal system in which the agreement has been concluded (in the examples, State A); and
2. the need to ensure that the agreement, legally binding and enforceable in State A, is also legally binding and enforceable in any other relevant legal system (State B, and possibly further States C, D, etc.).

41. In many legal systems, in disputes concerning children, issue (1) is a matter of seeking the court’s approval of the agreement, such that the agreement will be rendered binding and enforceable by being made into a court order.⁵³ However, there are also

⁵⁰ However, the court may apply the 2007 Convention if applicable, see *infra* paras 81 *et seq.*

⁵¹ The case examples are further elaborated in Prel. Doc. No 13 (Annex V), paras 39 *et seq.*

⁵² See *infra*, paras 67-68.

⁵³ *E.g.*, Argentina, Australia, Belgium, Brazil, Burkina Faso, China (Hong Kong SAR), Costa Rica, Czech Republic, Denmark, Estonia, Finland (by the Social Welfare Board), France, Greece, Honduras, Hungary (by the Guardianship Authority), Ireland, Israel, Latvia, Lithuania, Mauritius, Mexico, Norway, Paraguay, Poland, Romania, Slovenia, Spain, Sweden (by the Social Welfare Board), Switzerland, the United Kingdom (Northern Ireland; England and Wales), the United States of America and Venezuela, see Annex I.

some States where, in addition, it appears to be possible to render an agreement “enforceable” by other means: by registering the agreement with the court (without needing to seek the court’s approval of the terms),⁵⁴ by notarisation,⁵⁵ by both parents requesting a local official to determine that a written agreement on parental responsibility, domicile and time spent with the child may be enforced,⁵⁶ and by formal approval by a social welfare board.⁵⁷ In a few States, no additional formalities are required, and mediated agreements in family disputes involving children are immediately enforceable without any additional formalities being required.⁵⁸

42. Issue (2) could be achieved by two methods:

1. by taking the agreement to State B (or C, D, etc.) and requesting that a court in that State make a court order incorporating the terms of the agreement. Whether the court in State B (or C, D, etc.) can make such an order will again depend upon questions of international and internal jurisdiction; or
2. once the agreement has been rendered binding and enforceable in State A, by seeking recognition and enforcement of State A’s court order in State B.⁵⁹

43. An additional option may exist where an agreement dealing with family law issues is legally binding and enforceable in State A without the need to be turned into a court order and where there is a legal framework in place between State A and State B providing for the recognition of such an agreement under the same conditions as judgments.⁶⁰

44. Parents attempting to render an agreement enforceable by seeking from a court to turn the agreement into a court order may be confronted with the question whether the court in the State where they have undertaken the mediation or have reached an agreement (State A) has jurisdiction to make a court order. The same question arises when parents opt to take the agreement to State B and request that a court in that State make a court order incorporating the terms of the agreement. In cross-border family disputes, both international⁶¹ and internal⁶² jurisdiction will play a role when it comes to deciding whether a certain court will be able to assume jurisdiction to make a court order in the terms of the agreement.

⁵⁴ *E.g.*, Australia, Burkina Faso, Estonia, Greece, Honduras, *ibid.*

⁵⁵ *E.g.*, Belgium, Burkina Faso, Denmark, Estonia, Hungary, Romania, Slovenia, *ibid.*

⁵⁶ *E.g.*, Norway (by the County Governor), *ibid.*

⁵⁷ *E.g.*, Finland, Sweden, *ibid.*

⁵⁸ *E.g.*, Ecuador, Panama, *ibid.*

⁵⁹ The court order could, for example, be recognised and enforced in accordance with the 1996 Convention.

⁶⁰ *E.g.*, Art. 46 of the Brussels IIa Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000) or Art. 30 of the 2007 Convention (see *infra* paras 84-87 and 94-98).

⁶¹ *I.e.*, which State has jurisdiction to make a court order in respect of the child concerned, and regarding the particular subject matter of the agreement.

⁶² *I.e.*, which court within a State has jurisdiction to make a court order in respect of the particular subject matter of the agreement (this could be different courts within that State, for example, if the agreement includes custody / contact issues, as well as an agreement on child support).

45. In the case of mediated agreements, one factor that should be emphasised is the fact that one of the perceived benefits of mediation is often precisely that parties may prefer to retain a certain degree of flexibility and lack of formality in the organisation of their family affairs. The requirement of turning their mediated agreement into a court order may seem to place an additional burden on them and may discourage them from settling their dispute on an amicable basis (which States in fact seek to promote by allowing more party autonomy⁶³). On the other hand, parties may opt not to mediate if mediation is regarded as a less effective and / or secure alternative to judicial proceedings since compliance with agreements concluded in mediation would depend on the good will of the parties.⁶⁴

46. In order to become an enforceable court order, specific legal requirements may also need to be fulfilled, such as hearing the child and ensuring that the agreement is in the child's "best interests". This could add value to the procedure since, generally, in mediation there is no obligation of parents to act in the best interests of the child or in line with his / her rights, as the dispute remains in the private realm of the family. However, if the court is seised to make the agreement into an order, thought will need to be given to the interests of the child. As the agreement may lead to a child living in a different State from one of his / her parents, which has serious implications, the ability of the court to assess whether the interests of the child have been sufficiently taken into account may offer some extra protection.⁶⁵

47. Aside from questions regarding jurisdiction, particular problems may arise when the agreement covers multiple issues for which different internal and international jurisdictional rules apply, such as, for example, custody and child support issues. The reality is that when parties mediate or try to reach agreed solutions, they do so without being bound by the coverage of one specific convention – they negotiate over a "package" of rights, of conditions, of terms such as return in an abduction case, custody, access, maintenance and support, and property.

48. Furthermore, it may be a lengthy, cumbersome and expensive process to render an agreed solution in a cross-border family dispute involving an array of issues legally binding in all States concerned. Yet, it is unquestionably in the child's best interests when parties can reach an agreed solution, as the relationship of all will have less friction and the resulting agreement is more readily honoured if achieved through amicable resolution.

49. Among the modern Hague Children's Conventions, the 1996 Convention, as well as the 2007 Convention (although to a lesser extent because of its more limited scope), may assist parents in achieving recognition of their agreed solution in a cross-border dispute concerning children in all Contracting States concerned. The scope and application of these Conventions therefore play an important role in the discussion on the recognition and enforcement of agreements in cross-border family disputes.⁶⁶ It has to be acknowledged, however, that there are matters which fall outside the scope of both Conventions with the result that none of the Conventions applies and therefore no

⁶³ See *infra* Section VII, paras 112 *et seq.*

⁶⁴ See Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Recital 19. Recognising this situation, this Directive that aims at promoting the amicable settlement of disputes and at facilitating access to ADR, calls on Member States of the European Union to ensure that the parties to a mediated agreement can have the content of their agreement made enforceable. See *infra*, paras 101-105.

⁶⁵ See S. Vigers, "Mediating International Child Abduction Cases", Hart Publishing, Oregon, 2011, p. 54.

⁶⁶ See *infra*, Section V. paras 36 *et seq.*

existing legal framework is applicable to resolve matters of jurisdiction, recognition and enforcement in a specific case.⁶⁷ There is also the possibility that requirements regarding the personal or temporal scope of the Conventions are not met or that the case involves one or more non-Contracting States; the latter problem would, however, certainly be solved when more States join the Conventions.

50. Furthermore, many parents may be reluctant to reach a voluntary agreement regarding their child living in, and travelling between, different countries without addressing contact or visitation rights and the need for child support. Therefore, as mentioned above, it is likely that a voluntary agreement may involve issues that fall in the scope of the 1980, 1996 and 2007 Conventions, each of which may as applied have different rules concerning jurisdiction, recognition and enforcement.

V. Cross-border recognition and enforcement of agreements in consideration of existing Hague Conference Family Law Conventions

51. In considering the desirability and feasibility of a new instrument in the area of voluntary agreements, consideration must be given to existing instruments, particularly the 1980, 1996 and 2007 Conventions and jurisdictional issues that may result in difficulty applying the Conventions to the enforcement of cross-border agreements.

A. The 1980 Convention

52. The 1980 Convention provides the remedy of a prompt return of a child wrongfully removed from his / her habitual residence, or wrongfully retained outside of his / her habitual residence.⁶⁸

53. Acknowledging that a considerable number of cases could be settled without any need to have recourse to the courts,⁶⁹ Article 7 c) of the 1980 Convention mandates that Central Authorities take all appropriate measures to “secure the voluntary return of the child or to bring about any amicable resolution of the issues”. This mirrors Article 10 of the Convention, namely that “[t]he Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child”.

54. Despite the intentional emphasis on seeking an amicable solution included in the Convention, the practice in many Contracting States initially focused on court proceedings and discussion of improving the operation of the Convention was on improving judicial mechanisms. Given that the Convention was drafted to fill the legal gap previously existing in this area, it is not surprising that Contracting States, relying

⁶⁷ This is, for example, the case when parents conclude an agreement containing provisions regarding inheritance of one or both parents' properties by the child in the case of one of the parent's deaths since succession is not covered by the 1996 Convention (see Art. 4 f) of the 1996 Convention) nor by the 2007 Convention.

⁶⁸ See Art. 1 of the 1980 Convention. The Convention refers to “agreements” in Art. 3 acknowledging that rights of custody may arise, among others, “by reason of an agreement having legal effect under the law of [the State of habitual residence of the child before his / her removal from] that State”. See for more information the “Explanatory Report on the 1980 Hague Child Abduction Convention” by E. Pérez-Vera, 1982 (hereinafter referred to as “Pérez-Vera Report”), p. 447, para. 70. The Report is available at < www.hcch.net > under “Publications”.

⁶⁹ Pérez-Vera Report (*ibid.*), p. 454, para. 92.

upon the new legal framework, focused their efforts principally on court-based solutions. Indeed efforts to promote voluntary resolution initially developed primarily in relation to cases falling outside the Convention regime, where no legal framework existed.⁷⁰ Recognition of the value of seeking voluntary return or amicable resolution has gained more support in recent years which largely reflects the increasing importance placed upon facilitating agreed solutions in the domestic family law of many Contracting States. Agreements reached between parents in the context of cross-border removal or retention of children are therefore on the rise.⁷¹

55. A challenge arises if the parents reach a voluntary agreement related to the child's return that goes beyond the return itself, *i.e.*, it includes custody, as illustrated by Examples 1 and 2 earlier. In this case, one has to consider that the 1980 Convention contemplates that the jurisdiction where the child is presently located, after the child was wrongfully removed from or retained from his / her habitual residence, shall take steps to secure the return of the child.⁷² If the competent court in this jurisdiction were to find that the child must be returned pursuant to the 1980 Convention, that court would have no authority to hear the merits of the underlying custody case. The court would apply Article 16 of the 1980 Convention that states: "After receiving notice of a wrongful removal or retention of a child [...] the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention [...]." If the parents were to reach a voluntary agreement related to the child's return, which included custody and contact provisions, the court seised with jurisdiction under the 1980 Convention to hear the return application would have no authority to incorporate those custody and access terms into a court order, thereby leaving only an agreement and no corresponding court order.⁷³

56. In an international abduction case, where the parents have reached an agreed solution on the question of the child's return or non-return as well as the long-term custody and contact issues concerning the child, as part of the "package", the effect of Article 16 of the 1980 Convention may⁷⁴ be as follows:

⁷⁰ See C. Gosselain, "Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States - a Research Paper", Prel. Doc. No 7 of August 2002 for the attention of the Special Commission of September / October 2002, (available at < www.hcch.net > under "Publications"). See also S. Vigers (*op. cit.* note 65), at pp. 13 *et seq.*

⁷¹ There is some evidence that there has been a change in practice, see N. Lowe, "A Statistical Analysis of Applications made in 2003 under the Hague Convention of 28 October 1980 on the Civil Aspects of International Child Abduction, Part I – Overall Report", Prel. Doc. No 3 of September 2008, in particular at pp. 30 *et seq.* (available at < www.hcch.net > under the "Child Abduction Section").

⁷² See Art. 9 of the 1980 Convention.

⁷³ See Pérez-Vera Report (*op. cit.* note 68), p. 463, para. 121, Prel. Doc. No 13 (Annex V), para 45, and the Guide to Good Practice on Mediation (*op. cit.* note 8), para. 299.

⁷⁴ The interpretation and application of Art. 16 in Contracting States will be a matter for each Contracting State. These examples are provided from reports given by some Contracting States concerning the challenges which have occurred, see Prel. Doc. No 13 (Annex V), paras 43 *et seq.*

1. When the parents reach an agreement including *return* of the child to the State of its habitual residence, the court of the State to which the child has been removed and which is seised with the return proceedings may make a court order concerning the agreement to return the child and conclude the return proceedings by consent. It may, however, consider that Article 16 prohibits a decision on the merits of rights of custody and thus the court from approving the terms of the agreement insofar as they deal with the merits of the custody and contact issues.

2. When parents reach an agreement including *non-return* of the child, the court seised with the return proceedings may consider that it can approve, in a court order, the part of the agreement concerning the non-return of the child. It may also consider that it can then immediately proceed to approve, in a court order, the agreement relating to the custody and contact issues since it has been determined that the child is not to be returned and therefore Article 16 no longer “blocks” the jurisdiction on issues relating to custody. However, whether this is possible may depend upon the internal and international jurisdiction of the court to determine such matters. The internal procedural law may not allow a court dealing with the return proceedings, following a formal termination of those proceedings, to proceed immediately to determine the custody issues. In this event, ending the return proceedings with a non-return decision and thus rendering the agreement as regards the non-return binding without immediately rendering the remainder of the agreement on custody and contact issues binding may put the amicable solution of the dispute at risk due to the interdependence of the different parts of the agreement.

57. Hence, there is a challenge concerning the recognition and enforcement of an agreement which is concluded between parents in a child abduction case and which contains other matters than the decision on the return of the child. However, it should be noted that there seems to be general support for the proposition that an amicable solution reached between parents in these cases, in particular through mediation, should have a broader scope than that of return. The benefit of mediation is precisely that it can take other factors into account. It is recognised that the question of return is in most cases not the only problem between the parents and that it is difficult to focus only on return as the return decision is closely linked to these other problems.⁷⁵

58. Voices expressing reluctance for mediation to cover broader issues refer, however, to the fact that custody issues should not be discussed in cases of abduction due to the fact that these other issues are specifically excluded as the 1980 Convention is concerned with prompt return and one parent should not obtain unfair advantage by changing the venue for custody determination through abduction. However, the Convention does permit and indeed encourage parental agreements. The fact that some issues that parents want to include in the negotiation or mediation process may fall outside the

⁷⁵ See S. Vigers, p. 39 (*op. cit.* note 65).

scope of the court hearing in the framework of the return proceedings could hamper the ability of reaching voluntary agreement in these cases.⁷⁶

59. This controversial issue reconfirms the existence of practical and legal challenges for parents seeking an amicable solution. First, there may be different approaches being applied in different jurisdictions regarding the scope of mediation in child abduction cases in a sense that, in some States, the mediation process would need to be limited to the question of return, in others it could include other matters, such as custody or child support. Secondly, one has to take into account that allowing parents to discuss broader issues in the State to which the child has been removed or in which it is retained could raise concerns of recognition and enforcement of the agreement in the relevant jurisdictions (in the State to which the child has been removed or in which it is retained and / or in the State of the child's habitual residence).

B. The 1996 Convention

60. The 1996 Convention aims to avoid multiple jurisdictions being vested with the ability to take measures of protection for a child or the child's property and to this end centralises jurisdiction generally in the authorities of the State of the child's habitual residence.⁷⁷ It furthermore determines the law applicable to the case in question and provides for simplified recognition and enforcement of court orders between Contracting States.⁷⁸

61. The 1996 Convention uses the term "measures of protection" without defining it. This was done against the background that measures vary with each legal system and to ensure a wide coverage of the Convention on all measures aiming to protect children or the child's property.⁷⁹

62. The 1996 Convention contemplates that measures of protection may be by mutual agreement of the parties, as opposed to judicial determination. It states in Article 31 that "[t]he Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to – [...] b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies; [...]".

