

**Council on General Affairs and Policy – March 2020**

<b>Document</b>	Preliminary Document <input type="checkbox"/> Information Document <input checked="" type="checkbox"/>	Info. Doc. 2 of January 2020
<b>Title</b>	Overview of the findings of the Experts' Group on cross-border recognition and enforcement of agreements in family matters involving children in relation to the development of a normative instrument	
<b>Author</b>	Permanent Bureau, in consultation with the Chair of the Experts' Group	
<b>Agenda item</b>	Item III-3	
<b>Mandate(s)</b>	N/A	
<b>Objective</b>	To summarise the findings of the Experts' Group in relation to the development of a normative instrument	
<b>Action to be taken</b>	For Approval <input type="checkbox"/> For Decision <input type="checkbox"/> For Information <input checked="" type="checkbox"/>	
<b>Annexes</b>	<p>Annex I 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</p> <p>Annex II Report of the Experts' Group meeting on cross-border recognition and enforcement of agreements in family matters involving children (The Hague, 2-4 November 2015)</p> <p>Annex III Conclusions and Recommendations of the Experts' Group meeting of 14 to 16 June 2017 for the attention of the Council on General Affairs and Policy of March 2018</p> <p>Annex IV Conclusions and Recommendations of the meeting of 28-29 June 2018 for the attention of the Council on General Affairs and Policy of March 2019, Meeting of the Experts' Group on cross-border recognition and enforcement of agreements in family matters involving children (The Hague, 28-29 June 2018)</p>	
<b>Related documents</b>	Prel. Doc. No 4 of January 2019 for the attention of the 2019 meeting of CGAP	

## Introduction

1. This document summarises the findings made so far by the Experts' Group on cross-border recognition and enforcement of agreements in family matters involving children ("the Experts' Group") in relation to the development of a binding instrument.

2. The information presented in this document builds on reports of past meetings of the Experts' Group, as well as Conclusions and Recommendations adopted by the Experts' Group in the course of its meetings. Where formal reports of past meetings are unavailable, this document relies on notes taken by the Permanent Bureau. The reports of these past meetings, as well as the Conclusions and Recommendations adopted by the Experts' Group, are annexed to this document.

3. The Council on General Affairs and Policy ("CGAP") established the Experts' Group at its 2012 meeting, with the following mandate:

"The Council also 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."<sup>1</sup>

4. The Experts' Group held a total of four meetings to date. These took place in November 2013, December 2015, June 2017 and June 2018.<sup>2</sup>

5. In the course of these four meetings, the Experts' Group explored the need for an instrument relating to the cross-border recognition and enforcement of agreements in family matters involving children, whether or not such instrument is binding.

6. The Experts' Group considered the development of a non-binding instrument in the form of a Practical Guide, or Navigation Tool. This Navigation Tool would assist readers in the practical use of the HCCH 1980 Child Abduction, HCCH 1996 Child Protection, and HCCH 2007 Child Support Conventions in relation to agreements in family matters involving children. Following the recommendations of the Experts' Group, at its 2016 meeting CGAP tasked the Permanent Bureau, in consultation with the Experts' Group:

"to develop a non-binding 'navigation tool' to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign State under the 1980, 1996 and 2007 Hague Conventions".<sup>3</sup>

7. A draft Practical Guide on cross-border recognition and enforcement of agreements reached in the course of family matters involving children ("draft Practical Guide") was put to the Members of the HCCH for approval at the 2019 meeting of CGAP. In the light of reservations expressed by some

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<sup>1</sup> See "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (17-20 April 2012)", C&R No 7, available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under "Governance" then "Council on General Affairs and Policy".

<sup>2</sup> See for further details on the work undertaken by the Experts' Group the "Report of the Experts' Group meeting on cross-border recognition and enforcement of agreements in family matters involving children (The Hague, 2-4 November 2015)", Prel. Doc. No 5 of January 2016 for the attention of the Council of March 2016 on General Affairs and Policy of the Conference (attached to this document (minus its annexes) as Annex II and available on the HCCH website (see path indicated in note 1) (hereinafter, "Report of the 2015 Experts' Group Meeting") and the "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", Prel. Doc. No 5 of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference (attached to this document (minus its annexes) as Annex I and available on the HCCH website (see path indicated in note 1) (hereinafter, "Report of the 2013 Experts' Group Meeting").

<sup>3</sup> See "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (15-17 March 2016)", C&R No 17, available on the HCCH website (see path indicated in note 1).

delegations, it was decided to recirculate the draft Practical Guide to allow Members to provide additional comments. On the basis of comments received, the draft Practical Guide is currently being revised with a view, in particular, to increasing its readability for a wider audience. Upon finalisation, the Guide will be put to CGAP for final approval.<sup>4</sup>

8. Following on the initial mandate of the Experts' Group, this current document will focus on the findings made by the Experts' Group in relation to the desirability (I) and the feasibility (II) of the development of a new *binding instrument*.

### **I. Findings of the Experts' Group in relation to the need for a new binding instrument**

9. The discussions of the Experts' Group regarding the need for a new binding instrument must be seen in the light of three issues:

- a. First, the increased mobility of families and children across borders;
- b. Secondly, the increased settlement of family matters and disputes through agreements between the parties; and
- c. Thirdly, the practical and legal challenges concerning the recognition and enforcement of voluntary agreements across borders as, although the existing HCCH 1980 Child Abduction, HCCH 1996 Child Protection, and HCCH 2007 Child Support Conventions promote amicable settlements, the first two of these Conventions do not provide comprehensive and easily practicable solutions for making these settlements enforceable across borders and the third Convention only covers the maintenance elements of such voluntary agreements.

Against the background of these three issues, the Experts' Group considered the purpose of a new binding instrument relating to the cross-border recognition and enforcement of agreements in family matters involving children.

10. First, the Experts' Group noted the increase in cross-border movements of families and children in recent decades.<sup>5</sup>

11. Secondly, 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, to decide, for example, on a custody agreement or parenting plan, without intervention of an authority (*e.g.*, court approval or registration)".<sup>6</sup>

12. These two trends, that of increased mobility of families and of increased use of amicable solutions to solve family disputes, have combined to require that voluntary agreements be "portable".<sup>7</sup> This means that, in order for such amicable solutions to be effective, they must be in a form that allows their recognition and enforcement in States other than the State where the agreement was reached.