63. If parties reach an agreement as to custody or contact (*i.e.*, a "measure of protection" under the 1996 Convention), their agreement can be incorporated into a court order and will be recognised in accordance with Article 23 of the 1996 Convention by operation of law in all Contracting States.⁸⁰ Parties may then obtain a declaration of

⁷⁶ Concerning this discussion, see S. Vigers, pp. 39 to 42 (*op. cit.* note 65) and E. Carl / M. Erb-Klünemann, "Integrating Mediation into Court Proceedings in Cross-Border Family Cases", in C. Paul / S. Kiesewetter "Cross-border Family Mediation", Wolfgang Metzner Verlag 2011, pp. 59 *et seq.*

⁷⁷ Explanatory Report on the 1996 Hague Child Protection Convention by P. Lagarde ("Lagarde Report"), p. 553, para. 37 (available at < www.hcch.net > under "Publications").

⁷⁸ Provisions on applicable law are included in Chapter III (Arts 15-22), provisions on recognition and enforcement in Chapter IV (Arts 23-28).

⁷⁹ See Lagarde Report (*op. cit.* note 77), p. 547, paras 18-19. According to Art. 3, measures of protection include attributing, exercising, terminating or restricting parental responsibility, rights of custody, guardianship, curatorship, or analogous institutions, designating a person or body to have charge of a child's person or property and that person's functions, placing a child in foster care or a similar institution, supervision by a public authority of the care of a child, and administering, conserving or disposing of a child's property.

⁸⁰ A Contracting State can refuse to recognise a measure of protection only under certain conditions, see Art. 23(2) of the 1996 Convention.

enforceability or register their order under Article 26(1) of the 1996 Convention to effectuate actual enforcement of the agreement's terms.⁸¹ The Convention in Article 26(2) requires Contracting States to apply "a simple and rapid procedure" to the declaration of enforceability or registration. Article 24 of the 1996 Convention permits a decision to be given regarding the recognition or non-recognition of measures of protection ("advance recognition").⁸²

64. A parental agreement incorporated into a court order may, however, not fall completely within the scope of the 1996 Convention. As mentioned above, the agreement may contain terms not considered measures of protection, such as an application for a divorce, financial provision post-divorce, agreements regarding maintenance, travel costs, passport and visa issues.⁸³ In particular when a case is mediated, it often addresses a number of issues as a "package" and parties do not negotiate along "convention lines". Many parents may be reluctant to agree to certain measures of protection without these other terms being included in their agreement.

65. The 1996 Convention refers to "agreements" in Article 16(2) in the chapter on applicable law.⁸⁴ According to Article 16(1), the attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child. The second paragraph extends this approach to parental responsibility derived from an agreement or a unilateral act: "The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect."⁸⁵

66. The 1996 Convention may apply when the agreement was concluded and homologated⁸⁶ or approved by an administrative or judicial authority. The Lagarde Report, referring to Article 16(2) of the Convention, states that "[i]f the attribution or the extinction of parental responsibility by an agreement [...] must be approved or reviewed by a judicial or administrative authority, it should be characterised as a measure of protection [...]".⁸⁷ To the extent that the agreement (homologated or approved) qualifies as a measure of protection under the 1996 Convention, it is subject to recognition and enforcement as stipulated in Articles 23 *et seq.* of the 1996 Convention (but only as to

⁸¹ See also in this regard, the Guide to Good Practice on Mediation, (*op. cit.* note 8), p. 81, para. 297.

⁸² See the Lagarde Report (*op. cit.* note 77), p. 587, paras 129 *et seq.* It should be noted that the Convention leaves it to the law of the requested State to define the procedure for this preventive action and that for this procedure, the Convention does not impose, as it does for declaration of enforceability, a "simple and rapid" procedure, see Lagarde Report, p. 587, para. 130.

⁸³ See Art. 4 of the 1996 Convention. See also the "Revised draft Practical Handbook on the operation of the 1996 Hague Protection of Children Convention" (*op. cit.* note 35), para. 13.45.

⁸⁴ The Lagarde Report (*op. cit.* note 77) refers in this context to the notion of "agreement" included in Art. 3 of the 1980 Convention, see p. 579, note 53.

⁸⁵ The Lagarde Report (*ibid.*) states that Art. 16(2) "will find its utility in the case where, under the law of the State of the child's habitual residence, this act or agreement takes effect 'without intervention of a judicial or administrative authority'. If paragraph 2 did not exist, an attribution (or extinction) resulting from this act or agreement would be outside of the Convention, for it does not arise 'by operation of law' within the meaning of paragraph 1. The interest of paragraph 2 is to submit it to the same law as is the attribution (or extinction) by operation of law", p. 579, para. 103.

⁸⁶ Homologation describes a judicial approval for certain acts to provide the homologated act with the enforceability of a judicial decision. The concept is used differently in different legal systems.

⁸⁷ See the Lagarde Report (*op. cit.* note 77), p. 589, para. 103.

the subject covered by Art. 16(2), that is the attribution or the extinction of parental responsibility).

67. However, not all legal systems provide the opportunity for a judicial or administrative approval or homologation of an agreement on family matters. Furthermore, those systems which provide for homologation⁸⁸ vary from each other with respect to their legal requirements and effects. And nothing in the 1996 Convention obliges the Contracting States to provide a "homologation" procedure or an active administrative review for voluntary agreements. Thus, if the habitual residence of the child is in a State where the courts or authorities do not homologate or approve voluntary agreements, parents do not have the possibility of making their agreement legally binding.

1. The 1996 Convention in cases of cross-border disputes involving the wrongful removal or retention of a child

68. In international child abduction cases, as far as international jurisdiction is concerned, where the 1996 Convention is in force between the two States concerned, Article 7 of the 1996 Convention will have to be taken into account.⁸⁹ According to this article, the State of the child's habitual residence immediately before the abduction will retain jurisdiction to take measures for the protection of the person and property of the child (including measures on the merits of custody and contact) until the child has acquired a (new) habitual residence in another State and the conditions in either Article 7(1) *a*) or *b*) are met. Jurisdiction concerning the merits of the long-term custody and contact issues would therefore remain with the State of habitual residence of the child unless the conditions set out in Article 7 are satisfied. The State to which the child was removed or in which he / she was retained would not have jurisdiction to approve these matters in a court order, even if the parents would want that court to recognise their amicable agreement which covers more than return and resolves issues of the child's future habitual residence and access.⁹⁰

69. Other provisions of the 1996 Convention seem to offer a solution (or, at least, a partial one) in these circumstances. The parents may seek a court order including the terms of their agreement in the State of the habitual residence of the child which retains jurisdiction over the long-term merits of custody and contact issues in accordance with Article 7. They would then benefit from the 1996 Convention's provisions on recognition

⁸⁸ *E.g.*, in France, homologation is possible for all measures relating to parental responsibility. Art. 373-2-7 of the Civil Code stipulates that "parents may seize the family court judge to have homologated the agreement through which they organise the terms of exercise of parental authority and establish their contributions to the support and education of the child. The judge shall homologate the agreement unless he observes that it does not sufficiently protect the welfare of the child or that the consent of the parents was not freely given". In Germany, a homologated agreement pursuant to § 156 FamFG is possible in parental custody in separation and divorce, rights of access or the return of the child. According to Art. 374 of the Belgian Civil Code, the judge can attribute the exclusive exercise of the parental responsibility to one parent "in the absence of an agreement on the modalities of residence, on important decisions concerning the child's health, education, training, leisure and religious or philosophical orientation, or if this agreement appears to be contrary to the interests of the child". The same article provides for the possibility of a homologation, but only with regard to agreements relating to the residence of the child.

⁸⁹ Art. 7 of the 1996 Convention is designed to support, as does Art. 16 of the 1980 Convention, the notion that an abducting parent should not be able to bring about a change of jurisdiction in relation to the merits of a custody dispute by abducting a child.

⁹⁰ See in this regard Prel. Doc. No 13 (Annex V), paras 46 *et seq.*

and enforcement, making their agreement-based court order legally binding and enforceable in all Contracting States to that Convention.

70. Secondly, a transfer of jurisdiction from the State of the habitual residence of the child to the State to which the child was removed or in which it was wrongfully retained could be sought to render the agreement binding in the latter State by a court order.⁹¹

71. Both options, however, may result in considerable further practical difficulties and expense for the parties. For example, the court dealing with the custody issues in the State of the child's habitual residence (either rendering the agreement binding, or deciding on the transfer of jurisdiction) is not under a Convention obligation to deal with the case expeditiously in contrast to the court seised with the return proceedings under the 1980 Convention. The process may therefore be too lengthy to keep the return proceedings under the 1980 Convention pending, even though courts in many States tend to deal with custody matters in a speedy way.

2. The 1996 Convention in cross-border disputes concerning children that do not involve the wrongful removal or retention of a child, e.g., in international family relocation cases

72. International family relocation involves a permanent move of the child, usually together with the child's primary carer, from one State to another. It is not a well-defined legal notion and only a limited number of States have specific and detailed legislation on national or international family relocation as opposed to simply setting out in legislation the principle that an (international) family relocation requires the permission of the other parent or of the court.⁹²

73. The result of an international relocation is often that the child will live at a much greater distance from the non-relocating parent and the exercise of contact by that parent will become more difficult and expensive. It is therefore important that the terms and conditions of an order regarding contact made in the context of an international relocation are respected in the State to which relocation occurs.

74. In international relocation cases, the authorities (usually courts) in the State of the habitual residence of the child decide on whether and if so, under which conditions, it is in the best interests of the child to relocate and they, for example, decide on the continuing contact the child would have with the non-relocating parent. Aside from the practical implications of the relocation, such as costs and travel arrangements, granting permission to relocate also raises the issue of recognition and enforcement of the new arrangements (e.g., regarding contact) in the State of relocation. Furthermore, if orders in such situations are not respected in a particular State, this may have a negative

⁹¹ A transfer of jurisdiction is regulated in Arts 8 and 9 of the 1996 Convention. However, according to Art. 16 of the 1980 Convention, the courts in the State to which the child has been removed can only decide on custody issues once the pending return proceedings end with a determination "that the child is not to be returned". A transfer of jurisdiction under the 1996 Convention may therefore only assist in cases where the parents' agreements include a consensus on the "non-return" of the child.

⁹² See "Preliminary Note on International Family Relocation", Prel. Doc. No 11 of January 2012 for the attention of the Sixth Special Commission of January 2012 (available at < www.hcch.net > under the "Child Abduction Section"), p. 16, para. 44 (with examples of State legislations).

impact on judges considering whether to permit relocation to that State in the future, for example the permission to relocate may be refused because contact cannot be adequately guaranteed.

75. The 1996 Convention is applicable to court orders related to international family relocation provided that they constitute a “measure of protection” under the Convention.

76. For example, when an order regarding contact is made in the context of international relocation by the authorities in the Contracting State where the child is habitually resident, that order is entitled to be recognised by operation of law in the Contracting State to which relocation is to occur and to be enforced in that Contracting State as if it had been made in that Contracting State.⁹³ The 1996 Convention also offers the possibility of an application for “advance recognition” in the event there is any concern that the order might not be recognised following the relocation.⁹⁴

77. However, a concern in international relocation cases may be that, under the 1996 Convention, as soon as the child becomes habitually resident in the Contracting State to which he / she has lawfully relocated, jurisdiction to take measures of protection in respect of the child will change to the competent authorities in that new Contracting State. One concern is that the relocating parent may “take advantage” of this change in jurisdiction and subsequently apply to modify, restrict or even terminate the access or contact rights of the other parent.⁹⁵

78. Where the relationship of the parents breaks down and one of the parents wishes to leave the country with the child, parents may seek an amicable solution, such as through mediation,⁹⁶ and conclude a voluntary agreement on the terms of the relocation.

79. Some States are therefore promoting amicable solutions between parents on the issue of relocation.⁹⁷ Furthermore, the “Washington Declaration on International Family Relocation”⁹⁸ states that “[t]he voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings”.

80. As with court orders, voluntary agreements in cases of international family relocation often require recognition and enforcement in multiple States, especially in the State to which the child relocates. Compared with other voluntary agreements, there may be challenges in rendering the agreement binding in the State in which it was concluded and / or in the State to which the child will move. These challenges may prevent parties from seeking an amicable solution, a result that is counterproductive to

⁹³ Art. 23(1) and Arts 26 and 28 of the 1996 Convention.

⁹⁴ Art. 24 of the 1996 Convention.

⁹⁵ The court in the Contracting State to which the child has relocated, when seised with the modification of a contact order, might make use of the transfer of jurisdiction or co-operation provisions of the 1996 Convention, see “Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice” (*op. cit.* note 42), Chapter 8, pp. 38 *et seq.*

⁹⁶ See the Guide to Good Practice on Mediation (*op. cit.* note 8), p. 20, para. 30.

⁹⁷ See “Preliminary Note on International Family Relocation”, Prel. Doc. No 11 of January 2012 (*op. cit.* note 92), p. 9, para. 22.

⁹⁸ The Washington Declaration stems from the International Judicial Conference on Cross-Border Family Relocation, Washington, D.C., United States of America, 23-25 March 2010, co-organised by the Hague Conference and the International Centre for Missing and Exploited Children with the support of the U.S. Department of State. It is available as an annex in the “Preliminary Note on International Family Relocation”, Prel. Doc. No 11 of January 2012 (*ibid.*).

the prevailing view that amicable solutions between parents are in the best interests of the child.

C. The 2007 Convention

81. The 2007 Convention aims at ensuring the effective international recovery of child support and other forms of family maintenance and is applicable to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years and, under certain conditions, to spousal support.⁹⁹ To this end, it seeks, among others, to facilitate and to simplify the procedures to which the foreign decision is submitted before enforcement under internal law may take place.¹⁰⁰

82. In Chapter V (Arts 19 to 31), the Convention provides for the recognition and enforcement of maintenance decisions rendered by a judicial or administrative authority in respect of a maintenance obligation. The term "decision" also includes a settlement or agreement concluded before or approved by such an authority.¹⁰¹

83. Article 19(4) extends the application of this chapter to "maintenance arrangements",¹⁰² which is defined in Article 3 e) of the Convention:

"[M]aintenance arrangement" means an agreement in writing relating to the payment of maintenance which –

- i) has been formally drawn up or registered as an authentic instrument¹⁰³ by a competent authority; or
- ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority."¹⁰⁴

⁹⁹ See Arts 1 and 2 of the 2007 Convention.

¹⁰⁰ See Art. 1 c) of the 2007 Convention. Aside from this, the Convention, to achieve the objective of ensuring the effective international recovery of child support and other forms of family maintenance, establishes a comprehensive system of co-operation between the authorities of the Contracting States, makes available applications for the establishment of maintenance decisions, and requires effective measures for the prompt enforcement of maintenance decisions, see Art. 1 a), b) and d).

¹⁰¹ The inclusion of both "settlements" and "agreements" was made to "ensure a broad coverage of the chapter [on recognition and enforcement] as the two terms have different meanings in the different legal systems", see the "Explanatory Report on the Convention on the International Recovery of Child Support and other Forms of Family Maintenance" by A. Borrás and J. Degeling, 2013 (available at < www.hcch.net > under "Publications"), hereinafter referred to as the "Borrás / Degeling Report", p. 157, para. 433.

¹⁰² However, Contracting States have the option of making a reservation in accordance with Art. 30(8) of the 2007 Convention as a result of which these States would not be obliged to recognise and enforce maintenance arrangements.