13. Thirdly, the Experts' Group considered the legal and practical challenges that individuals may encounter when attempting to have a voluntary agreement recognised and enforced abroad and how

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<sup>4</sup> See "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (5-8 March 2019)", C&R No 19, available on the HCCH website (see path indicated in note 1).

<sup>5</sup> See Annex A of the Report of the 2013 Experts' Group Meeting, C&R No 8 (*op. cit.* note 2); see also, Report of the 2015 Experts' Group Meeting at para. 20 (*op. cit.* note 2).

<sup>6</sup> See Report of the 2013 Experts' Group Meeting at para. 15 (*op. cit.* note 2).

<sup>7</sup> See Annex A of the Report of the 2013 Experts' Group Meeting, C&R No 8 (*op. cit.* note 2).

a binding instrument in the area could assist in overcoming these challenges. Specific challenges that the Experts' Group identified were:

- a. The issue of "package agreements": At its first meeting in 2013, 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".<sup>8</sup>
- b. Lack of legal certainty: The Experts' Group further acknowledged that this results in a lack of predictability and legal certainty for parties and "may lead to cumbersome and more expensive legal proceedings to render the agreement binding in a foreign State."<sup>9</sup> Indeed, the responses to the questionnaire prepared by the Experts' Group showed that there was legal uncertainty amongst governments about the current legal framework for making family agreements effective across borders.
- c. Fragmentation of private international law rules: Experts also noted that the recent evolution of private international law in relation to children and families "has led to an increase in the applicability of international Conventions and EU Regulations on very specific matters."<sup>10</sup> The fragmentation of private international law rules across multiple instruments has contributed to making the legal landscape in the area of recognition and enforcement of voluntary agreements extremely complex.

These three complexities have arisen in particular in the context of abduction and relocation cases, as observed by the 2011 Special Commission reviewing the HCCH 1980 Child Abduction and HCCH 1996 Child Protection Conventions.<sup>11</sup> With respect in particular to international relocation disputes, the Experts' Group noted that voluntary agreements have been increasingly promoted in this area and that agreements concluded in that context often cover a wide spectrum of topics, such as custody, contact with the non-custodial parent and travel and visiting arrangements.<sup>12</sup>

14. Throughout its meetings, the Experts' Group has considered the purpose of a new binding instrument, as well as the means to achieve it. In that light, the Experts' Group has at different times made four recommendations:

- a. **Any new binding instrument should build on and supplement the existing HCCH Conventions.** With respect to the means to achieve the new binding instrument, the Experts' Group noted already at its first meeting that such new instrument

"should not replace or contradict existing international legal instruments, but rather enhance and reinforce the current legal framework, including relevant Hague family law Conventions".<sup>13</sup>

This recommendation was reiterated by the Experts' Group at its second and its third meeting, noting that the binding legal instrument "will build on and supplement the 1980, 1996 and 2007 Hague Conventions".<sup>14</sup> At its third meeting, the Experts' Group

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<sup>8</sup> *Ibid.*, C&R No 6.

<sup>9</sup> See Report of the 2013 Experts' Group Meeting, at para. 57 (*op. cit.* note 2).

<sup>10</sup> *Ibid.*, at para. 20.

<sup>11</sup> See Annex A of the Report of the 2013 Experts' Group Meeting, C&R No7 (*op. cit.* note 2).

<sup>12</sup> See Report of the 2013 Experts' Group Meeting, at para. 54 (*op. cit.* note 2).

<sup>13</sup> See Report of the 2013 Experts' Group Meeting, at para. 68 (*op. cit.* note 2).

<sup>14</sup> See Report of the 2015 Experts' Group Meeting, at para. 32 (*op. cit.* note 2).

recommended that the new instrument “would build on, and add value to, the 1980, 1996 and 2007 Hague Conventions, and be developed with a view to attracting as many States as possible”.<sup>15</sup>

- b. **Any new instrument should aim to provide a “one-stop-shop” for voluntary agreements.** As early as 2013, the Experts’ Group identified the benefits of developing a one-stop-shop with a view to facilitating recognition and enforcement of “package agreements”. Against the background that private international law rules in this area are fragmented, the need for an instrument concentrating venue jurisdiction on one single authority to provide for recognition and enforcement of such agreements was noted by the Experts:

“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”.<sup>16</sup>

- c. **Any new instrument should provide for simple rules for recognition and enforcement.** The Experts noted that a new binding instrument would ideally create rules regulating the making of an agreement enforceable in one Contracting State (the State of origin) as this would facilitate making the rules for recognition and enforcement of such agreements simple in other Contracting States. The Group noted the value of “a simplified and prompt procedure, which may include concentrated jurisdiction, to render a package agreement legally binding and enforceable in one Contracting State and for simple and prompt recognition and enforcement of the decision of that court or authority in other Contracting States”.<sup>17</sup>
- d. **Any new instrument should provide greater party autonomy.** Acknowledging the increasing role of party autonomy in family law, the Experts’ Group further indicated that “parents should be able to confer jurisdiction exclusively on one competent appropriate authority” for the approval of so-called “package agreements”.<sup>18</sup> While acknowledging that the existing HCCH Family Law Conventions already provide for a certain degree of party autonomy,<sup>19</sup> the Experts’ Group noted that the benefits of a new binding instrument should enable “party autonomy by giving parents the possibility of selecting a legal system which has a substantial connection with the child to render the agreement enforceable”.<sup>20</sup>

## II. Initial findings of the Experts’ Group in relation to the feasibility of a binding instrument

15. In line with the mandate given by CGAP at its 2012 meeting, the Experts’ Group has commenced considering the feasibility of developing a binding instrument on the recognition and enforcement of voluntary agreements. While there was early general support among the members of the Experts’

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<sup>15</sup> See “Conclusions and Recommendations of the Experts’ Group meeting of 14 to 16 June 2017 for the attention of the Council on General Affairs and Policy of March 2018”, attached to this document as Annex III and available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under “Projects” then “Legislative Projects” then “Family agreements involving children”.

<sup>16</sup> See Report of the 2013 Experts’ Group Meeting, at para. 67 (*op. cit.* note 2).

<sup>17</sup> *Op. cit.* note 15.

<sup>18</sup> See Report of the 2015 Experts’ Group Meeting, at para. 6 (*op. cit.* note 2).

<sup>19</sup> See for further details on the role of party autonomy under the HCCH Conventions the “Revised draft Practical Guide: Cross-border recognition and enforcement of agreements reached in the course of family matters involving children”, Prel. Doc. No 4 of January 2019 for the attention of the Council of March 2019 on General Affairs and Policy of the Conference (available on the HCCH website (see path indicated in note 1)), Chapter III, at paras 92 *et seq.*

<sup>20</sup> *Op. cit.* note 15.

Group in relation to the feasibility of a new binding instrument,<sup>21</sup> the Experts' Group considered some of the potential issues that would need to be addressed in developing such an instrument.

16. In particular, the Experts' Group gave consideration to the feasibility of concentration of venue jurisdiction (A). The Experts' Group also considered whether the existing HCCH Family Law Conventions would allow for the new instrument to provide for increased party autonomy (B).

#### **A. Concentrated venue jurisdiction**

17. In relation to the issue of concentrated venue jurisdiction, the Experts' Group acknowledged that the idea of a "one-stop-shop" solution that would concentrate venue jurisdiction in one single competent authority to make an agreement enforceable in the State of origin and in one single competent authority for the recognition and enforcement of such agreements may pose some challenges. In particular, in States where maintenance issues are usually dealt with by administrative authorities,<sup>22</sup> having one single authority to deal with "package agreements", which include issues relating to maintenance, may prove difficult but the problems, according to the Experts' Group, are not insuperable given the appropriate political will.

18. The Experts' Group agreed that, in the context of a new instrument that promotes party autonomy and encourages family agreements, it is a policy decision for States to decide whether and, if so, how far they should consider adjusting their present methods of allocating international and venue jurisdiction for custody, access, maintenance, other financial and property arrangements, and for allocating the competent authorities that deal with recognition and enforcement of decisions in relation to these matters, at least for the purposes of applying the new instrument.<sup>23</sup>

#### **B. Party autonomy and the existing HCCH Family Law Conventions**

19. The Experts' Group considered whether the relevant HCCH Family Law Conventions would permit a future instrument to establish greater party autonomy.

##### **1. The HCCH 1980 Child Abduction Convention**

20. Considering whether the HCCH 1980 Child Abduction Convention would allow for a new binding instrument to provide greater party autonomy, the Experts' Group noted that while Article 36 of the Convention "allows one or more Contracting States to agree among themselves to derogate from any provisions of the Convention which may imply a restriction on returning the child", Article 16 of the Convention imposes "restrictions on the jurisdiction of a court hearing a return application to decide on the merits of custody rights until the return is refused under that Convention".<sup>24</sup> Further to Article 16 "the judicial or administrative authorities of 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".

21. In cases where parents have agreed to the return of the child to the State of habitual residence, a future instrument that would facilitate recognition and enforcement of a voluntary agreement would be consistent with Article 36 of the Convention. In cases where parents have agreed that the child will remain in the State to which he / she was taken, Article 36 does not provide a solution. However, there is no inconsistency with the HCCH 1980 Child Abduction Convention because in these cases, it would have been determined that a child is not to be returned, so that the prohibition on deciding on the merits of the case provided for in Article 16 no longer applies. The Experts' Group agreed that the

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<sup>21</sup> See Annex A of the Report of the 2013 Experts' Group Meeting, C&R No 13 (*op. cit.* note 2).

<sup>22</sup> See Report of the 2015 Experts' Group Meeting, at para. 27 (*op. cit.* note 2).

<sup>23</sup> See Report of the 2015 Experts' Group Meeting, at para. 28 (*op. cit.* note 2).

<sup>24</sup> See Report of the 2015 Experts' Group Meeting, at para. 8 (*op. cit.* note 2).

“literal, systematic and teleological interpretation of Article 16” should not prevent the court from approving a non-return agreement as this Article

“aims to avoid the misuse of custody proceedings by the taking parent in the State to which the child was taken...[Therefore, w]here the court seized with the Hague return proceedings ends the proceedings by approving a parental agreement on non-return, this is a correct use of the 1980 Convention and not a circumvention of it”.<sup>25</sup>

## 2. The HCCH 1996 Child Protection Convention

22. In relation to the HCCH 1996 Child Protection Convention, the Experts’ Group noted that this Convention “does not affect the possibility of one or more Contracting Parties through its Article 52 [utilising] the possibility of one or more Contracting States concluding agreements which contain provisions on matters governed by that Convention”.<sup>26</sup> Therefore, the limited party autonomy in the 1996 Convention can be extended by a new HCCH Convention. In policy terms the 1996 Convention already allows a transfer of jurisdiction to any court that has a “substantial connection” with the child. That phraseology inspired the Experts’ Group’s recommendation in 14(d) above.

## 3. The HCCH 2007 Child Support Convention

23. The Experts noted that the HCCH 2007 Child Support Convention does not create positive rules of direct jurisdiction but is not negative about party autonomy for maintenance agreements between spouses. The Experts’ Group highlighted the following excerpts from the Practical Guide as particularly relevant in that respect:

“111. The Convention text indicates furthermore in a couple of instances, the readiness to accept party autonomy concerning jurisdiction. Given the fact that the States negotiating the Convention could not agree on a set of direct rules on jurisdiction, the option of a choice of court may not be visible at first glance. However, both, the negative rules of jurisdiction in Article 18 and the indirect rules of jurisdiction in Article 20 contain a reference to 'agreement on jurisdiction'. This kind of agreement is expressly not envisaged for maintenance obligations in respect of children.”<sup>27</sup>