¹⁰³ Authentic documents are drawn up by an authority that authenticates the signature of the parties and verifies the content of the instrument. In several States (e.g., Belgium, France, Germany, Poland or Spain) this authority is a notary public and the instrument will be produced in the form of a notarial deed. According to Art. 19(1), an agreement may be regarded as a "decision" for the purposes of recognition and enforcement if it has been "concluded before or approved by" a judicial or administrative authority. In the case of a "maintenance arrangement", the authority involved may be a notary public ("competent authority"), and need not be a judicial or administrative authority. For more information, see the Borrás / Degeling Report (*op. cit.* note 101), pp. 75 and 77, paras 73-74 and p. 159, para. 440.

¹⁰⁴ Recognising the diverse practice States have developed, this sub-paragraph intends to cover a range of different situations in which a competent authority intervenes in the context of agreements relating to the payment of maintenance, see the Borrás / Degeling Report (*ibid.*), p. 77, para. 74 (with examples).

84. The definition of “maintenance arrangements” is meant to encompass both authentic instruments and private agreements.¹⁰⁵ Article 30 stipulates under which conditions a maintenance arrangement made in a Contracting State is entitled to recognition and enforcement.

85. The Borrás / Degeling Report explains that Article 30 is the result of long discussions on the inclusion of authentic instruments and private agreements in the scope of the 2007 Convention, reflecting the legal diversity on how different legal systems make use (or not) of these instruments in their domestic law. The inclusion of these instruments was deemed desirable due to the “growing tendency to promote amicable solutions and to avoid contentious procedures in several States”. The Report further notes that “[i]n view of the movement towards alternative methods of dispute resolution, it is important to have a mechanism that provides for the recognition and enforcement of private agreements and authentic instruments which may result from these dispute resolution systems.”¹⁰⁶

86. According to Article 30(1) of the 2007 Convention, maintenance arrangements made in a Contracting State are entitled to recognition and enforcement under the condition that such an authentic instrument or private agreement be enforceable as a decision in the State of origin. It follows from this that an agreement that is enforceable as a *contract* rather than a *decision* will not fall within the scope of this Chapter.¹⁰⁷

87. Article 30(2) enumerates the required documents to accompany an application for recognition and enforcement of a maintenance arrangement, namely a complete text of the maintenance arrangement¹⁰⁸ and a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin.¹⁰⁹

88. The 2007 Convention is noteworthy for the fact that by seeking to cope with the legal diversity concerning the use of instruments dealing with maintenance obligations under domestic law by different legal systems, it covers a broad range of such instruments, ranging from decisions rendered by a judicial or administrative authority, including settlements or agreements concluded before or approved by such an authority, to other arrangements including authentic instruments and private agreements.

89. In particular, by covering maintenance arrangements including private agreements under certain conditions, the Convention responds to the need for clear rules regarding the recognition and enforcement of voluntary agreements between parents. The 2007 Convention contributes in this regard to the promotion of amicable solutions taking into account that voluntary compliance is a desirable outcome in child support cases since it results in fewer demands on the Central Authority for enforcement measures, and avoids the costs and delays involved in judicial proceedings. The willingness of the Convention drafters to accommodate and encourage within the international framework voluntary

¹⁰⁵ See the Borrás / Degeling Report (*op. cit.* note 101), p. 75, para. 72.

¹⁰⁶ *Ibid.*, p. 187, para. 552.

¹⁰⁷ *Ibid.*, p. 187, para. 554.

¹⁰⁸ It is not required that the copy of the text of the maintenance arrangement is certified by the competent authority of the State in which it was made, see Art. 25 of the 2007 Convention that requires such certification only upon a challenge or appeal or upon require by the competent authority in the State addressed.

¹⁰⁹ It is not important that a certain form of arrangement is enforceable according to the law of the State of origin, but that the arrangement in the concrete case meets the requirement of enforceability as a decision in the State of origin, see the Borrás / Degeling Report (*op. cit.* note 101), p. 187, para. 558.

agreements in respect of maintenance is also in line with the responsibility which Central Authorities have to encourage amicable solutions with a view to the voluntary payment of maintenance.¹¹⁰

90. One shortcoming of the 2007 Convention may be that an agreement that is enforceable as a *contract* rather than a *decision* is excluded from the scope of the Convention and would thus not benefit from the expedited and simplified procedures for recognition and enforcement laid down in the Convention.

91. Furthermore, the 2007 Convention does not offer a solution to situations where parents agree on a range of issues, including maintenance but also custody or contact issues, and request recognition and enforcement of the whole "package".¹¹¹ It also does not resolve problems of internal or international jurisdiction, where different courts address different substantive areas, such as one court handling 1980 Convention return applications, another for custody, and yet another for maintenance.¹¹²

V. Cross-border recognition and enforcement of agreements in consideration of other existing legal instruments

A. Brussels IIa Regulation (European Union)

92. An example of a regional instrument dealing with the recognition and enforcement of voluntary agreements is Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, (hereinafter referred to as "Brussels IIa Regulation"). This Regulation provides for automatic recognition of all judgments without any intermediary procedure being required¹¹³ and deals with the recognition and enforcement of authentic instruments and agreements.

93. Article 46 of the Brussels IIa Regulation states that "[d]ocuments which have been formally drawn up or registered as authentic instruments and are enforceable in one European Union (EU) Member State and also agreements between the parties that are

¹¹⁰ See in this regard W. Duncan "The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Comments on its Objectives and Some of its Special Features" in *Yearbook of Private International Law*, Vol. X, pp. 313-332, 2008. See also *supra* para. 5.

¹¹¹ See in this context Art. 19(2) of the 2007 Convention stating that the rules on recognition and enforcement apply only to "parts of the decision which concern maintenance obligations" and thus enables States to recognise and enforce only the part of the decision dealing with maintenance without giving effect to other matters. See also Art. 21 of the 2007 Convention providing for severability and partial recognition and enforcement.

¹¹² It can, however, be noted that both the 1996 and 2007 Conventions take into account that cases often arise in the context of divorce proceedings. The 1996 Convention considers this interrelationship of divorce proceedings and those concerning child measures of protection by recognising jurisdiction in Art. 10. The 2007 Convention provides in Art. 20(1) *f*) for a ground of indirect jurisdiction establishing that a decision given by an authority exercising jurisdiction on a matter of personal status or on parental responsibility will be recognised; see the Borrás / Degeling Report (*op. cit.* note 101), p. 163, para. 458.

¹¹³ See Chapter III, Arts 21-52 of the Brussels IIa Regulation. The grounds for non-recognition of a judgment are limited – see Recital 21 and Arts 22 and 23 of the Brussels IIa Regulation.

enforceable in the EU Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments". The objective of the Brussels IIa Regulation in this regard is to grant authentic instruments and agreements the same position as judgments if they are enforceable in the State of their origin.¹¹⁴

94. Article 46 extends only to such authentic instruments and agreements which concern matters covered by the Regulation, which are divorce and parental responsibility.¹¹⁵ Examples of agreements falling within the scope of this article are custody agreements approved by an administrative authority and enforceable agreements, in particular court settlements, concerning the right of access as well as agreements of enforceable character on the return of the child.¹¹⁶

95. The Brussels IIa Regulation does not provide a full definition of the terms "authentic instrument" and "agreement". With regard to authentic instruments, Article 13(3) of the former Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses referred to "[...] documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded [...]". The term has acquired an autonomous European meaning and certain elements can be inferred from this formulation. Further requirements have been added by the Court of Justice of the European Union (hereinafter "CJEU").¹¹⁷

96. Accordingly, an authentic document must be something in writing whose author can be identified, formally drawn up or registered and enforceable in one Member State. To ensure the authenticity of the document, the CJEU requires that a public authority or other authority empowered for that purpose by the state of origin must have been involved in order to establish the authority of that document.¹¹⁸ Instruments drawn up between private parties alone do not satisfy this condition. And while documents set up by ordinary lawyers are said not to meet the requirement, documents set up by notaries do.¹¹⁹ Agreements as included in Article 46 of the Regulation comprise a court settlement – which will regularly fulfil the requirements of an authentic instrument as well – but also out-of-court-settlements if they are granted direct enforceability.¹²⁰

¹¹⁴ See Recital 22 to the Brussels IIa Regulation stating: "Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to judgments for the purpose of the application of the rules on recognition and enforcement."

¹¹⁵ The Brussels IIa Regulation applies to civil proceedings relating to divorce, separation and marriage annulment, as well as to all aspects of parental responsibility (see Art. 1). Art. 46 applies to authentic instruments drawn up or registered and agreements concluded in a Member State of the Regulation on or after 1 March 2005 (see Art. 64(1) and Art. 72).

¹¹⁶ See U. Magnus in Magnus / Mankowski, *Brussels IIbis Regulation*, Sellier European Law Publishers GmbH, Munich, 2012, Section 5, para. 5, p. 380. The author refers as examples to Finnish and Swedish law according to which custody agreements are approved by an administrative authority.

¹¹⁷ See, for example, ECJ (1999) I-03715 (Case C-260/97, *Unibank A/S v. Flemming G. Christensen*) referring to Art. 50 of the Brussels Convention (see in particular para. 14).

¹¹⁸ In *Unibank A/S v. Flemming G. Christensen* (*ibid.*), the court states (para. 15): "Since the instruments covered by Art. 50 of the Brussels Convention are enforced under exactly the same conditions as judgement, the authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity. Since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments."

¹¹⁹ Magnus / Mankowski (*op. cit.* note 116), Section 5, para. 9, p. 382.

¹²⁰ *Ibid.*, para. 10, p. 382.

97. As mentioned above, authentic instruments and agreements must be enforceable as such in a Member State. With respect to authentic documents, it is common ground that despite the expression “in one Member State” in Article 46, the document must be enforceable in the Member State of origin, that is the State whose public or publicly empowered authority certified the authenticity of the document in question. It is the law of this State that determines the question of enforceability. The law of the Member State where recognition and enforcement is sought does not play a role, nor does the nationality or habitual residence of the involved persons.¹²¹ With respect to agreements, the question whose law shall determine their enforceability is less settled.¹²² Article 46 states that “agreements between the parties [...] are enforceable in the Member State in which they were concluded”. For court settlements, the law of the State whose court is seised when the settlement was concluded governs.

98. Since Article 46 declares authentic instruments and agreements as “enforceable under the same conditions as judgements”, it is a common understanding that also the formal requirements provided for by Articles 37 to 39 and Article 45 of the Brussels IIa Regulation have to be satisfied, namely that either the original or an authenticated copy of the authentic instrument or agreement needs to be produced.¹²³

99. While the Brussels IIa Regulation, and specifically Article 46, provides the possibility of cross-border recognition of agreements in matters of parental responsibility, its application is obviously restricted to the EU Member States. The Regulation therefore does not provide assistance when a parent is relocating outside the EU or where recognition is sought outside the EU. In addition, it contains no possibility for choice of law or jurisdiction, aspects that parents might want to incorporate into an agreement that would have the possibility of being revised or modified by further agreement to meet changed circumstances.

100. The Brussels IIa Regulation furthermore does not provide a solution to the challenge that parents face if they negotiate a “package” and some of the issues included in the agreement fall outside the scope of the Regulation.

B. Mediation Directive (European Union)

101. With regard to mediated agreements, reference should be made to the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter referred to as the “Mediation Directive”). The objective of this Directive is “to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings”.¹²⁴ The Mediation Directive applies to civil and commercial matters

¹²¹ *Ibid.*, para. 12, p. 383.

¹²² The wording of Art. 46 is not clear due to differences in the language versions. It is therefore disputed how the State should be determined whose law governs their enforceability: the law of the State according to which the agreement has been formally concluded and shall take effect (which raises the question according to which law the agreement was concluded), the law of the place where the agreement was concluded (if such a place can be distinguished and although this place could be accidental), or the law of the State with which the agreement is most closely connected (which is the general conflicts rule for contracts), to name but a few options, see *ibid.*, paras 13-15, pp. 383-384.

¹²³ Art. 37(1) *a*) and Art. 45(1) *a*) of the Brussels IIa Regulation.

¹²⁴ Art. 1(1) of the Mediation Directive.

in cross-border disputes and excludes rights and obligations which are not at the parties' disposal under the relevant applicable law.¹²⁵

102. Recital 19 of the Mediation Directive refers to the recognition and enforcement of mediated agreements and states that:

“Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.”

103. Furthermore, the Mediation Directive mentions that the content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States and refers in this regard to the Brussels IIa Regulation, among others. In this regard, the Directive clarifies that this Regulation “specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State”.¹²⁶

104. The Mediation Directive in Article 6 requires Member States to “ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability”. It further states that “[t]he content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made”.¹²⁷

105. With the transposition of the Mediation Directive into domestic law, mechanisms to give effect to a mediated agreement, if the parties so desire, are therefore mandatory within the European Union.¹²⁸

¹²⁵ Art. 1(2) of the Mediation Directive.

¹²⁶ Recital No 20 and 21 of the Mediation Directive.

¹²⁷ Art. 6(1) and (2) of the Mediation Directive.

¹²⁸ See Art. 12 of the Mediation Directive according to which “Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011 [...]”.

C. Council of Europe Recommendations

106. When the Council of Europe (hereinafter "CoE") addressed mediation in cross-border family disputes in the mid-1990s, it recognised that the use of family mediation and other dispute resolution processes related to family matters was a relatively new process in the Member States of the CoE. Also, there was no international legal instrument which established the main directions concerning family mediation as well as the basic principles applicable to this process of dispute resolution. Due to the increasing internationalisation of family relationships, the CoE saw the need to create a mechanism for co-operation between States and to encourage the use of mediation and other means of resolving disputes, when parents are living or expect to live in different states, in all matters relating to children, and in particular to resolve disputes which may arise in respect of transfrontier access and custody issues. The objective of Recommendation No R (98) 1,¹²⁹ adopted by the Committee of Ministers of the CoE in 1998, was therefore to assist and provide states with a basis and framework for the establishment and regulation of the alternative processes for the resolution of family disputes.¹³⁰

107. In preparation of this Recommendation, the CoE found that family mediation may be better suited than more formal legal mechanisms to the settlement of sensitive, emotional issues surrounding family matters and that reaching agreements in mediation has been shown to be a vital component in making and maintaining co-operative relationships between divorcing parents. These agreements reduce conflict and encourage continuing contact between children and their parents. The CoE further noted that parents who are able to make their own decisions about arrangements for the residence of their children, and for contact between children and the non-residential parent, were more likely to make these arrangements work and less likely to ignore or break them. Many parents experienced difficulties in complying with decisions which are imposed by the judicial or other competent authority, thus causing further disputes and an unsatisfactory situation for children. Decisions reached consensually by the parents had a better chance of standing the test of time, thus protecting the best interests of children.¹³¹

108. With regard to the recognition and enforcement of mediated agreements, the CoE noted that in most States, the agreements reached in mediation were recorded and copies given to the parties who might then take them to their lawyers. Such agreements were usually not legally binding, although there was considerable variation between States on this matter. The CoE noted, however, that even where the agreements were legally binding, they were not usually enforceable unless and until they had been endorsed by the appropriate judicial or other competent authority. Further research by

¹²⁹ Recommendations are issued by the Committee of Ministers to CoE Member States on matters for which the Committee has agreed on a common policy. Recommendations are not binding on CoE Member States.

¹³⁰ See paras 7-8 of Recommendation No R (98) 1 on Family Mediation. See also the Explanatory Memorandum to the Recommendation, paras 4-5 and para. 20. The Recommendation and the Explanatory Memorandum are available on the website of the Council of Europe (< www.coe.int >).