24. The Experts’ Group noted that the HCCH 2007 Child Support Convention provides in Article 30 for a generous system of recognition and enforcement of “maintenance arrangements”, as defined in Article 3(e). Such maintenance arrangements can concern child support as well as spousal support and any other maintenance to which the Convention is extended by its Contracting States. However, it is possible for States to enter a reservation not to recognise and enforce a maintenance arrangement (see Art. 30(8)). Maintenance arrangements that are enforceable in one Contracting State are enforceable in other Contracting States subject only to limited exceptions on public policy, fraud and conflicting with a maintenance decision (Art. 30(1) and (4)). The maintenance arrangement has to be in writing. In order to be enforceable in the original Contracting State and therefore to be eligible for circulation in other Contracting States it must meet one of two conditions – (a) be an authentic instrument drawn up or registered by a competent authority; or (b) have been authenticated by, or concluded, registered or filed with a competent authority – and be the subject of review and modification by a competent authority.<sup>28</sup>

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<sup>25</sup> See “Revised draft Practical Guide: Cross-border recognition and enforcement of agreements reached in the course of family matters involving children”, Prel. Doc. No 4 of January 2019 for the attention of the Council on General Affairs and Policy (hereinafter “Revised draft Practical Guide”) (available on the HCCH website (see path indicated in note 1)), at para. 167. See also “Explanatory Report on the 1980 Hague Child Abduction Convention”, in *Actes et documents de la Quatorzième session* (1980), Tome III, Child abduction, The Hague, Imprimerie Nationale, 1982, at para. 121.

<sup>26</sup> See Report of the 2015 Experts’ Group Meeting, at para. 8 (*op. cit.* note 2).

<sup>27</sup> *Ibid.*, at para. 111.

<sup>28</sup> See Revised draft Practical Guide, at paras 105 *et seq* (*op. cit.* note 25).

25. The opinion of the Experts' Group is that the system of recognition and enforcement of maintenance arrangements in the HCCH 2007 Child Support Convention can provide inspiration for a new HCCH Convention that would allow such arrangements to cover other subject matters, notably parental responsibility and property, hopefully without any reservations. Nothing in the 2007 HCCH Child Support Convention prevents the HCCH from concluding a new Convention that would, if the negotiators decided to do so by consensus, extend the scope of maintenance arrangements to other subject matters. Such a framework would create a one-stop-shop for the review and modification by a competent authority of such widened arrangements, as well as another one-stop-shop for the recognition and enforcement of such widened arrangements in other Contracting States. A new Convention could also make other improvements that are consistent with the objects and purpose of the Convention and protect the application of the 2007 Convention for those States that do not choose to become a Party to the new Convention (see Arts 51 and 52 of the 2007 Convention).

### **Conclusion**

26. At its last meeting in June 2018, the Experts' Group acknowledged that there was some hesitancy from certain Members of the HCCH regarding the development of a binding instrument. The Experts considered the need for additional research with a view to gaining a more in-depth assessment of the benefits of a binding instrument and to conclude its work on its feasibility. Against this background, the Experts' Group made the following recommendations for the attention of the 2019 meeting of CGAP:

- “2. The Experts' Group recommends that the Project of cross-border recognition and enforcement of agreements in family matters involving children be kept on the work programme of the Hague Conference and that the Permanent Bureau continue to monitor developments in this area, including the impact of the Practical Guide. The Experts' Group is willing to assist, without cost implications for the Organisation, the Permanent Bureau in its monitoring role until further steps have been decided by Council. The Permanent Bureau would consult with the members of the Experts' Group, at least once a year, through video and telephone conference.
3. Finally, the Experts' Group recommends that the Permanent Bureau explore with the members of the Experts' Group the possibility of applying for funded research to investigate further the problems and good practice associated with enabling cross-border family agreements to be made enforceable in different legal systems. In the light of the research findings the Experts' Group will consider whether to uphold its recommendation to develop a binding legislative instrument.”<sup>29</sup>

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<sup>29</sup> See “Conclusions and Recommendations of the meeting of 28-29 June 2018 for the attention of the Council on General Affairs and Policy of March 2019”, Meeting of the Experts' Group on cross-border recognition and enforcement of agreements in family matters involving children (The Hague, 28-29 June 2018), attached to this document as Annex IV and available on the HCCH website (see path indicated in note 15).



## **ANNEXES**

## **ANNEX I**

**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*

## 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."<sup>1</sup> 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".<sup>2</sup>

2. In accordance with this mandate, a meeting of the Experts' Group on Cross-Border Recognition and Enforcement of Agreements (the "Experts' Group")<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

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\* 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.

<sup>1</sup> 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".

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

<sup>3</sup> 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.

<sup>4</sup> 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.

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

<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> The decision of the Council of 2012 to establish an Experts' Group represents therefore a significant step forward to advance on this matter.

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<sup>7</sup> 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](http://www.hcch.net) > (path indicated in note 2).

<sup>8</sup> *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".

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

<sup>10</sup> *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,<sup>11</sup> 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,<sup>12</sup> to decide, for example, on a custody agreement or parenting plan, without intervention of an authority (*e.g.*, court approval or registration).<sup>13</sup>

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.<sup>14</sup>

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<sup>11</sup> See C&R No 3 (Annex A).

<sup>12</sup> *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).

<sup>13</sup> See C&R No 3 (Annex A).

<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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 stakeholders<sup>18</sup> 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.<sup>19</sup> Due to the increased mobility of families, these "package agreements" should be "portable" to foreign jurisdictions.<sup>20</sup> 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;

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<sup>15</sup> 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.

<sup>16</sup> See C&R No 4 (Annex A).

<sup>17</sup> See C&R No 2 (*ibid.*).

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

<sup>19</sup> See C&R No 6 (Annex A).

<sup>20</sup> 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".<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup>

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

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

<sup>22</sup> See C&R No 13 (Annex A).

<sup>23</sup> 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 scope<sup>24</sup>), 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.<sup>25</sup>

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.<sup>26</sup>

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.

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

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

<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

(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.<sup>29</sup> 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

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<sup>27</sup> 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 [...]."

<sup>28</sup> 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.

<sup>29</sup> 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.<sup>30</sup>

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"<sup>31</sup> under the 1996 Convention (e.g., on custody and contact), their agreement can, for example, be incorporated into a court order<sup>32</sup> and will be recognised by operation of law in all Contracting States.<sup>33</sup> Parties may obtain a declaration of enforceability or register their order to effectuate the actual enforcement of the agreement's terms.<sup>34</sup>

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<sup>30</sup> 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.