¹³¹ See Recommendation No R (98) 1, para. 7 (*ibid.*) and the Explanatory Memorandum (*ibid.*), para 7.

the CoE also showed that some parents who used mediation were disappointed when their agreements did not carry the same weight or authority as court-imposed solutions.¹³²

109. In Section IV of Recommendation No R (98) 1, the CoE therefore suggests that States facilitate the possibility of approval by a judicial or other competent authority within the framework of their own family legislation:

“States should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law.”¹³³

110. The CoE noted that the facilitation of the approval of mediated agreements and the establishment of mechanisms for enforcement could contribute significantly to the credibility of, and respect for, mediation. Any mechanism for securing approval by the judicial or other competent authority should, however, not lead to delay or excessive costs.¹³⁴

111. In 2002, the CoE Committee of Ministers adopted Recommendation No (2002)10 on mediation in civil matters. The Guiding Principles in the Recommendation suggest, among others, that mediators should inform the parties of the effect of their agreement and of the steps to be taken if one or both parties wish to enforce their agreement.¹³⁵

VII. Party autonomy and the recognition of voluntary agreements

112. The recognition of voluntary agreements is based on the concept that the parents are best placed to know how to arrange for their child and how to resolve amicably their dispute. The idea of giving legal effect to parental decisions is not new and many legal systems have recognised as legally binding parental acts without court approval or registration. For example, there is the ability in some legal systems to designate a testamentary guardian for a child, even though the testamentary dispositions are taken without the intervention of any authority. In certain jurisdictions, such as Belgium,¹³⁶ France¹³⁷ and Germany,¹³⁸ the testamentary designation is legally binding, unless the guardian refuses the guardianship or the guardianship would be contrary to the best interests of the child. This demonstrates that legal systems are willing to give legal effect to the wills of the parents, with limited possibilities of judicial review.

113. Party autonomy has also gained support in the case law of the European Court of Human Rights, with the explicit reference to the Recommendation No R (98) 1 of the Committee of Ministers of the CoE¹³⁹ in its case *Cengiz Kiliç v. Turkey*.¹⁴⁰ In this case, the

¹³² See Explanatory Memorandum (*op. cit.* note 130), paras 49 *et seq.*

¹³³ See also *ibid.*, para. 50.

¹³⁴ *Ibid.*, paras 52-53.

¹³⁵ Section VI of Recommendation Rec (2002)10, available at (< www.coe.int >).

¹³⁶ Art. 392 of the Belgian Civil Code.

¹³⁷ Art.403 of the French Civil Code.

¹³⁸ § 1777 *et seq.* of the German Civil Code

¹³⁹ See *supra*, paras 106 *et seq.*

¹⁴⁰ *Cengiz Kiliç v. Turkey*, Application No 16192/06 of 6 December 2011, available at < www.echr.coe.int >.

Court emphasised that the understanding and co-operation of the parents remained important factors, if not essential, in resolving child disputes. It noted that the Turkish legal system made no provision for civil mediation, a process that could promote such co-operation between the parties. The Court considered that by failing to take such measures, the State had fallen short of its obligations under Article 8 of the European Convention on Human Rights.¹⁴¹

114. Parents are given more autonomy to decide on matters concerning their children and amicable agreements are promoted increasingly in some States' domestic law. For example in Germany, the Act on Proceedings in Family Cases and in Matters of non-contentious litigation (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG*) of 17 December 2008 emphasises the importance of agreements. According to § 156 FamFG, in cases involving children that concern parental custody in separation and divorce, the residence of the child, rights of access or the return the child, the court shall, at any stage of the proceedings, work towards an agreement of the parties, if it is not contrary to the child's best interests. In the United States of America, some States recognise the importance of mediated agreements, as shown by a recent decision of the Supreme Court of Texas which decided that "if a settlement agreement meets [certain requirements], a party is entitled to judgment on the mediated settlement agreement notwithstanding [...] another rule of law",¹⁴² in this case a challenge based on the "best interests" of the child.

115. Both the 2007 Convention and recent European Regulations (both in effect and proposed)¹⁴³ reflect this growing acceptance of party autonomy in family law, often in connection with giving legal effect to agreements, and increasing the opportunity for choice of applicable law. As discussed earlier, Article 46 of the Brussels IIa Regulation includes certain voluntary agreements which are authentic instruments and agreements, and treats them the same as judgments to facilitate their cross-border recognition.¹⁴⁴

116. The trend towards more party autonomy in family law extends to the choice of applicable law which is reflected by the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter "the Rome III Regulation"), as well as by recent codifications on private international law, such as in Belgium.¹⁴⁵ Article 5(1) of the Rome III Regulation states that "[t]he spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws [...]".

117. These newer instruments and domestic laws can be contrasted to the 1996 Convention which reflects a traditional approach, relying on the idea that in the case of a child dispute, the agreement of the parents should only be entitled to produce legal effects if it complies with the conditions set out by the law of the habitual residence of the child. Parents are not allowed to choose the applicable law from among those that have a close connection to the dispute.

¹⁴¹ *Ibid.* paras 132 *et seq.*

¹⁴² Supreme Court of Texas, *In re Stephanie Lee*, No 11-0732, of 27 September 2013.

¹⁴³ See, *e.g.*, Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations in Art. 4 and the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM/2011/0126 final – CNS 2011/0059) in Art. 16.

¹⁴⁴ See *supra*, paras 92 *et seq.*

¹⁴⁵ Art. 55, § 2 of the Belgian Code on Private International Law allows spouses to choose the applicable law to divorce or legal separation.

118. As mentioned before, parents may be required to have their agreement made into a court order or have it homologated or approved by a judicial or administrative authority in order to have the agreement recognised and enforced in all relevant States. The perception and reality of adding a lengthy and expensive layer to the efforts of parents to reach an amicable agreement (if required, in an expeditious way) may discourage reliance on mediated agreements by parents and the choice of alternative dispute resolution instead of litigation. Although many States have undertaken efforts to promote more party autonomy (which are reflected in some regional and international instruments), parents still face challenges with regard to the recognition and enforcement of their voluntary agreement. One may ask why States take the first step of promoting amicable agreements, without regard to the necessary second step of making sure that parents can rely on these agreements in all jurisdictions that are relevant – especially in light of the increasing need for multiple jurisdictions to recognise the result with families crossing borders.

VIII. Areas for consideration by the experts in preparation for and during the meeting

119. In view of the Council's mandate to the Experts' Group, the Permanent Bureau would ask experts to be prepared to discuss the areas below (A-H) at the meeting from 12 to 14 December 2013.¹⁴⁶ Some of the questions may overlap or not apply in your jurisdiction, but they are designed to stimulate thought and discussion.

120. The Permanent Bureau would ask the experts to share any cases (decided) or case studies that might help illustrate some of the current treatment of voluntary agreements in international family disputes and solutions.

121. The Experts' Group will seek to identify areas where a gap exists and where existing international instruments may not offer a possible or efficient solution, based on legal, jurisdictional or practical problems.

A. Scope and terminology of a voluntary agreement

What constitutes a voluntary agreement (*e.g.*, achieved through mediation, conciliation, negotiation)?

Can a "parenting agreement" be a voluntary agreement and are there any special requirements?

Is there a requirement as to who drafts the voluntary agreement (*e.g.*, lawyer, notary, mediator, parties)?

What areas would be included in a voluntary agreement (*e.g.*, return, custody, access, child support, relocation, travel of the child, education, holiday arrangements, property of child, third party (grandparents) access)?

What areas may not be included (*e.g.*, separation agreement)?

¹⁴⁶ These areas were sent to the experts on 23 October 2013 as "Questions for the Experts' Group on Recognition and Enforcement of Voluntary Cross-border Agreements in International Child Disputes".

What elements are necessary for formal validity (*e.g.*, written agreement, particular language, witnesses)?

B. Treatment under domestic law

Under what circumstances is a domestic voluntary agreement entitled to recognition in the rendering forum (State where it is obtained)?

Short of a court order, can it be recognised / enforced by homologation, authentication, notarial act, etc?

Could a voluntary agreement be recognised / enforced through an administrative body?

Must a court or administrative authority approve / review the voluntary agreement for it to be recognised / enforced in your jurisdiction?

Could a voluntary agreement be recognised / enforced without any formalities?

Are there different requirements in general depending on the content of the agreement, such as return, custody, access, child support, relocation, education, property of the child?

C. Treatment in cross-border situations

Under what circumstances is a voluntary agreement from a foreign jurisdiction entitled to recognition / enforcement in your jurisdiction?

Will your jurisdiction recognise / enforce a voluntary agreement made in another jurisdiction and which is not (yet) incorporated into a judgment?

Will your jurisdiction recognise / enforce a voluntary agreement that has not been transformed into a judgment but involves homologation, authentication, or notarial act, etc?

Will your jurisdiction recognise / enforce a voluntary agreement that has been approved / reviewed by an administrative body in another jurisdiction?

Does it matter what other State or other legal system the agreement is from?

If your jurisdiction recognises a voluntary agreement executed in another jurisdiction what process must be followed for recognition / enforcement and does that process differ from that applied for domestic voluntary agreements?

D. Process for recognition and enforcement

Is the process for recognition / enforcement of a voluntary agreement different from that applicable to a judgment (domestic or foreign)?

In connection with the process for recognising / enforcing a voluntary agreement (domestic or foreign), what are the costs and time involved?

Is a third party guardian or equivalent used during the process?

Is there any procedural mechanism to require a review of the "best interests of the child"?

Is there any requirement for party representation or legal representation?

E. The role of existing private international law instruments

Under the 1996 Convention, would a court recognise / enforce a foreign voluntary agreement not incorporated in a judgment and if so, in what circumstances?

If a court would not recognise / enforce a foreign voluntary agreement unless incorporated in a judgment, is there a process to domesticate or provide recognition / enforcement outside of the 1996 Convention / under national law (e.g., registration)?

Under the 1996 Convention, how would a court recognise / enforce a voluntary agreement that includes matters outside the scope of the Convention such as child support?

What role, if any, would the 1980 Convention play in connection with the recognition / enforcement of a voluntary agreement providing for the return or non-return of the child, pending an application for return? What issues might be raised under the 1980 Convention, such as jurisdictional (domestic and international) ones?

F. Desirability of an international instrument providing for cross-border recognition and enforcement of voluntary agreements

Is there a need for, and is it desirable, to have an instrument providing for recognition and enforcement of voluntary agreements?

What do you see as the key legal problems, such as jurisdictional issues, due to the absence of an international instrument?

What do you see as the key practical issues currently created by the absence of an international instrument, including cost, time, domestic jurisdictional problems, and limitations on the scope of the voluntary agreement?

In what areas are there gaps or a need for further means in connection with the recognition / enforcement of voluntary agreements currently?

In what areas are there gaps that will not be resolved by the 1996 Convention and another international instrument?

Are there regional instruments that provide sufficient mechanisms for the recognition / enforcement of voluntary agreements?

What would be the benefits / disadvantages of a new international instrument providing for cross-border recognition and enforcement of voluntary agreements?

G. Feasibility of an international instrument providing for cross-border recognition and enforcement of voluntary agreements

What do you see as the legal and practical problems of developing an international instrument providing for cross-border recognition and enforcement of voluntary agreements?

Assuming the need for an instrument, what type of instrument would you consider feasible: binding or non-binding?

Assuming the need for an instrument, what would be the scope of the instrument?

Assuming the need for an instrument, what limitations on party autonomy might be necessary or would there be a requirement for court or administrative oversight?

What impact would the inclusion of different legal systems have in the development / drafting an instrument (*e.g.*, Sharia)?

H. Conclusions and Recommendations for the Council in response to mandate

Is an international instrument providing for cross-border recognition and enforcement of voluntary agreements desirable? If so, in what circumstances and why?

Is there a need for a binding or non-binding instrument? If so, what would be its scope?

Is the development of an international instrument feasible?

What further research or information (such as through a questionnaire) might be necessary to clarify either the desirability or feasibility of an international instrument providing for cross-border recognition and enforcement of voluntary agreements?

What further actions may be required?

IX. Conclusion

122. As mentioned before, this Experts' Group is an important step forward to address the challenges that governments, courts, practitioners, and parents worldwide face with regard to the recognition and enforcement of voluntary agreements. It is important that experts appreciate the scope of the mandate for this meeting. The focus is on determining if there is a need for some form of instrument – binding or not – to help in cross-border recognition and enforcement of voluntary agreements so as to foster and encourage amicable resolution in international family disputes. One major emphasis is on addressing the need – identifying the “gaps” – as well as the desirability of some instrument, whether binding or not. Although the Experts' Group might identify and discuss potential obstacles to an instrument, it is premature for this meeting to address or seek to resolve all aspects of feasibility at this point.

Experts' Group on Recognition and Enforcement of Voluntary Cross-Border Agreements

12-14 December 2013



BACKGROUND NOTE ON RECOGNITION AND ENFORCEMENT OF VOLUNTARY CROSS-BORDER AGREEMENTS

ANNEX I

Summary of State responses provided in Country Profiles relevant to the recognition and enforcement of voluntary cross-border agreements

Contracting States to the 1980 Convention are requested to complete a Country Profile to assist with the fulfilment of their obligations under Article 7 of the 1980 Convention. The Country Profile provides information of a general character on the law of a State in connection with the application of the Convention and keeps States and their Central Authorities informed regarding the operation of the Convention in other States.

This annex summarises selected responses relevant to the Experts' Group.¹

1. States which do not have any mediation program/possibility:²

Bulgaria, Colombia, Cyprus, Dominican Republic, El Salvador, Honduras, Malta, Peru, Turkey, Ukraine, Uruguay

2. Question 19.5 of the Country Profile

a) Are there legal restrictions on the content of mediated agreements regarding family law matters in your State?

- a. Yes: Argentina, Australia, Belgium, Canada-ALB, Canada-NS (subject to court approval), Costa Rica (sexual abuse, Domestic violence, renouncing parental authority),* Ecuador, Finland, France, Greece, Guinea (when the child's best interests are at risk),** Honduras, Israel, Latvia, Mexico, Poland, Slovenia, South Korea, Sweden, United States of America, Venezuela
- b. No: Brazil, Bulgaria, Burkina Faso, Canada-BC, Canada-MAN, Canada-PEI, Canada-QUE, Canada-SAS, Chile, China Hong Kong, Colombia, Cyprus, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Hungary, Ireland, Lithuania, Malta, Mauritius, New Zealand, Norway, Panama, Paraguay, Peru, Portugal, Romania, South Africa, Spain, Switzerland, Thailand, Turkey, Ukraine, UK – England and Wales, UK – Northern Ireland, Uruguay

¹ The complete Country Profiles are available on the Hague Conference website at < www.hcch.net > under the "Child Abduction Section".

² See Country Profiles, response to para 19.1(b) "What mediation services / structures exist in your State where an incoming application has been received for the return of a child?".

* Translated from the original Spanish by the Permanent Bureau.

** Translated from the original French by the Permanent Bureau.

b) Which additional formalities, if any, are required in your State to make mediated agreements in a family dispute involving children enforceable?

(1) Notarisation of the mediated agreement

Belgium, Burkina Faso, Denmark, Estonia, Hungary, Romania, Slovenia

(2) Court approval of the mediated agreement

Argentina (civil or family courts), Belgium, Brazil (in theory, any agreement can be brought for homologation and if homologated by court will be considered as a decision of that court), Burkina Faso, Canada-MAN (Queen's Bench (Family Division, or Provincial Court), Canada-NS (Supreme Court consent order), Canada-QUE (Superior Court), China HK (High Court or Family Court), Costa Rica (homologation),* Czech Republic (but depends on the content of the agreement), Estonia, France, Hungary (by the Guardianship authority), Ireland, Israel, Latvia, Lithuania, Mexico, Paraguay, Poland (the court which has general or special competence to hear the case is competent to approve of the agreements concluded before mediator), Romania (the court seized with the family dispute case), Slovenia (district courts), South Africa (in Hague Convention matters High Court), South Korea, Spain, Sweden, Switzerland (a court can only approve a mediated agreement (and make it enforceable) if the mediation was ordered or initiated by the court), UK – Northern Ireland, United States of America (the competent court is generally the state court that would have jurisdiction over the underlying custody/access case or the federal court with jurisdiction over a Convention return proceeding), Venezuela (the "protection" court that knows of the case)*

(3) Registration of the mediated agreement with the court

Australia (Family Court, Federal Magistrate's Court), Burkina Faso, Canada-BC (provincial court or Supreme Court), Canada-NS (Supreme Court), Canada-SAS (Court of Queen's Bench, Family Division, Family Court), Estonia, Greece (court of first instance), Honduras (with the children's judges),* South Africa

(4) Other

Australia, Canada-ALB (terms put into court order), Canada-PEI (Terms of mediated agreement must be incorporated into a consent order or a formal separation agreement witnessed, and the parties afforded independent advice), Denmark (if the parties make an agreement during mediation, it has to state in the agreement that the agreement is enforceable), Finland (an agreement on child custody or access has to be confirmed by the Social Welfare Board), Guinea (the Central Authority submits the agreement to the appropriate agency for an opinion),** Mauritius (the agreement is made by a judge in the court), New Zealand (Parties may seek to have some or all of the terms of the agreement embodied in an order of the court. The order may be enforced to the extent possible under domestic law), Norway (when both parents request it, the County Governor may determine that a written agreement on parental responsibility, domicile and time spent with the child may be enforced. Normally, when mediation is done in court, the parents will reach a court agreement, which is enforceable in the same manner as a judgment),

Sweden (formal approval by the Social Welfare Committee), UK – England and Wales (the parties can apply to the court for the terms of the mediated agreement to be incorporated into an order of the court), UK – Northern Ireland (application for court to include mediated agreement in terms of a court order)

- (5) No additional formalities are required. Mediated agreements in family disputes involving children are immediately enforceable without any additional formalities being required

Ecuador, Panama

c) Is the mediated agreement, once approved by or registered with a court, treated as an order of that court?

- a. Yes: Argentina, Brazil (in theory, any agreement can be brought for homologation and if homologated by court will be considered as a decision of that court), Belgium, Burkina Faso, Canada-BC, Canada-NS, Canada-QUE, Canada-SAS, China HK, Czech Republic, Denmark (in cases of access and the child's place of living, you must bring the agreement to the court of the regional state administration), Ecuador, Estonia (can be turned into a court order: if all the demands set out in the law are met the court can check if all demands are met), Finland, France, Greece (after a request to the tribunal may to render a decision with the same content of the agreement), Honduras, Ireland, Israel, Latvia, Lithuania, Mauritius, Mexico, Norway (agreements that are mediated in court are treated as an order of the court, but this is different for agreements made outside court; steps to turn agreement into court order: when both parents request it, the county governor may determine that a written agreement on parental responsibility, domicile and time spent with the child may be enforced), Paraguay, Poland (the agreement concluded before a mediator has the same power as the agreement concluded before a Court; nobody is to bear court fees of rendering the mediated agreement enforceable under the Polish law), Romania, Slovenia (it is a court settlement), South Africa, Spain, Switzerland, United States of America, Venezuela
- b. No: Australia, Canada-ALB, Canada-MAN, Hungary, New Zealand, South Korea, Sweden, UK - England and Wales, UK - Northern Ireland

d) Is it possible to turn a mediated agreement into a court order?

- a. Yes: Australia (a consent order would need to be obtained from competent court), Belgium (homologation by 1st instance court),** Canada-ALB, Canada-BC, Canada-MAN, Canada-PEI (consent order Supreme Court), Canada-QUE (judge of the Superior Court has to homologate the agreement to give it effect), Canada-SAS, Estonia, Hungary (only possibility is to turn the mediated agreement into a court order in the framework of the court procedure), Ireland (please see the European Communities (Mediation) Regulations 2011. S.I. No 209 of 2011), New Zealand (parties may seek to have some or all of the terms of the agreement embodied in an order of the court. The order may be enforced to the extent possible under domestic the law), South Africa, Sweden, UK – England and Wales (the parties need to

apply to the Court for the terms of the mediated agreement to be incorporated into an Order of the Court), UK – Northern Ireland (parties must apply to the court dealing with the application)

b. No: Guinea, Honduras

e) Who bears the cost of rendering the mediated agreement enforceable? Please list the number from question 19.5 b) next to the relevant answer

- a. The parties must pay: Argentina (2), Australia (3,4), Belgium (1,2), Brazil (2), Canada-ALB (4), Canada-BC (3), Canada-MAN (2), Canada-NS (2, 3), Canada-PEI, Canada-QUE (2), Canada-SAS (if legal counsel are retained), Estonia (1, 2, 3), France (2), Hungary, Ireland, Lithuania (2), New Zealand (4), Norway (4), Slovenia (1), South Africa (2, 3), South Korea (2), Switzerland (2), UK - England and Wales, UK - Northern Ireland, United States of America
- b. The cost is covered by any free or reduced rate legal assistance provided to one / both parties: Argentina (2), Canada-QUE (2), China HK (2), Denmark (1), Estonia (2, 3), Guinea (2), Hungary, Ireland (2), South Africa (2, 3), UK - England and Wales, UK - Northern Ireland, United States of America
- c. Central Authority: Guinea (1), Romania (but only if the mediated agreement concerns only aspects that fall under the 1980 Convention), South Africa (2, 3)
- d. There are no costs: Brazil (if the CA is involved in the agreement, it is possible that the Office of Attorney General takes the agreement to court for homologation at no costs), Czech Republic, Ecuador, Finland (4), Greece, Paraguay, Poland (2), Slovenia (2), Sweden (4), Venezuela

3. Question 19.6: Agreements mediated in another State

a) Can an agreement mediated in another State in a family dispute involving children be approved by a court or otherwise formalized in your State in the same manner as an agreement mediated in your State (see question 19.5 above)?

- a. Yes: Canada-QUE, Canada-SAS (this can occur pursuant to a consent agreement, so long as it meets all other legal requirements and is within the court's jurisdiction), China HK, Czech Republic, Ecuador, Finland, Greece, Ireland (for EU States), Israel, New Zealand, Romania, Slovenia, South Africa, Sweden (within the EU according to Brussels IIa, with the Nordic countries according to the Convention 1977:595), Switzerland, UK - England and Wales, UK - Northern Ireland

- b. No, a different method for formalizing the agreement must be used: Argentina (if the agreement has been approved by a judge in the other State, it will be subject to recognition through exequatur in Argentina; if no judge has approved the agreement, the Argentine judge will ask the parties to ratify it), Australia (mirror orders, consent orders or a registered parenting plan concluded under the Family Law Act 1975 would need to be used), Brazil (the agreement must be registered in the requesting State's court)
- c. No, it is not possible to formalize an agreement mediated in another State: Canada-MAN, Denmark, Hungary (but if agreement of the parties falls under the scope of EU regulation 2201/2003 or 805/2004, a simplified procedure can be applied), Mauritius, Panama, Paraguay, Poland, Spain, Uruguay, Venezuela
- d. Other: Belgium (currently under discussion transposition of Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, and see proceedings of the Hague mediation group), ** Burkina Faso (only if there are agreements between the two countries), ** Canada-ALB (an agreement is not enforceable but if the terms are put into an order granted by the court then they could be enforceable), Canada-BC (yes, as long as the conditions met by statute in BC are met: see section 44 of Family Law Act – <http://www.bclaws.ca>), Canada-NS (issue not raised to date), Canada-PEI (would either require a consent order from the other state or a consent order of the Supreme Court of Prince Edward Island), Estonia (it is possible to formalize an agreement mediated in another State if it is based on the Estonian Mediation Act), France (the parties may apply to the courts in the State of enforcement for exequatur of a decision by a court in another State having made the agreement based on mediation enforceable), ** Guinea (this depends on the nature of the agreement), ** Ireland (this is possible in relation to other EU Member States), Latvia (only if it is approved by the Court in a form of judgment), Lithuania (under the Code of Civil Procedure, a conciliation agreement approved by a foreign State court (except the EU Member States) may be recognized and implemented in the country, where it was drawn up, and if it is consistent with the Constitution and the public), Mexico (it depends on the legal nature of the mediation), * Norway (when both parents request it, the County Governor may determine that a written agreement on parental responsibility, domicile and time spent with the child may be enforced), South Africa (agreement will be subjected to the best interests of the child test), South Korea, United States of America (a mediated agreement that has been turned into a court order in another state could be registered with the competent court in the U.S. and become an enforceable order here under the UCCJEA. Registering a foreign court order is a relatively simple process. However, a private agreement between two parties that had not been turned into a court order would not be able to be registered as a foreign judgment. The parties could, however, bring their agreement to a U.S. court with competent jurisdiction and have it approved by a judge directly)

**Experts' Group on Recognition and
Enforcement of Voluntary Cross-
Border Agreements**

12-14 December 2013



**BACKGROUND NOTE ON RECOGNITION AND ENFORCEMENT
OF VOLUNTARY CROSS-BORDER AGREEMENTS**

ANNEX II

**Summary of responses to Part I, No 1, of the
"Questionnaire on the Desirability and Feasibility of a Protocol to the *Hague
Convention of 25 October 1980 on the Civil Aspects of International Child
Abduction*" of December 2010¹**

In April 2010, the Council on General Affairs and Policy authorised the Permanent Bureau to circulate a questionnaire "to States Parties and Members later this year seeking general views as well as views in relation to the specific elements which might form part of a protocol"² to the 1980 Hague Convention. In accordance with this mandate, the Permanent Bureau sent a questionnaire prior to Part II of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, asking general views on the desirability and feasibility of a protocol, as well as views on specific matters which might form part of a protocol.³

States were asked to give views on possible components of a protocol that were listed in the Questionnaire and asked to indicate for each of them:

- whether, in their opinion, provisions on these matters could serve a useful purpose; and
- how high a priority they would attach to the development of provisions on these matters.⁴

This document summarises the responses provided to Part I, No 1, of the Questionnaire, on "Mediation, conciliation and other similar means to promote the amicable resolution of cases under the Convention".⁵

¹ The Questionnaire (Prel. Doc. No 2 of December 2010 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention) and the responses are available on the Hague Conference website at < www.hcch.net > under the "Child Abduction Section".

² See the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (7-9 April 2010), p. 2 (available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs").

³ See the Questionnaire on page 3, *op. cit.* note 1.

⁴ See the Questionnaire on page 5, *ibid.*

⁵ The response from the European Union, sent by letter dated 15 March 2011, is included at the end of this document, under Section B.

A. State responses to the Questionnaire

1.1 Possible component: Expressly authorising the use of mediation / conciliation / other means to promote the amicable resolution of cases under the Convention

Argentina:

Article 7 c) of the 1980 Hague Convention clearly states that Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures: c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues. In this regard, this Central Authority believes that an express provision authorizing the use of mediation, conciliation and / or other means to promote amicable resolutions would be unnecessary and redundant, since the possibility of using mediation or conciliation is already foreseen in the Convention.

Armenia:

Mediation and / or conciliation means have in fact a very significant role in the whole procedure. The clauses mentioned have indeed an important input for the benefit of children and for the good practice.

Australia:

Australia considers the inclusion of an express authority to use the various means of alternative dispute resolution to have potentially significant benefits to member States use of the Convention. The approach of encouraging mediation (and other forms of amicable resolution) is consistent with Australia's leading role in the Working Party on Mediation.⁶ In approaching their inclusion, details for the use of these alternative processes could be imported from the principles, once they are have been agreed upon and established, that are developed by the Working Party. Framing the details in the Convention from those developed by the Working Party will ensure they are appropriate for implementation by all member States.

Burkina Faso:

Mediation and amicable resolution should be the first stages to be promoted in the resolution of cases of child abduction, before any court action is contemplated.*

Canada:

Canada does not support the establishment of a Protocol to the 1980 Convention to expressly authorize or deal with mediation (conciliation or other means), for the following reasons:

- a) Canada does not require a protocol expressly authorizing the use of mediation or conciliation to offer such services under the 1980 Convention, or to enact legislation in this regard.
- b) Article 7 c) of the Convention provides that CAs shall take all appropriate measures, either directly or through an intermediary, to secure the voluntary return of the child or to bring about an amicable resolution of the issues. In our view, "appropriate measures" is sufficiently broad to include mediation (conciliation or other means) in cases where it is appropriate to offer or provide such services.

⁶ See Background Note on Recognition and Enforcement of Voluntary Cross-Border Agreements, para. 15 with note 26 (*footnote added*).

* Translated from the original French by the Permanent Bureau.

- c) Where mediation (conciliation and other means) is offered under the 1980 Convention, it must be aimed at achieving its objects - that is ensuring the prompt return of a child wrongfully removed or wrongfully retained or making arrangements for the exercise of existing access rights. A proposal to establish a protocol to structure mediation (conciliation and other means) on the substantive issues of custody and / or access would exceed the limited scope of application of the 1980 Convention.
- d) The private international rules surrounding custody and access fall under the 1996 Convention, and mediation (conciliation or other means) regarding these issues is provided for in article 31 b) of that Convention.
- e) Assuming a Protocol to the 1980 Convention to deal with mediation (conciliation or other means) were supported by a majority of States, the development of such an instrument would be premature at this time. A Guide to Good Practice on Mediation in the context of the 1980 Convention is currently being finalized. The reasonable approach would be to allow States party to the 1980 Convention to first consider and apply the Guide and to assess its effectiveness before considering whether it would be appropriate to entrench standards for mediation (conciliation and other means) in the specific context of the 1980 Convention in a binding international instrument.

Level of priority: very low.

Chile:

This Central Authority considers it necessary to include these forms of amicable solutions in a protocol in order to unify the regulations or the treatment given in the different Contracting States to these matters in relation with return and access applications.**

China Hong Kong SAR:

Provision could serve a useful purpose. High priority is to be attached.

China Macao SAR:

It is deemed that provisions expressly authorizing the use of mediation or conciliation is unnecessary at the moment. As laid down in Article 7 c) of the Convention, Central Authorities shall take all appropriate measures, either directly or through an intermediary, to secure the voluntary return of the child or to bring about an amicable resolution of the issues. Apparently, "appropriate measures" stated therein include means of mediation, conciliation or other similar means of amicable resolution.

Furthermore, the Guide to Good Practice on Mediation in the context of the 1980 Convention is currently being finalized. It is thought that provisions for mediation is needed to be put into a protocol only when the majority of States parties to the 1980 Convention consider such Guide insufficient.

Low priority is to be attached to this issue.

Colombia:

Certainly this type of arrangement is highly useful to the extent that it allows the early resolution of disputes without going to a judicial process.**

Dominican Republic:

Yes. High Priority. It would help to resolve conflicts amicably and without recourse to legal remedies, which will meet the requirement of speed required by the Convention.

** Translated from the original Spanish by the Permanent Bureau.

El Salvador:

High priority. We believe it is necessary to use mediation and / or conciliation, however it is preferable that the term is broader in the sense that embodies Alternative Dispute Resolution including friendly decisions because not all States Parties apply equally conciliation and / or mediation.**

Israel:

The use of mediation can be a very useful instrument to find amicable solutions, abridge the legal process and may avoid further abductions. The use of mediation may also be useful in cases with non Hague States to overcome multi cultural difficulties. Therefore it should be a very high priority of the Conference to open new venues to implement the Convention.

Mexico:

Mediation is a concept defined differently in every state. Also, it is subject to federal and state legislation. Not every Central Authority is entitled / capable of performing mediation acts.