<sup>31</sup> Art. 3 of the 1996 Convention.

<sup>32</sup> 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).

<sup>33</sup> Art. 23 of the 1996 Convention.

<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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,<sup>38</sup> financial provision post-divorce, maintenance, travel costs, passport and visa issues.<sup>39</sup>

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.<sup>40</sup> 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.

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<sup>35</sup> 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.

<sup>36</sup> For transfer of jurisdiction, see Arts 8 and 9 of the 1996 Convention.

<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> See Art. 4 of the 1996 Convention.

<sup>40</sup> 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.<sup>41</sup>

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 maintenance<sup>42</sup> 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 met<sup>43</sup>): (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.<sup>44</sup> It is therefore possible that in a specific case no legal framework is applicable to resolve *all* matters of jurisdiction, recognition and enforcement.<sup>45</sup> A "partial"

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<sup>41</sup> 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).

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> 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.

<sup>45</sup> 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.<sup>46</sup>

54. This problem may well occur in **international relocation** cases where amicable solutions between parents are increasingly promoted.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup>

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<sup>46</sup> See in this regard *supra*, para 40.

<sup>47</sup> 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).

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

<sup>49</sup> See C&R No 8 (Annex A).

<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup>

## **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.

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<sup>51</sup> See C&R No 8 (*ibid.*).

<sup>52</sup> See C&R No 10 (*ibid.*).

67. The Experts' Group found that parents and other involved stakeholders<sup>53</sup> 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".<sup>54</sup>

68. Any new instrument should not replace or contradict existing international legal instruments, but rather enhance and reinforce the current legal framework,<sup>55</sup> 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.**

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<sup>53</sup> See *supra*, note 18.

<sup>54</sup> See C&R No 12 (Annex A).

<sup>55</sup> See C&R No 13 (*ibid.*).



## **ANNEX II**

**REPORT OF THE EXPERTS' GROUP MEETING ON CROSS-BORDER RECOGNITION AND  
ENFORCEMENT OF AGREEMENTS IN FAMILY MATTERS INVOLVING CHILDREN**

**(THE HAGUE, 2-4 NOVEMBER 2015)**

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**RAPPORT DU GROUPE D'EXPERTS RELATIF À LA RECONNAISSANCE ET À L'EXÉCUTION  
TRANSFRONTIÈRES DES ACCORDS EN MATIÈRE FAMILIALE IMPLIQUANT DES ENFANTS**

**(LA HAYE, DU 2 AU 4 NOVEMBRE 2015)**

*Preliminary Document No 5 of January 2016 for the attention  
of the Council of March 2016 on General Affairs and Policy of the Conference*

*Document préliminaire No 5 de janvier 2016 à l'attention  
du Conseil de mars 2016 sur les affaires générales et la politique de la Conférence*

**Experts' Group on Cross-border recognition and enforcement of agreements in family matters involving children**

**2-4 November 2015**



**Report of the Experts' Group meeting on cross-border recognition and enforcement of agreements in family matters involving children**

**(The Hague, 2-4 November 2015)**

***Introduction***

1. The Council on General Affairs and Policy of the Conference (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.<sup>[1]</sup> 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".<sup>2</sup> In accordance with this mandate, the Experts' Group met from 12 to 14 December 2013 under the chairmanship of Ms Katharina Boele-Woelki, at that time Professor at the University of Utrecht.<sup>3</sup>

2. In 2014, the Council invited the Permanent Bureau "to circulate a questionnaire and to convene another meeting of the Experts' Group to consider further the role that existing Hague Family Law Conventions play in cross-border recognition and enforcement of agreements in international child disputes, as well as the impact that an additional instrument might have on the practical use and 'portability' of these agreements across borders. The Council also invited the Permanent Bureau to expand the composition of the Experts' Group so as to include more judges and practitioners".<sup>4</sup> Following this, the Experts' Group was expanded to include more judges and private practitioners.<sup>5</sup> The Experts' Group met for the second time from 2 to 4 November 2015 under the chairmanship of Mr Paul Beaumont, Professor at the University of Aberdeen.<sup>6</sup>

***Report on the discussion at the meeting***

3. In the second meeting, the Experts' Group considered further the nature and extent of the legal and practical problems, including jurisdictional issues in connection with the recognition and enforcement of agreements reached in the course of international family disputes involving children. The Experts' Group was greatly helped by the answers to the Questionnaire that was sent out by the Permanent Bureau in advance of the meeting. With a view to facilitating the discussions at the meeting, the Experts' Group received in advance a summary<sup>7</sup> of the responses to the Questionnaire prepared by the Permanent Bureau and a document compiling all the responses.

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<sup>1</sup> *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*, hereinafter referred to as "1996 Hague Convention".

<sup>2</sup> Conclusions and Recommendations adopted by the Council in 2012, para. 7.

<sup>3</sup> See "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", Prel. Doc. No 5 of March 2014.

<sup>4</sup> Conclusions and Recommendations adopted by the Council in 2014, para. 5.

<sup>5</sup> A list of participants is included as Annex 1. New members of the Experts' Group include, *i.a.*, judges from Germany, New Zealand and South Africa and private practitioners from China (SAR Hong Kong), Dominican Republic and Ireland.

<sup>6</sup> Professor Beaumont took over the function of Chair from Professor Boele-Woelki who, for professional reasons, was unable to continue participating in the Experts' Group.

<sup>7</sup> The summary is attached to this document as Annex 2.

4. The Experts' Group noted the conclusions of the first meeting and agreed to focus on considering the feasibility of both of the options mentioned in those conclusions: firstly, to develop a non-binding navigation tool that would be of assistance in applying the existing Hague Family Law Conventions, *i.e.*, the 1980 Hague Convention,<sup>8</sup> the 1996 Hague Convention and the 2007 Hague Convention,<sup>9</sup> to agreements in family matters involving children; and secondly, to develop a binding instrument that would give legal effect to such agreements in a more cost effective and simple way.