Monaco:

The use of mediation or any other form of alternative dispute resolution should be given preference and seems fundamental, as litigation of this kind exceeds the boundaries of law and requires intermediation by professionals to facilitate communication between the parents. This could accordingly be of interest, and consistent with the Guide to Good Practice.*

Montenegro:

We believe that regulation of this matter is of a great importance for the best interests of children and parents, and that with the use of mediation can be avoided long procedures, so we give high priority for the development of these provisions.

New Zealand:

The purpose of the 1980 Convention is to secure the prompt return of children. The 1980 Convention already provides for and encourages amicable resolution, which we support. Introducing a protocol risks considering the substance or substantive issues of individual cases which falls outside the scope of the 1980 Convention creating jurisdictional issues. It also risks creating a perception that mediation of the issues is automatic, which could reduce the incentive of the taking parent to act lawfully by obtaining a relocation order prior to removing the child, thereby undermining the Convention's purpose. Each State has its own domestic procedures and laws to achieve this objective.

Norway:

No comment at this stage, ref. our answer to question 1 under part II.

Panama:

High priority. Panamanian Central Authority considers that the alternative methods of dispute resolution (mediation, conciliation), are useful and promote the early resolution of cases if international child refund.

Philippines:

A provision expressly authorizing mediation / conciliation / negotiation and other modes of alternative dispute resolution would be useful and would ensure the exhaustion of all possible remedies and the expeditious resolution of controversy, hereby giving primordial consideration to international child abduction. Issues and substance of the procedure must be included in the protocol relating the same to applicable laws and / or existing model law on arbitration proceedings. Recognition and enforcement of the awards or the result of the mediation / conciliation / negotiation and other modes of alternative dispute resolution should also be clearly defined in a protocol.

Poland:

The Polish party supports the project of introduction of international regulations concerning methods of settlement of disputes in matters covered by the Hague Convention of 1980 which would be an alternative to court proceedings.

Portugal:

Yes.

Switzerland:

In Rule No 1 of the Annex to the Conclusions and Recommendations adopted by the Commission on 9 November 2006, the importance of such an attempt in the context of any steps governed by the Convention needs to be highlighted, while pointing out that it should not affect the requirement of expeditiousness in the review of the application for the child's return. Amicable resolution of disputes subject to the Convention is the least traumatic form of resolution for the child. As a result, methods for amicable dispute resolution ought to receive preference in practice in all States parties. It is unfortunate that some States have not set up an efficient system favouring mediation or conciliation. The Convention does not provide the necessary incentive for setting up such a system. Yes to a provision in support. High priority.*

Ukraine:

It should be noted, that in Ukraine functions concerning the peaceful resolution of the cases on return of children or providing the access to them according to the 1980 Convention are executed by the Central Authority directly and through its regional departments or, in particular cases, are within the competence of the Service on Children Issues as far as the mediation, inter alia in family matters, and respectively the specialized authorities, which ensure the mediation, do not exist. At the same time, despite the absence of legislative provisions for mediation in Ukraine, we consider that the resolution of the matter concerning the implementation of sole standards of the procedures of reconciliation in cases under the 1980 Convention in single international document might stimulate the development of extrajudicial means of resolution of cases by the Member States of the 1980 Convention and respectively might positively influence the practice of implementation of the 1980 Convention. It should be noted that mediation is a worthy alternative to the judicial resolution of disputes when the search of mutually acceptable decision is being conducted not on the basis of formal documents, but exclusively taking into account the search for balance of interest of the parties, reaching positive result and mutual understanding in the conflict (dispute) which is especially important for such cases as those on the basis of the 1980 Convention. However, in cases when the mediation is absent or it is conducted by the Central Authority or by the authorized body, the specific demands concerning the mediation or other procedures might complicate the practical implementation of these provisions. Thereby, taking into account different forms and means of implementation of mediation or similar measures by the Member-States as well as different experience of implementation of mediation, the sole principles and approaches to mediation in cases concerning the 1980 Convention

should be defined and implemented. To the time being, according to the legislation in force achievement of peaceful resolution of matter on the return of a child is possible on all stages of the consideration of the case, including the stage of execution of the decision on the return of a child. Thus, bearing in mind the best interests of the child we support encouraging of application of mediation on all stages. The main point is that all interested parties should strive for that.

United States of America:

For the reasons stated below in response to Part II Question 1, we do not favor the negotiation of a protocol to the Abduction Convention and instead favor a dialogue among States Parties that would explore ways in which to address certain issues raised in this part of the Questionnaire within the existing treaty framework. We believe that the requirement in Article 7(c) of the Convention already provides sufficient authority for Central Authorities to promote the use of mediation or other voluntary resolutions to these issues.

Venezuela:

Mediation: medium priority. Venezuelan special legislation foresees mediation (in the civil judicial proceedings) and conciliation (in the administrative proceedings) at all levels, involved in children and adolescents matter.

Zimbabwe:

This will help both parents to better understand the procedure and the reason for the return of the child in his country of habitual residence. An amicable solution does not emotionally stress the child.

1.2 Possible component: Addressing issues of substance and procedure surrounding the use of such means (e.g., concerning matters such as confidentiality, the interrelationship between the mediation process and return proceedings, or the recognition and enforcement of agreements resulting from mediation)

Argentina:

The Argentine Central Authority is hesitant regarding the possibility of establishing a standardized procedure for mediation in child abduction cases. Legal systems and local possibilities differ from one State to the other and what is possible in one State could be hard to implement in others. Consequently, this Central Authority believes that a guide to Good Practice (as the one the Hague Conference is developing) would be more useful for States than mandatory provisions emerging from a Protocol to the Convention.

Armenia:

Issues addressing the substance and procedure of the use of such means are of high priority as well. The regulation of the recognition and enforcement of agreements resulting from mediation will contribute to the complete and effective conduct for completing the procedure.

Australia:

Australia believes that it is important that any proposed protocol adequately addresses issues of substance and procedure, and how these relate to issues such as confidentiality, admissibility and the recognition and enforcement of agreements resulting from mediation. Addressing these issues will likely provide greater clarity to both courts and Central Authorities on the use of alternative dispute resolution mechanisms, thus

encouraging greater use of mediation and conciliation. As such Australia is in favour of their inclusion.

Burkina Faso:

Mediation and amicable resolution allow the information needed for an informed decision to be gathered. The social workers assigned to this task are sworn, and there are no confidentiality problems. Once consensus has been achieved, enforcement of the agreements is no longer problematic, and the procedure for the child's return or otherwise will be conducted with both parties' collaboration. This form of action offers the advantage of securing and preserving the social connections between the parents, which is essential for the child later.*

Canada:

N/A

Chile:

As indicated previously, the aspects mentioned should be incorporated with the aim to unify the criteria related to the different forms of amicable solution and the programs or mechanisms used by States, specially in relation with the time or terms involved and the form in which the negotiations are being held when one of the parents lives abroad.**

China Hong Kong SAR:

Provision could serve a useful purpose. High priority is to be attached.

China Macao SAR:

Please see response to question 1.1.

Colombia:

Colombia already has implemented legislation to reconcile other alternative methods of dispute resolution (Act 640 of 2001), as procedural requirement before any proceedings before the judge, but even in the trial stage, with a verbal summary will process require the judge to invite the parties involved to resolve the situation amicably, where both gain and promote the interests of the Child, children or adolescent and any time during the parties can reach a settlement.**

Dominican Republic:

No.

El Salvador:

High priority. In El Salvador there is pre-judicial conciliation procedure as Alternative Dispute Resolution, however, it is considered advisable that prior act to be applicable in all States, provided they take care to set appropriate limits and, as mentioned aspects of substance or procedure clear.**

Israel:

It would be important to include such issues in a protocol, as it would provide a clear framework and encourage a wider use of mediation. There may even be room to consider developing a Convention on Cross Border Mediation of Disputes, as presented in a working document to the Council on General Affairs and Policy meeting of 2009 by Israel.

Mexico:

Since mediation is not a part of the restitution process and it might not be fully developed in many states, a protocol addressing this particular issue might not be helpful.

Monaco:

Issues of merit ought to be governed by an international regulation; and those of form by the laws of the forum concerned by the dispute, or even the law of the location to which the child has been removed.*

Montenegro:

We think that this issue is probably solved with specific national laws (as it is in the case of Montenegro, where the Law on Mediation governs the rules of procedure of mediation in civil disputes, including disputes arising from family relationships). We believe that this question is of a low priority.

New Zealand:

Issues of substance fall outside the scope of the 1980 Convention. If mediation were to address questions of substance the mediation should be conducted in or by the State of the habitual residence of the child, or State which has jurisdiction, and subject to that State's rules. The substantive issues fall within the scope of the 1996 Convention. The 1996 Convention has very clear rules to address questions of jurisdiction, recognition and enforcement.

Norway:

No comment at this stage, ref. our answer to question 1 under part II.

Panama:

High priority. This Central Authority considers that it would clearly need to regulate the procedure to be used for the resolution of cases through the friendly methods and most important is the establishment of the recognition of the resolution of mediation and conciliation agreements in the States parties to the Convention.

Philippines:

N/A

Poland:

It seems that such regulations could be similar to the Directive of the European Parliament and Council 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters. In our opinion, the regulation should specify institutions offering alternative methods of conflict settlement (mediation, arbitration etc.) and set up general rules on which such methods should be based. In particular, the following issues should be regulated: conditioning the commencement of mediation (or other out-of-court methods of dispute settlement) upon the will of the parties, confidentiality of mediation proceedings, impartiality of the mediator and a guarantee of recognition and enforcement of a settlement agreement reached as a result of mediation proceedings conducted in another state.

Portugal:

Yes.

Switzerland:

In order to secure effective, and insofar as possible, uniform, implementation of these forms of amicable dispute resolution, framework provisions dealing with points such as the relationship between the mediation process and the return proceedings, and the recognition and enforcement of agreements resulting from mediation would be very useful. High priority.*

Ukraine:

In our opinion, the provisions on non-disclosure and confidentiality are exclusively important for implementation of mediation and their inclusion is certainly necessary. Herewith, the question of executing the agreements, reached as the result of mediation, is surely important. As soon as it is foreseen that the decisions, reached as the result of mediation, are executed by the parties voluntarily, when one party of the negotiations refuses to execute such decision the question of the necessity of recognition and execution of decision arises. An effective mechanism for this may be the possibility to fill in an application on recognition and execution of decision, reached as the result of mediation. Herewith, it should be formalized in some certain document. At the same time, if the national legislation of the States Parties to the 1980 Convention does not foresee the recognition and execution of agreements, which may be reached in the cases on the return of a child according to the 1980 Convention, the mechanism of implementation of such provision must be not compulsory and more flexible.

United States of America:

For the reasons stated below in response to Part II, Question 1, we do not favor the negotiation of a protocol to the Abduction Convention and instead favor a dialogue among States Parties that would explore ways in which to address certain issues raised in this part of the Questionnaire within the existing treaty framework. We believe that cross-border mediation and dispute resolution are still emerging fields and that it may be premature to try to establish universal substantive or procedural standards at this time. We support efforts by states to experiment with creative approaches and hope that such experimentation will lead to the development of best practices. We recognize, however, that in some cases involving domestic violence and child abuse, screening for appropriateness for mediation is of paramount importance and must be carefully designed to ensure the safety of the parents and child. We underscore the importance of ensuring that mediators are adequately trained on the dynamics of domestic violence. We also support the promotion of nonbinding principles such as the Malta Principles.

Venezuela:

The interrelationship between the mediation process and return proceedings is important.

Zimbabwe:

The challenge is that some State are not prepared to bear the costs for the Mediator's services. The Mediator needs to work hand in hand with Central Authorities from both countries (where the child has been abducted to and the one from his habitual residence). There is need for impartiality in the role of the Mediator. How do we prevent the Mediator from being bias? Once again, feasibility might be very difficult; in that who will initiate and bear the costs of the services of the Mediator?

1.3 Other possible components**Colombia:**

As part of the implementation of alternative dispute resolution, have also been created justices of the peace within their area who are able to invite the parties to reach agreements to end their disputes. There are private organizations dedicated to the provision of conciliation service (Notaries, NGOs, conciliation centers), who are licensed by the Ministry of Justice for its operation.**

Israel:

Other issues that might be beneficial to include in a protocol or Convention would be: to develop cross border mediation rules of conduct and ethics, training, accreditation and continuing professional development, evaluation of cross border mediators, quality control of the services, including the procedures to enable parties to lodge complaints against mediators.

New Zealand:

It is up to each State to consider how best to meet its obligations under the Convention. There are many different methods of doing this. We believe a more prescriptive approach could detract from the Convention and undermine its purpose. We support the encouragement of States to become members of the 1996 Convention which deals with these issues.

Portugal:

Interaction between Article 7 of the 1980 Convention and the future Protocol.

(The other States who replied to this Questionnaire did not provide any comments under No 1.3.)

B. Response from the European Union sent by letter dated 15 March 2011:

[...] The European Union thanks the Permanent Bureau for the opportunity to submit comments and fully supports the objective of the consultation, *i.e.* to ask States Parties and Members whether they consider a protocol desirable and feasible and, if so, to seek their views on specific matters which might form part of a protocol. In this context, the European Union would like to point out that already in its comments on the proposal by Switzerland for a protocol to the 1980 Convention it stressed the importance it attached to a prior feasibility study of the need and support for a protocol as well as of the precise scope of such an international agreement. The present consultation is an integral part of the feasibility study to be drawn up by the Permanent Bureau and submitted to States Parties and Members for consideration by the forthcoming Special Commission.

The European Union would like to prejudge the outcome and wishes to reserve its final position on the feasibility of a protocol to the 1980 Convention until the results of the study are known.

As far as the desirability of a protocol to the Convention is concerned the European Union would like to highlight the following points.

As already stated in its comments on the proposal by Switzerland for a protocol to the 1980 Convention, the EU believes that the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Convention') already remedies some of the perceived shortcomings of the 1980 Convention. This has also been acknowledged by the Council on General Affairs and Policy of the Hague Conference, which, in the Conclusions and Recommendations it adopted at its meeting of 7 to 9 April 2010, stated that the feasibility study should also take into account the extent to which the provisions of the 1996 Convention supplement those of the 1980 Convention.

Almost half of the currently 30 Contracting States to the 1996 Convention have been applying this instrument only since 2010 or will be applying it as from this year. The European Union is therefore of the opinion that there is not yet sufficient experience to evaluate the practical operation of the 1996 Convention and its interplay with the 1980 Convention and believes that this will be borne out by the answers to Part III of the Questionnaire on the practical operation of the 1980 and 1996 Conventions circulated by the Permanent Bureau in November 2010. In its view, it would be desirable to have more extensive practical experience of the operation of the 1996 Convention in a critical mass

of Contracting States before deciding whether any additional rules need to be set out in a protocol to the 1980 Convention.

Furthermore, the European Union believes that careful consideration should be given to whether the objectives of a possible protocol could not be achieved equally well by 'soft law' measures, such as Special Commission recommendations or good practice guides. In this context, the European Union notes that the Permanent Bureau is already in the process of establishing a draft Guide to Good Practice on Mediation under the 1980 Convention and Principles for the Establishment of Mediation Structures in the context of the Malta Process, and draft General Principles for Judicial Communication to be considered by the forthcoming Special Commission. In the view of the European Union the practical impact of such 'soft law' measures and the improvement that they may bring in the operation of the 1980 Convention should be evaluated when considering any additional rules in the form of a protocol.

The European Union would like to reiterate that possible future negotiations on a protocol to the 1980 Convention must not substantially alter the interpretation of existing key Convention articles, as that would risk undermining the carefully balanced consensus among the Contracting States in the area of parental child abduction, which also forms the basis of Council Regulation (EC) No 2201/2003, the key Union instrument in this area.

The European Union does not wish to make any proposal for possible components of a protocol or comment on their order of priority at this stage. However, it will give careful consideration to any recommendation to embark on the process of drawing up a protocol emanating from the Special Commission. In any event, such a decision could only be taken by the Council on General Affairs and Policy of The Hague Conference.

Experts' Group on Recognition and Enforcement of Voluntary Cross-Border Agreements

12-14 December 2013



BACKGROUND NOTE ON RECOGNITION AND ENFORCEMENT OF VOLUNTARY CROSS-BORDER AGREEMENTS

ANNEX III

Summary of responses to Questionnaire II of 2009 sent to members of the Working Party on Mediation

To develop principles for the establishment of mediation structures, the Permanent Bureau, in co-ordination with the co-Chairs of the Working Party, sent in 2009 two questionnaires to the members of the Working Party.

Questionnaire I focused on existing mediation structures, current approach in non-Hague Convention cases and existing rules and legislation on family mediation. Questionnaire II focused on the enforceability of mediated agreements.¹

The following summary reflects the responses by the members of the Working Party on Mediation to Questionnaire II.

ENFORCEABILITY OF MEDIATED AGREEMENTS

1. Are there legal restrictions on the content of mediated agreements regarding family law matters in your country?

Australia: Yes. There are no restrictions on the content of mediated agreements regarding family law matters in Australia. However, some legal requirements must be observed where the parties seek to have agreements recognised by a court. For example, a court will not make a parenting order that is contrary to the best interests of the child or which addresses child maintenance when an application could be properly made under the Child Support (Assessment) Act 1989. In making parenting orders (including by consent), the court must ensure that, to the extent possible and consistently with the child's best interests being paramount, the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.

Canada (Riverdale, ONT): Yes, cannot mediate things that parties cannot negotiate, such as: the divorce itself; child support that derives from the requirements of the provincial Child Support Guidelines.

¹ The questionnaires and the responses provided by the members of the Working Party are available at < www.hcch.net > under the "Child Abduction Section".

Canada (Ismaili Conciliation and Arbitration Board, ONT): No

Canada (BC, CA): No

Canada (QUE): No

Canada (ALB): No

Canada (Blitt): Yes. Mediated agreements are confidential.

France: Yes. The mediated agreements must respect the public order and safeguard the child's interest.*

Germany: Yes. Agreements on child custody or contact are limited by the best interest of the child. All agreements must be consistent with imperative national law.

India: No. However, every mediated agreement has to meet the requirements of the relevant law including the test of Order XXIII Rule 3 of the CPC.

Jordan: Yes, this falls within the competence of the executive branch, and requires notarisation and approval, and then official certification.

Malaysia: Both **yes** for civil and Syariah judicial systems.

Civil: The legal restriction on the content of mediated agreement regarding family law matters in the Civil Judicial System is the enforceability of the mediated agreement.

Syariah: Under the Syariah judicial system in Malaysia (which has jurisdiction only over Muslims), there are three types of mediation which are as follows:

- (i) mediation conducted by the Syariah Court which is known as "Sulh Council";
- (ii) mediation conducted by the Legal Aid Department;
- (ii) mediation conducted by a Syariah lawyer or any other person. Unlike mediation conducted by the Legal Aid Department and mediation conducted by a Syariah lawyer or any other person, mediation through Sulh Council is part of the court process in the Syariah Court. On this note, the contents of mediated agreements that relate to family law matters shall be in line with the existing Syariah laws in Malaysia as well as the Islamic principles. As in the case of custody of a child, the mediated agreements shall not affect the welfare of the child.

Morocco: Yes. According to Article 327-56 (2) of the Code for Civil Procedure, the mediated agreement, which has to respect the provisions of Article 62 of the Dahir of 9 Ramadan 1331 (12 August 1913), being the Code for obligations and contracts,

* Translated from the original French by the Permanent Bureau.

cannot address matters excluded from the scope of the settlement and must be concluded in accordance with the reserves, conditions and limitations laid down for the validation of the settlement in Articles 1099 to 1104 of the same Dahir. Matters of personal status, public policy or other personal rights which are not subject to commerce are excluded from the scope of the settlement.*

UK: Yes. Questions of Status (including whether at law a person is divorced, married, in a civil partnership, or whether a person has parental responsibility and so on) are not open to mediation as these are exclusively dealt with via the judicial / court process. Non-status issues are open to mediation, but agreements cannot run counter to public policy and must be fair in the circumstances.

USA: No – but if the couple wants to turn the mediated settlement into an enforceable court order, a judge will not be able to accept provisions that are contrary to law or contrary to the best interests of the child.

2. Are mediated agreements in a family dispute involving children enforceable in your country without any additional formalities such as notarisations or approval by court?

Australia: No. In Australia, mediated agreements involving parenting arrangements are not enforceable unless formalised through court orders.

Canada (Riverdale, ONT): Yes. A mediated separation agreement is enforceable in the same manner as any separation agreement: including by filing it with the Provincial Division court for enforcement purposes.

Canada (Ismaili Conciliation and Arbitration Board, ONT): No.

Canada (BC, CA): No.

Canada (QUE): No.

Canada (ALB): Yes / No. Mediated agreements regarding support may be enforced if they are in the proper form. Mediated agreements for other family issues are not enforceable. Generally, other family issues do not have outside enforcement available. Where outside enforcement is available, a court order is necessary (e.g., police enforcement of access or a restraining order must be in a court order)

Canada (Blitt): Yes. Provided the mediated agreement is drawn up as a contract it is enforceable as would any contract subject to specific concerns such as access which may require a court order.

France: No. In order to be enforceable, agreements must be homologated by a Family Court Judge, according to Article 376 of the Civil Code stating that: "No relinquishment or transfer relating to parental authority may be effective, unless under a judgment (...)". An agreement on attributes of parental authority cannot be

subject to a notarial act. French case-law in this matter shows that only the judge has the power to verify that the interest of the child is respected.*

Germany: No.

India: No. Any agreement settling rights of minors requires leave of the Court. Such settlement has to be approved by the Court in the best interest of the child.

Jordan: Yes, it requires the notarisation and approval of the court, and requires the presentation of proof to the trial judge.

Malaysia: No for both civil and Syariah judicial systems.

Syariah: A mediated agreement is not enforceable in the Syariah Court, unless the agreement is produced in the Syariah Court for the purpose of record and endorsement as a court order.

Morocco: No. The mediated agreement will be enforceable only once the formalities laid down in Article 327-69 of the Code for Civil Procedure are fulfilled. This Article stipulates that the transaction shall have the force of *res judicata* between the parties concerned and can be accompanied by "a mention of" *exequatur*. To this end, the President of the court having territorial jurisdiction to rule on the matter shall be competent to grant "mention of" *exequatur*.*

UK: No. Parties that wish their mediated agreements to become binding, may take steps to convert these into legally binding documents either via the court process by obtaining a court "consent" order (providing the terms are fair and not contrary to public policy) or by asking their legal advisors to draft a legally binding document of a contractual nature. Either route would then enable an aggrieved party to seek enforcement by issuing court proceedings either to enforce the court "consent" order, or to rectify the breach of the legal agreement.

USA: No – they must be approved by a competent court to be turned into an enforceable order.

3. Can agreements mediated in your country in a family dispute involving children be approved by or registered with a court?

Australia: Yes. In Australia, mediated agreements involving children can be approved by a court with the consent of the parties. Parenting orders deal with parenting arrangements for a child including with whom a child is to live, spend time or communicate, the allocation of parental responsibility for a child and its exercise, child maintenance, variation, dispute resolution and any other aspect of the care, welfare or development of the child. Alternatively, the parties can formalise a mediated agreement by entering into a parenting plan, which is a written agreement that deals with parenting arrangements for children. A Parenting plan cannot be registered in a court. However, parenting plans registered in a court prior to 14 January 2004 continue to have effect.

Canada (Riverdale, ONT): Yes. They are "filed" with the provincial court, under the Family Law Act, or incorporated into a court order of either the provincial court or the Superior Court.

Canada (Ismaili Conciliation and Arbitration Board, ONT): Mediated agreements can be incorporated into a court order

Canada (BC, CA): Yes.

Canada (QUE): Yes

Canada (ALB): No. As noted in the previous comment, agreements with maintenance provisions can be filed with the Court. Also, agreements can be used as evidence in an application for an order which could be considered the Court approving the agreement

Canada (Blitt): Yes.

France: Yes.

Germany: Yes.

India: Yes. They have to be approved by the Court. There is no provision for registration.

Jordan: Yes, and as a condition thereof it must be acceptable to, and in conformity with, public order and morals.

Malaysia: No for civil. **Yes** for Syariah.

Syariah: Mediated agreements in a family dispute involving children shall be produced before the Syariah Court for the purpose of record and endorsement as a court order, which is thereby enforceable in the Syariah Court.

Morocco: No because the mediated agreement concluded in our country is placed in a conventional and not judicial context.*

UK: Yes. See response to #2.

USA: Yes – as long as the court has jurisdiction to hear the case and the court finds the mediated agreement to be in the best interests of the child.

3. a) Is the agreement once approved by or registered with a court treated as a decision of that court?

Australia: Yes. Once a parenting order has been made the mediated agreement is treated as a decision of that court. Parenting orders are legally enforceable but are subject to the terms of a subsequent parenting plan (unless the order provides otherwise). The Family Law Act 1975 (“the Act”) requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

Canada (Riverdale, ONT): Yes.

Canada (Ismaili Conciliation and Arbitration Board, ONT): Yes.

Canada (BC, CA): Yes.

Canada (QUE): Yes.

Canada (ALB): Yes, an agreement with maintenance provisions is treated as an order of the Court for enforcement purposes

Canada (Blitt): Yes. Subject to using the appropriate court order language

France: Yes.

Germany: Yes.

India: Yes.

Jordan: This is subject to the Law Concerning the Execution of Foreign Judgments, whereby it is given the status of enforceability.

Malaysia: Yes for Syariah judicial system. Syariah - Please refer to answers for question 2 and 3

UK: Yes – but it would be known as a court “consent” order suggesting that its terms - albeit sanctioned by the court - were not a product of judicial determination but of the mutual consent of both parties to the dispute in question.

USA: Yes.

3. b) What exact steps are needed to make a mediated agreement into a court order?

Australia: Parents need to complete an “Application for Consent Orders” form. A copy of the kit that can be used to apply for parenting orders can be obtained from the Family Court of Australia’s website (www.familycourt.gov.au).

Canada (Riverdale, ONT): See #3 above.

Canada (Ismaili Conciliation and Arbitration Board, ONT): Through the normal court proceedings, by filing the agreement with the court

Canada (BC, CA): The original agreement must be filed with the court. If the agreement was entered into before July 1, 1995, a signed consent (in the form prescribed by the Provincial or Supreme Court Rules, as applicable) must also accompany the agreement.

Canada (QUE): The parties can request a lawyer to prepare the court procedure. The procedure can also be initiated by the parties themselves.*

Canada (ALB): A maintenance agreement only has to be filed to be enforced as an Order. Other types of provisions in an agreement would have to be put into the form of a Court Order to be treated as a Court Order.

For support, the agreement does not need to be incorporated into an order if it is in the proper form and has been filed with the court

Canada (Blitt): Must have legal proceeding filed with the court – e.g. Divorce, Provincial Court Action.

France: It is the responsibility of the parties to seise jointly the family court judge to this end. The judge, after verification of the protection of the interest of the child, can endorse this agreement by a homologation judgment.*

Germany: Both parties have to file corresponding applications. The court has to confirm the agreement by court order.

India: In a matter pending before Court, the mediated agreement becomes enforceable after it is approved by the Court. This agreement is sent back to the Court for approval.

Jordan: It is subject to the Law Concerning Foreign Agreements signed by the competent authorities in our country and those countries.

Malaysia:

Syariah:

1. If the mediated agreement is a result of the Sulh Council in the Syariah Court, the mediated agreement will be produced to the judge by the Mediation Officer (Sulh Officer) who handles the mediation process, for the purpose of record and endorsement as a court order.
2. However, if the mediated agreement was achieved through other mediation processes such as by the Legal Aid Department or Syariah lawyers who acted on behalf of the parties in dispute, the mediated agreement will be inspected by the Sulh Officer. If the agreed terms and conditions are in line with the existing Syariah laws in Malaysia and Islamic principles, the mediated agreement will be produced before the judge for the purpose of record and endorsement as a court order.
3. If the agreed terms and conditions are contrary to the existing Syariah laws in Malaysia and Islamic principles, the Sulh Officer will call the parties to discuss the terms and conditions. If the parties come to an agreement which is in line with the existing Syariah laws in Malaysia and Islamic principles, the Sulh Officer will prepare a new agreement and will produce it before the judge to be recorded and endorsed as a court order.
4. If an agreement cannot be achieved, the case will be forwarded before the Court for hearing and trial by the judge.

UK: Active steps by both parties must be taken for a mediation agreement to be made enforceable, otherwise it will lack any legal effect. Please refer to our response to Question 2 with regard to the exact steps

USA: File a consent motion for a custody hearing in the court that has jurisdiction over the custody case. The judge will ask the parties if they understand the agreement and enter into it knowingly and voluntarily and, if there are no provisions that violate the law or that are contrary to the best interests of the child, the judge will generally approve the agreement and turn it into an enforceable court order

3. c) Which court would be competent?

Australia: The Act confers jurisdiction on the Family Court of Australia, the Federal Magistrates Court, State Family Courts (currently only the Family Court of Western Australia), State and Territory courts exercising summary jurisdiction and State and Territory Supreme Courts.

Canada (Riverdale, ONT): Provincial Division and Superior Court, including Superior Court Family Court branch.

Canada (Ismaili Conciliation and Arbitration Board, ONT): Ontario Court of Justice or the Family Court

Canada (BC, CA): British Columbia Provincial Court and/or British Columbia Supreme Court

Canada (QUE): *Cour Supérieure du Québec*

Canada (ALB): With regard to a filed maintenance agreement, the Court of Queen's Bench. However, an application for an Order can be made in either the Provincial Court or the Court of Queen's Bench.

Canada (Blitt): Queen's Bench of Alberta and Provincial Court of Alberta

France: In France, the competent judge is the family court judge of the *Tribunal de grande instance* within whose jurisdiction the child is habitually resident.*

Germany: Regularly the local court at the residence of the child; if it is a Hague or a Brussels IIa case, the specialized court at the place of the competent court of appeal is competent.

India: The Referral Court.

Jordan: The Regular Court.

Malaysia: Syariah - For Muslims, the Syariah Court will be the competent court.

UK: Court competence to make "consent" orders reflects the position with regard to court powers to hear certain cases. For instance, the Family Proceedings Courts may be approached to convert an agreement over child contact and/or residence into a court "consent" order, but may not do so with regard to proceedings to make financial arrangements following relationship breakdown as it has no powers to hear such cases.

The County Courts and the High Court may deal with mediation agreements over child contact / residence / maintenance, and over financial arrangements on divorce, separation and annulment as these courts have powers to hear all types of

family dispute. However, all such disputes that are connected to the dissolution of a civil partnership (a civil partnership is a registration process open to same-sex couples to formalise their relationship) may only be heard by the Principal Registry of the Family Division of the High Court, and an additional nine County Courts. Similarly, only those designated courts may be approached to convert into "consent" orders any mediation agreements that relate to the dissolution of a civil partnership.

USA: the state court that has jurisdiction over the custody case. Generally, where there has been no court case, the court of the state where the child has lived in the last 6 months would have proper jurisdiction. If there was already a US custody order in place, the court that issued that custody order would retain jurisdiction as long as one of the parties or the child still lives in that state

3. d) What are the costs for having a mediated agreement made into a court order in your country?

Australia: There are no fees imposed by the Courts for the making of parenting orders. If parties engage lawyers to assist them with the drafting of the parenting orders then they are personally responsible for those costs.