5. The Experts' Group noted that changes in practice in family law in the last 20 years have increased the willingness of experts in the field (including family judges) to accept that parents are in principle best placed to order their family's affairs, considering their children's best interests. Therefore, there is now a greater readiness to accept an expanded role for party autonomy both in private international law and domestic family law. In that connection, the Experts' Group noted the increased use and effectiveness of mediation and other forms of conciliation to help parties to reach an amicable agreement in family matters.

6. The Experts' Group acknowledged the increasing role of party autonomy in international family law while noting that parents should be able to confer jurisdiction exclusively on one appropriate competent authority for the approval of agreements pertaining to parental responsibility, access, maintenance and other financial arrangements (including property issues) – "package agreements".

7. The Experts' Group gave consideration to the limited role of party autonomy in the 1996 and 2007 Hague Conventions. In the 1996 Hague Convention, party autonomy is restricted to Article 10. This Article provides that where authorities are dealing with the divorce or legal separation of the parents of a child who is habitually resident in a Contracting State, they can exercise jurisdiction in relation to parental responsibility if the parents consent to that jurisdiction and at least one parent who has parental responsibility in relation to that child habitually resides in that State. As to the 2007 Hague Convention, it was agreed at an early stage not to deal with direct jurisdiction partly because it would not have been possible to reach consensus on all direct jurisdiction grounds. Therefore, the Convention does not regulate the competent authorities which have jurisdiction to give effect to an agreement on maintenance.

8. The Experts' Group considered whether the existing Hague Family Law Conventions permit a future instrument to establish greater party autonomy. It was noted that Article 52 of the 1996 Hague Convention states that the Convention does not affect the possibility of one or more Contracting States concluding agreements which contain provisions on matters governed by that Convention. It was recognised that the matter is rather more delicate in relation to the 1980 Hague Convention. Article 16 of this Convention imposes restrictions on the jurisdiction of a court hearing a return application to decide on the merits of custody rights until the return is refused under that Convention. Article 36 of the 1980 Hague Convention, however, allows one or more Contracting States to agree among themselves to derogate from any provisions of the Convention which may imply a restriction on returning the child. If a future instrument is agreed on parental agreements which allows the court hearing the return application to give effect to a parental agreement which facilitates the return of the child, this could be regarded as consistent with Article 36. If, however, the parents have agreed in a Hague return case that the child should remain in the State in which the child was abducted to, Article 36 is not the solution. In such a case, the court would have to have decided on a non-return and therefore the prohibition on deciding on the merits of rights of custody under Article 16 would no longer apply.

9. If a State is party to the 1996 Hague Convention, then under Article 5 of that Convention, once the habitual residence has changed to the State in which the child was abducted to, the authorities in that State have jurisdiction to decide on the merits of the rights of custody. One problem is that the case law on the Hague Conventions shows a disparity of approach as to when the habitual residence changes in this type of case. The Experts' Group noted, therefore, that it would be helpful if, *e.g.*, in a non-binding navigation tool, a recommendation could be made as to best practice on when habitual residence changes in this type of case. Such a

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<sup>8</sup> *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, hereinafter referred to as "1980 Hague Convention".

<sup>9</sup> *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, hereinafter referred to as "2007 Hague Convention".

recommendation could facilitate acceptance of a quick change of habitual residence where that is appropriate.

10. In this context, the Experts' Group discussed in particular whether the agreement of the parents to relocate the child, or not to return the child in an abduction case, immediately changes the habitual residence of the child. The Experts' Group recognised that different courts in Contracting States to the 1980 Hague Convention take different views on the extent to which parents can determine the habitual residence of the child. Therefore, in some jurisdictions the agreement of the parents would immediately change the habitual residence, whereas in other jurisdictions that adopt a more child-centred approach, courts would look at all the facts of the case and take as one element the agreement of the parents. In some of those jurisdictions, the child would have to be resident in the new State for a particular period of time before the agreement of the parents would lead to a change of the habitual residence. It may be very difficult to agree on best practice on the interpretation of the 1980 and the 1996 Hague Conventions that habitual residence would change at the moment of the agreement of the parents.

11. The Experts' Group considered that Article 11 of the 1996 Hague Convention can play a role to allow the authorities where the child is present but not habitually resident to take necessary urgent measures for protection which will circulate by operation of law in Contracting States to that Convention until such time as the authorities of the habitual residence have taken the measures required by the situation. However, the backdrop to Article 11 may not be sufficient to encourage family agreements because that Article runs the risk that the interim measures of protection might not be respected in the court of habitual residence when it decides the case. There may also be doubts as to whether Article 11 may be applied to these cases because some may argue that they are not "urgent" measures.

12. The Experts' Group agreed that it would be useful to give, in a non-binding navigation tool, an explanation of how the transfer of jurisdiction provisions in Articles 8 and 9 of the 1996 Hague Convention can be used to facilitate the turning of an agreement relating to parental responsibility and other matters covered by that Convention into an enforceable decision. The International Hague Network of Judges can be used to facilitate the transfer process.

13. However, it was recognised that such transfer of jurisdiction is not a complete solution that would remove the need for a new binding instrument, partly because the transfer mechanism may be complex, costly and time-consuming. The transfer mechanism does not guarantee that the agreement will be adjudicated upon by the authorities that the parents would prefer.

14. In relation to a non-binding navigation tool, the Experts' Group further considered that it would be helpful to give as generous an interpretation to the scope of the 1996 Hague Convention as possible, consistent with the wording and the objects of that Convention. For example, consideration should be given to including issues relating to costs of education and costs of enabling contact to be treated as within the scope of the 1996 Hague Convention. In general, the Experts' Group encouraged non-Contracting States to the 1996 Hague Convention to ratify or accede to it.

15. The Experts' Group also encouraged non-Contracting States to the 2007 Hague Convention to ratify or accede to it. This Convention facilitates the recognition and enforcement of maintenance arrangements and decisions concerning child support and spousal support where they are accompanied by an application for child support. However, the Convention does not provide for direct rules of jurisdiction guaranteeing party autonomy.

16. It was noted that even the rule of indirect jurisdiction in Article 20(1)(e) of the 2007 Hague Convention does not allow for party autonomy in disputes relating to maintenance obligations in respect of children. However, Article 20(1)(f) does allow for indirect jurisdiction where the authority was exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties. There are also other grounds of indirect jurisdiction that may be relevant, but Contracting States may make reservations to some of the grounds including Article 20(1)(e) and (f). Therefore, there is a potential small gap that some decisions on child support would not fall under the rules of indirect jurisdiction of the 2007 Hague Convention. It was also noted that the recognition

and enforcement of agreements under Article 30 of the 2007 Hague Convention would not be subject to any rules of indirect jurisdiction. This provision covers agreements that fall within the broad definition of "maintenance arrangements" under Article 3(e) of that Convention. However, certain agreements may not fall within the definition, resulting in a small gap that some agreements in relation to child support issues would not circulate under the 2007 Hague Convention.

17. Furthermore, the 2007 Hague Convention does not ensure that the authority dealing with recognition and enforcement of the maintenance arrangement or decision would be the same authority as deals with the recognition and enforcement of parental responsibility and access issues under the 1996 Hague Convention.

18. The Experts' Group recognised that it would not be possible to amend the three existing Hague Family Law Conventions. However, there was agreement that it is possible to create a new instrument that would build on and supplement the existing Hague Family Law Conventions by providing for a less complicated and more cost-effective way of making family agreements enforceable in and portable to different States.

19. It was also noted that within the context of the European Union ("EU"), Article 12(4) of the Brussels IIa Regulation<sup>10</sup> creates a wider basis for party autonomy in relation to parental responsibility and access issues which could provide an inspiration for a future global instrument. The Experts' Group noted, however, that ideally the new instrument should go further and include maintenance and other financial arrangements within the scope of what can be agreed by the parties and given effect to by a single competent authority. It was also noted that within the EU, Article 3(d) of the EU Maintenance Regulation<sup>11</sup> permits the courts dealing with the parental responsibility issues to also deal with the maintenance issues in the same litigation. Article 4 of the EU Maintenance Regulation also permits choice of court in a wide range of cases.

20. The Experts' Group noted that in recent decades, cross-border movement of children and families has significantly increased. The Experts' Group agreed that the evolution of private international law in relation to children and families has led to an increase in the applicability of international Conventions and EU Regulations on very specific matters. This creates a situation where the possibility of concluding, recognising or enforcing a "package agreement" is currently extremely complex because it requires the application of different instruments to different issues within the agreement. Therefore, a new instrument that will facilitate the possibility of concluding, recognising and enforcing such "package agreements" is needed.

21. As regards the recognition and enforcement of a "package agreement", the Experts' Group agreed that the ideal scenario would be a single competent authority in each Contracting State able to recognise and enforce the foreign decision on such an agreement. One advantage of a system based on party autonomy is that in relation to the jurisdictional filter, the recognising and enforcing authority would only need to check whether the parties had agreed to the jurisdiction of the competent authority of origin.

22. Another advantage of such a new system would be the saving of costs which otherwise would be incurred by the uncertainty of the current system as to which competent authority or authorities are in a position to make the "package agreement" enforceable. Costs would also be saved by avoiding the need to go to more than one competent authority in a State to get the decision on the "package agreement" recognised and enforced.

23. It has to be borne in mind that the competent authority with jurisdiction to give effect to the agreement under a new instrument may be able to do so with a light touch. In particular, the competent authority may not need to make an independent assessment of the best interests of the child but rather only interfere with the agreement where it is clearly not reflecting the best interests of the child. However, in order to ensure that an agreement will be given effect to by the authority, best practice would be to ensure that the parents did take account of the

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<sup>10</sup> 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.

<sup>11</sup> 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.

views of the child depending on the age and maturity of the child. The authority giving effect to the agreement must ensure that the right of the child to be heard has been applied in the making of the agreement and / or before that authority. It was recognised that the practice in different States varies widely as to when and how the child should be heard in custody and access cases. The Experts' Group agreed that it would not be feasible to prescribe one approach to when and how the child should be heard either in a new instrument or in a recommendation for best practice.

24. In relation to the new instrument, the Experts' Group agreed that it would need to decide which limits should be placed on the parents' autonomy in their choice of jurisdiction. Inspiration for appropriate connecting factors could be found in Article 8(2) of the 1996 Hague Convention and Article 4 of the EU Maintenance Regulation.

25. The Experts' Group considered that a new instrument might provide for a role for Central Authorities in facilitating the process for enabling an agreement to be enforceable. It was noted that further discussion is needed on this point.

26. The Experts' Group discussed the possibility of taking measures to give enhanced legal weight to "package agreements" by, for example, registering or authenticating them, or filing them with a competent authority. An important use of these measures would be to facilitate the portability of the agreement. The Experts' Group agreed to further explore the desirability and feasibility of creating, in a new binding instrument, a system for such measures to enhance the portability of "package agreements". The Experts' Group recognised that a similar system exists under the 2007 Hague Convention.

27. It was, however, pointed out that in a number of States maintenance issues are dealt with by administrative authorities. Therefore, it may be challenging to develop a new instrument, that has maintenance issues within its scope, that would give jurisdiction to a single competent authority in the State agreed by the parties to make their "package agreement" enforceable as a decision. It also may be challenging to get agreement by States to include in a new instrument that this decision on the "package agreement" would be given recognition and enforcement by a single competent authority in any State where it has to be enforced.

28. It was also pointed out that some States would find it difficult to accept the "one-stop-shop" for jurisdiction and for recognition and enforcement as this would require concentration of jurisdiction. The Experts' Group agreed that it is clearly a policy decision for States to decide whether, in the context of a new instrument that promotes party autonomy and encourages family agreements, it is worth adjusting their normal way of allocating jurisdiction for custody, access, maintenance, other financial and property arrangements and for allocating the competent authorities that deal with recognition and enforcement of decisions in relation to these matters.

29. It was also recognised that the development of a new binding instrument is a complex process and may take a long time to achieve widespread ratification. Therefore, the Experts' Group believed that it was also desirable to now develop recommendations as to how "package agreements" can be best given effect within the framework of the three existing Hague Family Law Conventions, whether or not a new instrument is adopted.