Canada (Riverdale, ONT): An action / proceeding must be commenced; there are the court / filing fees plus legal fees to draft pleadings and file agreement with court, and / or to draft the order / judgement incorporating the agreement. Cost at least \$1500-\$2000.

Canada (Ismaili Conciliation and Arbitration Board, ONT): Normal court proceeding costs

Canada (BC, CA): No cost in Provincial Court; filing fee of \$31.00 in Supreme Court.

Canada (QUE): This depends on the lawyer; for filing an agreement, the costs are usually between 1,000 and 1,500 USD.*

Canada (ALB): There would be a fee of \$25 for filing an agreement. If an application is made to have the Court grant an Order incorporating the terms of an agreement, an action would have to be commenced and the regular filing fees would apply. (For divorce proceedings the cost is \$210; for Family Law Act proceedings, if it a matter over which the Courts have concurrent jurisdiction, there is no filing fee. If it is a matter that only the Court of Queen's Bench has jurisdiction over, the filing fee is \$200.

Canada (Blitt): Would depend on the hourly rate of the lawyer or tariff if it is a legal matter.

France: The Family Court Judge can be seised by simple joint application of the parties, which is free of charge, unless the parties decide to be assisted by a lawyer.*

Germany: Court costs depend on the value of the claim. *E.g.*, in child custody or contact cases the costs are 44,50 Euros.

India: No additional expenses are involved. As in the case of all settlements the Court is likely to pass orders in terms of the Settlement.

Jordan: The agreement is free of any cost. As for the judgment that is issued by the court, it is subject to the applicable law concerning fees.

Malaysia:Syariah:

1. If the parties in dispute do not engage any Syariah lawyers in their case, the parties would only have to pay the registration fees. The fees depend on which State in Malaysia that the parties had filed their case. In average, the cost is normally in the region of RM10 to RM100.
2. However, if the parties engage Syariah lawyers for their cases, the parties will have to pay the lawyer's fees.

UK: We are unable to offer precise figures as solicitors' fees do vary. The court application fee for a consent order is in the region of £40. In other cases where proceedings have been issued but a "consent" order has been proposed by the parties to the court at least 14 days before the hearing date, no additional fee is payable for the "consent" order further to the initial fee which was paid when proceedings were issued.

USA: There would be a minimal filing fee. If the party uses a lawyer to help them file, they would pay for those fees.

4. Are there any other method(s) by which a mediated agreement can be rendered enforceable in your country (e.g., by being notarised)

Australia: No.

Canada (Riverdale, ONT): None that I am aware of.

Canada (Ismaili Conciliation and Arbitration Board, ONT): None.

Canada (BC, CA): No.

Canada (QUE): None that I am aware of.*

Canada (ALB): No.

Canada (Blitt): No Response.

France: No. A notary cannot make enforceable an agreement relating to the exercise of parental authority.*

Germany: At present: in contact and custody cases no. Enforceability will be improved by implementation of the EU-directive on mediation by 05/2011. In other cases notarisation is possible.

India: In case of a pre mediation litigation the provisions of the Arbitration and Conciliation Act, 1996 are invoked and a Conciliation agreement is drawn up.

Jordan: If it is brought before the Parliament, and approved by it, it is thereafter given full force and effect.

Malaysia: No other method(s) by which a mediated agreement can be rendered enforceable in your country for both Civil and Syariah Judicial System.

Morocco: No.

UK: It is possible for parties not to opt for a court "consent" order, and to seek to give their agreement legal effect by asking their legal advisors to draft a legally binding document of a contractual nature. Please refer to our response to Question 2.

USA: No.

4. a) What are the possible costs for this other method(s)?

Australia: N/A

Canada (Riverdale, ONT): N/A

Canada (Ismaili Conciliation and Arbitration Board, ONT): N/A

Canada (BC, CA): N/A

Canada (QUE): No Response.

Canada (ALB): N/A

Canada (Blitt): No Response.

France: N/A

Germany: Costs depend on the value of the claim. A notarisation *e.g.* of a mediated contact case would cost less than 100 €.

India: The Mediation Centre charges Rs.10,000/- towards costs at the initial stage. Thereafter, Rs.500/- is charged for every sitting and Rs.10,000/- towards the mediator's honorarium. The agreements are typed on Rs.100/- stamp paper.

Jordan: No response.

Malaysia: N/A

UK: Again, costs do vary as these depend on the fees that the legal advisors of the parties charge.

USA: No response.

5. Can agreements mediated in another country in a family dispute involving children be approved by a court or otherwise formalised in your country?

Australia: Yes. An agreement mediated in another country in a family dispute involving children could be approved by an Australian court as a parenting order. Only a court can document a parenting order.

Canada (Riverdale, ONT): Yes

Canada (Ismaili Conciliation and Arbitration Board, ONT): Child support mediated in another country can be formalised/registered and enforced in Canada

Canada (BC, CA): Yes.

Canada (QUE): No.

Canada (ALB): Only by the court granting an order that includes the mediated terms. For support, agreements that are enforceable in other jurisdictions will be enforceable in Alberta.

Canada (Blitt): Yes.

France: Yes. If the parents decide to seise the judge for the homologation of the mediated agreement*

Germany: Yes, approved by a court.

India: Yes. Only if they are presented in Court by filing appropriate proceedings and the Court approves the same.

Jordan: Yes, it is given force and effect, and reciprocity, in accordance with the Law Concerning the Execution of Foreign Judgments.

Malaysia: No for the Civil Judicial System; **yes** for Syariah Judicial System (Please refer to the answers for question Nos 6 and 3.b))

Morocco: Yes. According to Article 432 of the Code for Civil Procedure, foreign acts are entitled to enforcement in Morocco once the *exequatur* has been granted.*

UK: Yes. We understand that you may be receiving a separate submission from "Reunite" who we believe is better placed to respond to this question.

USA: Yes. If the agreement was approved by a judge in the foreign country in a proceeding that substantially complied with US notions of due process (notice and opportunity to be heard by both parties) and is now a court order, the parties would follow the steps described in 6 below to register the foreign judgement for enforcement. The foreign court order could also be directly enforced (which is quicker than registration, but is subject to defences that are not available for a registered order). If the agreement was not formalized into an order in the foreign country, the parties would have to follow the steps described in 3(b) with the appropriate US court.

5. a) If so, will the agreement mediated abroad be treated exactly as an agreement mediated in your country?

Australia: Yes. Once the agreement mediated in another country has been detailed in either a parenting order or a parenting plan it will be treated exactly as an agreement mediated in Australia which has been documented in the same way.

Canada (Riverdale, ONT): No response.

Canada (Ismaili Conciliation and Arbitration Board, ONT): Yes.

Canada (BC, CA): Yes.

Canada (QUE): No Response.

Canada (ALB): Not applicable for most family issues. For support, yes, the agreement from abroad will be treated as an agreement from Alberta. The criteria for Alberta (in the proper form) is not necessary for foreign agreements. The only requirement is that the agreement be enforceable in the foreign jurisdiction (and that Alberta have reciprocity with that jurisdiction).

Canada (Blitt): Would depend upon the language used, whether it conforms to our legal approach and manner it was signed.

France: Yes. If the agreement is homologated by the judge.*

Germany: Yes.

India: No.

Jordan: No.

Malaysia: No for the Civil Judicial System; **yes** for Syariah Judicial System

Morocco: Yes.

UK: Possibly - please refer to our response to Question 5.

USA: Yes.

6. In what circumstances, if any, can an agreement which has been approved by or registered with a court abroad, be recognised and enforced in your country?

Australia: An overseas child order can be registered by a competent Australian court. An overseas child order is defined as being an order from a prescribed overseas jurisdiction (a list of which is at Appendix 2) or an order made for the purposes of the Convention on the Civil Aspects of International Child Abduction by a judicial or administrative authority of a convention country. To enable such orders to be registered the following documents must accompany a request for registration:

1. A certified copy of an overseas child order that was made in that jurisdiction; and
2. A certificate of enforceability. Our court relies on the certificate as proof that the order for which registration is sought has not been modified or discharged in the jurisdiction in which it was made.

Canada (Riverdale, ONT): No response.

Canada (BC, CA): The agreement would first have to be incorporated into a court order, either in BC or the other country. If incorporated into the other country's order, that order must be recognized by a court in BC unless certain conditions were

not met, e.g., the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made.

Canada (QUE): No Response.

Canada (ALB): See above. If by registering it, the agreement was treated as a court order in the original jurisdiction

Canada (Blitt): If it relates to custody, access, child / spousal support, and the party seeking to enforce has a "real and substantial" connection to our jurisdiction.

France: Such foreign judgment is recognised in France without any further formality. To be enforceable, it has to be granted with an *exequatur* by the competent French court. Except for the application of international conventions, the French courts grant *exequatur* under three conditions:

- the indirect international jurisdiction of the seised foreign judge based on a connection between that judge and the dispute,
- conformity with international public policy,
- absence of fraud in law.*

Germany: Such agreements regularly cannot be recognised or enforced in Germany. This is only done in practice if both parties can prove that all relevant safeguards have been respected in the proceeding abroad. Then the German court may establish a German court order on the basis of the agreement without establishing the facts on its own. Beside this, if the agreement falls within the scope of the Brussels-II-bis Regulation. Article 46 states that such agreements are treated like court decisions coming from other EU Member States and thus can be recognised and enforced in Germany.

India: An agreement approved by the Court abroad will have the same force as a decree / order of a country having reciprocating treaty / agreement.

Jordan: Legally, if a foreign judgment is issued, it is subject to the Law Concerning the Execution of Foreign Judgments. As for the agreement, it may be executed upon the consent of the parties.

Malaysia:

Civil: An agreement can be recognised and enforced if there is a specific provision under a specific law such as under the Malaysian Reciprocal Enforcement of Judgements Act 1958.

Syariah: An agreement which has been approved by or registered with a court abroad can be recognised and enforced in the Syariah court in Malaysia if both parties are Muslims and one of the parties is living or a resident of any State in Malaysia. In this regard, the agreement has to be produced before a Sulh Officer by filing a new case in the Syariah Court. Several procedures would also have to be followed by parties. (Please refer to the answer for question 3(b) regarding the exact steps required to make a mediated agreement into a court order).

Morocco: The seized court shall ensure the regularity of the act. It also verifies that no stipulation of that decision is contrary to Moroccan public policy.*

UK: It is possible for this to happen if the mediation agreement has been converted into a court order. It would then be a matter of recognition of a foreign judgment that would be subject to the UK's "Conflict of Laws" rules (i.e., private international law rules). Different regimes of Conflict of Laws rules apply according to the originating country (where the judgment was made) and the content of that judgment.

USA: In almost all states, the foreign court order could be registered for enforcement under the UCCJEA if the foreign court proceeding substantially conformed to US standards of due process (both parties got notice and an opportunity to be heard) and the order had not been modified or amended. The foreign court orders can also be directly enforced (but not modified) in a US court, but the orders are open to defences that are not available to a registered order.

7. What specific measures are available in your country for enforcing an agreement on child custody or contact?

Australia: A mediated agreement that has been formalised in a parenting order is enforceable in an Australian family law court if the court finds that a party has failed to comply with the order without reasonable excuse. Depending on the circumstances of the case and the seriousness of any breach, a court may make one or more of the following orders:

- (a) a variation suspension or discharge of the original order
- (b) attendance at a post-separation parenting program
- (c) compensation for time lost with a child as a result of the contravention
- (d) compensation for reasonable expenses incurred as result of the contravention
- (e) payment of all or some of the legal costs of another party
- (f) the entering into of a bond (with or without surety or security)
- (g) participation in community service
- (h) imposition of a fine
- (i) imposition of a suspended sentence or a sentence of imprisonment (as a last resort)

Where a contravention is not found – a family law court may order the person who brought proceedings pay all or some of the legal costs of the other party or parties. A mediated agreement set out in a parenting plan is not legally enforceable. However, the court must have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

Canada (Riverdale, ONT): No response.

Canada (Ismaili Conciliation and Arbitration Board, ONT): Through court proceedings and Family Responsibility Office (FRO) for child support in Ontario

Canada (BC, CA):

1. the police may assist in enforcing a custody or access order by, for example, apprehending a child and bringing the child to the person entitled to custody or access;
2. a person who interferes with the custody or access of a child contrary to a court order can be charged with an offence;
3. a restraining order may be made against someone who interferes with custody granted under an order or an agreement;
4. the court can make orders in relation to custody and access including, for example, defining access very specifically;
5. a person who defies a court order for custody or access can be charged with contempt of court

Canada (QUE): No Response.

Canada (ALB): Generally, none.

Canada (Blitt): Court application.

France: In practice, the implementation of the mediated agreement does not cause any difficulties, since it is the result of the joint will of the parties. Once the agreement has been homologated, its enforcement is subject to general law. According to Article 18 of the Law of 9 July 1991 on the Reform of Civil Enforcement Procedures, "only the judicial officers being in charge of the enforcement can force execution [...]". Article 17 stipulates that this judicial officer "can request the support of the police force".*

Germany: Administrative fine, arrest, direct force (not in contact cases)

India: The Court has to be moved by an application for enforcement of the agreement. The Court then passes appropriate orders thereon.

Jordan: This is presented to the executive branch, which in turn presents it to the legislative branch, "the Parliament" for either approval or denial. In this regard, assistance is sought from civil society institutions, such as the Lawyers' Syndicate, the Jordanian Women's Association, or Childhood Care Institutions, etc.

Malaysia:

Civil: None.

Syariah: For a Muslim, the terms and conditions in the agreement on child custody or contact must be in line with the existing Syariah laws in Malaysia and Islamic Law. An agreement on child custody and contact can only be enforced after the agreement is recorded and endorsed by the Syariah court. In this regard, if any party fails to comply with the order without reasonable excuse, the court may, on the application of the aggrieved party, make one or more of the following orders:

- (a) Enforcement of judgment to do an act;
- (b) Vary an order; or
- (c) Notice to show cause / contempt of court.

Morocco: There are no specific enforcement measures in our country to enforce agreements relating to child custody.*

UK: A mediation agreement that has been converted into a court “consent” order may be enforced by the courts. It would be open to the party who seeks to rely on the order to approach the court to either vary or to enforce the terms of that order. It is possible to apply to the court for an enforcement order requiring the person who has failed to comply with the contact order to carry out unpaid work. It is also possible to apply for financial compensation for losses incurred as a result of the failure to comply with the contact order (for example the cost of a holiday which was lost). It also remains open to the court to treat noncompliance with a contact order as a contempt of court, punishable by a fine or imprisonment. The use of both of these remedies, however, is most infrequent as the impact of these would often be held to be contrary to the welfare of the child concerned.

USA: If the agreement is made into a court order, then the same enforcement mechanisms are available for that order as any court order – including findings of contempt of court, fines, jail time, and restrictions on visitation or custodial rights (supervised visits, etc). The UCCJEA (which has been adopted by almost all states in the U.S.) provides for expedited enforcement mechanisms for foreign and domestic custody orders. If the agreement is not merged into a court order, then the parties do not have the remedies listed above. They may have remedies under contract law, but it is frankly unclear how a custody agreement would be enforced under contract law.

Experts' Group on Recognition and Enforcement of Voluntary Cross-Border Agreements

12-14 December 2013



BACKGROUND NOTE ON RECOGNITION AND ENFORCEMENT OF VOLUNTARY CROSS-BORDER AGREEMENTS

ANNEX IV

[Report of the further work recommended by the Special Commission on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention](#) – *Preliminary Document No 12 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference*

(also available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "General Affairs")

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ANNEX V

[Guide to Part II of the Sixth Meeting of the Special Commission and consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions](#) – *Preliminary Document No 13 of December 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*

(also available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "Child Abduction")