30. The Experts' Group agreed that the purpose of the non-binding navigation tool would be to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign State under the existing Hague Family Law Conventions. To this end, the Experts' Group would develop sets of recommendations on the basis of the 1980 Hague Convention only; on the basis of the 1980 and 1996 Hague Conventions, on the basis of the 1980 and 2007 Hague Conventions, and finally on the basis of the 1980, 1996 and 2007 Hague Conventions. The objective is to clarify the paths that practitioners can choose under the applicable instrument(s) to ensure enforceability of an agreement across borders. The navigation tool would also help pave the way for showing that a binding instrument is still needed in this area. Although not legally binding, the navigation tool would guide experts in the current maze, encourage non-Contracting States to ratify or accede to the existing Hague Family Law Conventions and encourage States to negotiate a new instrument that would facilitate giving legal effect to such agreements and their recognition across borders.

31. Recognising that “package agreements” encounter difficulties when they “travel” across borders, in particular when their provisions go beyond the scope of the 1996 and 2007 Hague Conventions, the Experts’ Group also agreed to explore the possibility of the development of a binding legal instrument. The purpose of this instrument would be to confer jurisdiction exclusively on one court or authority for the approval of “package agreements” and to provide for simple rules for recognition and enforcement of the order of that court or authority. The new instrument should give a “one-stop shop” for such agreements and provide for party autonomy in this context by giving parents the possibility of selecting an appropriate jurisdiction. It would build on and supplement the 1980, 1996 and 2007 Hague Conventions.

***Recommendations to the Council on General Affairs and Policy***

32. In light of the above, the Experts’ Group submits the following conclusions and recommendations for approval by the Council on General Affairs and Policy:

The mandate of the Experts’ Group is continued in order to further explore the development of two instruments:

- (1) a non-binding navigation tool to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign State under the 1980, 1996 and 2007 Hague Conventions; and
- (2) a binding legal instrument that would establish a “one-stop shop” for agreements in a cross-border context pertaining to custody, access, child support and other financial arrangements (including property issues) and provide more party autonomy by giving parents the possibility of selecting an appropriate authority. The instrument would allow for the conferral of jurisdiction exclusively on one court or authority for the approval of such agreements and would provide for simple mechanisms for recognition and enforcement of the decision of that court or authority. It will build on and supplement the 1980, 1996 and 2007 Hague Conventions.

With a view to preparing the next meeting of the Experts’ Group, the Permanent Bureau is mandated to organise inter-sessional work towards the development of a draft navigation tool in co-operation with members of the Experts’ Group. Resources permitting, work towards the development of a binding legal instrument would also be started.

THE HAGUE, 4 November 2015



**ANNEX III**

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**Conclusions and Recommendations**

**for the attention of the Council on General Affairs and Policy of March 2018**

Family agreements involving children ("family agreements") are generally in the best interests of children and should be promoted internationally. Such agreements are often concluded as a result of mediation, conciliation or similar processes. The Experts' Group recognises that the best interests of a child is enhanced when such an agreement can be more easily rendered enforceable in one State and more readily recognised and enforced in other States.

While the existing Hague Family Conventions encourage the amicable resolution of disputes involving children, they do not contemplate the use of "package agreements" (*i.e.*, family agreements related to custody, access, relocation and/or child support and which may include spousal support and other financial matters, such as property issues) and do not provide a simple, certain or efficient means for their enforcement. From the Group's experience it is recognised that such agreements are increasingly frequently used. Very often the matters covered require the simultaneous application of more than one Hague Family Convention while some elements of those package agreements are not within the scope of any of the existing Hague Family Conventions. This creates difficulties for the enforcement of package agreements.

The Experts' Group's work on the navigation tool has confirmed that much benefit could be gained from adding value to the existing Hague Family Conventions by developing a new binding instrument in order to facilitate family agreements in Contracting States.

The benefits of such an instrument include:

- enabling package agreements to be made legally enforceable in one Contracting State and then recognised and enforced in other Contracting States cost effectively;
- establishing a simplified and prompt procedure, which may include concentrated jurisdiction, to render a package agreement legally binding and enforceable in one Contracting State and for simple and prompt recognition and enforcement of the decision of that court or authority in other Contracting States;
- whilst protecting the best interests of the child, enabling party autonomy by giving parents the possibility of selecting a legal system which has a substantial connection with the child to render the agreement enforceable.

Therefore the Experts' Group recommends to the Council to develop a new Hague Convention that would build on, and add value to, the 1980, 1996 and 2007 Hague Conventions, and be developed with a view to attracting as many States as possible.

## **ANNEX IV**

**Experts' Group meeting on  
recognition and enforcement  
of agreements in family matters  
(28-29 June 2018)**



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**Experts' Group on cross-border recognition and enforcement of agreements in  
family matters involving children**

**Conclusions and Recommendations of the meeting of 28-29 June 2018 for the  
attention of the Council on General Affairs and Policy of March 2019**

1. The Experts' Group considers that by the end of its fourth meeting, having taken account of the input on a previous draft of the 7<sup>th</sup> meeting of the Special Commission of October 2017 on the Practical Operation of the 1980 and 1996 Conventions, it has completed the work on the Practical Guide to Family Agreements under the Hague Conventions and invites the Council to approve the Guide. The Experts' Group will circulate the draft agreed by the Group to Members of the Hague Conference for comments in the autumn of 2018. The Experts' Group further recommends that if Council approves the Practical Guide it be widely disseminated to all relevant stakeholders.
2. The Experts' Group recommends that the Project of cross-border recognition and enforcement of agreements in family matters involving children be kept on the work programme of the Hague Conference and that the Permanent Bureau continue to monitor developments in this area, including the impact of the Practical Guide. The Experts' Group is willing to assist, without cost implications for the Organisation, the Permanent Bureau in its monitoring role until further steps have been decided by Council. The Permanent Bureau would consult with the members of the Experts' Group, at least once a year, through video and telephone conference.
3. Finally, the Experts' Group recommends that the Permanent Bureau explore with the members of the Experts' Group the possibility of applying for funded research to investigate further the problems and good practice associated with enabling cross-border family agreements to be made enforceable in different legal systems. In the light of the research findings the Experts' Group will consider whether to uphold its recommendation to develop a binding legislative instrument.