

Council on General Affairs and Policy of the Conference – March 2019

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Title	Revised draft Practical Guide: Cross-border recognition and enforcement of agreements reached in the course of family matters involving children	
Author	Permanent Bureau	
Agenda item	Item III.4	
Mandate(s)	C&R No 13 of the 2018 meeting of the Council on General Affairs and Policy	
Objective	To seek approval from Council of the Practical Guide	
Action to be taken	For Approval <input checked="" type="checkbox"/> For Decision <input type="checkbox"/> For Information <input type="checkbox"/>	
Annex	Explanatory Note 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 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention	
Related documents	n.a	

A. Introduction and how to make best use of the Practical Guide

1. The Practical Guide to Family Agreements under the Hague Conventions aims to assist with rendering an agreement made in the area of family law involving children legally binding and enforceable in the two or more States concerned by the agreement. The Practical Guide focuses on the solutions offered by the 1980 Hague Child Abduction Convention,¹ the 1996 Hague Child Protection Convention² and the 2007 Hague Child Support Convention.³

2. The Practical Guide contains three parts, which can be read autonomously, each consisting of an example agreement, a flowchart and a description. Part I uses the situation of a cross-border relocation (the envisaged lawful relocation of one parent with the minor child to another State). The other two parts focus on Hague Convention child abduction cases. Part II.a analyses the situation of a return agreement drawn up in the course of ongoing Hague return proceedings while Part II.b. is dedicated to non-return agreements drawn up in the course of ongoing Hague return proceedings. All three parts are based on the assumption that the 1980, 1996 and the 2007 Conventions are applicable between the States concerned and deal with issues regularly contained in family agreements such as: agreement on the residence of the child, parental responsibility, contact rights and child support.

3. It is important to note that the examples of agreements contained in the Practical Guide are not meant to be read as “model agreements”. On the contrary, it is highly discouraged to use these agreements as templates, since qualified legal advice is needed in cross-border family disputes in order to guarantee that the family agreement is drafted in line with the requirements of the applicable law and the circumstances of the individual case which may vary considerably. The example agreements simply serve as a basis to demonstrate the interaction of the 1980, 1996 and 2007 Conventions for the purpose of this Guide. All three example agreements are “mediated agreements”, they could have however also been the result of negotiation or similar processes or an unassisted agreement between the parties.

4. As an annex, this Practical Guide contains an “Explanatory Note 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 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention”. This Explanatory Note gives detailed background information and includes, *inter alia*, a checklist and drafting recommendations for family agreements. The flowchart descriptions make reference to the relevant parts of the attached Explanatory Note, which is why before using the Practical Guide it may be advisable to read the Explanatory Note. The main audience of the Practical Guide and the Explanatory Note are legally trained persons, which is inevitable in view of the complexity of the subject matter explored including the in-depth legal analysis of the solutions offered by the 1980, 1996 and 2007 Conventions. Finally, it must be highlighted that the content of the Practical Guide is provided for general information purposes only and does not constitute legal or other professional advice.

¹ **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction** (hereinafter, “the 1980 Hague Child Abduction Convention” or “the 1980 Convention”).

² **Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children** (hereinafter, “the 1996 Hague Child Protection Convention” or “the 1996 Convention”).

³ **Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance** (hereinafter, “the 2007 Hague Child Support Convention” or “the 2007 Convention”).

B. Example agreements and flowcharts

Abbreviations used in the description of the flowcharts:

1980 HC – 1980 Hague Child Abduction Convention.

1996 HC – 1996 Hague Child Protection Convention.

2007 HC – 2007 Hague Child Support Convention.

2007 HP – 2007 Hague Protocol.

Att. Expl. Note – Annex to this Guide: Explanatory Note 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 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention.

Central Authorities 1980 – Central Authorities under the 1980 Hague Child Abduction Convention, contact details available on the website of the Hague Conference at < www.hcch.net > under “Conventions”, then “1980 Hague Child Abduction Convention”, and “Central Authorities”.

Central Authorities 1996 – Central Authorities under the 1996 Hague Child Protection Convention, contact details available on the website of the Hague Conference at < www.hcch.net > under “Conventions”, then “1996 Hague Child Protection Convention”, and “Central Authorities”.

Central Authorities 2007 – Central Authorities under the 2007 Hague Child Support Convention, contact details available on the website of the Hague Conference at < www.hcch.net > under “Conventions”, then “2007 Hague Child Support Convention”, and “Central Authorities”.

Country Profiles 1980 – Country Profiles under the 1980 Hague Child Abduction Convention, available on the website of the Hague Conference at < www.hcch.net > under “Conventions”, then “1980 Hague Child Abduction Convention”, and “Country Profiles”.

Country Profiles 2007 – Country Profiles under the 2007 Hague Child Support Convention, available on the website of the Hague Conference at < www.hcch.net > under “Conventions”, then “2007 Hague Child Support Convention”, and “Country Profiles”.

C&R June 2011 SC – Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011), available on the Hague Conference website at < www.hcch.net > under “Conventions”, then “1980 Hague Child Abduction Convention”, and “Special Commission meetings”.

C&R Oct 2017 SC – Conclusions and Recommendations of the Seventh Meeting of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (10-17 October 2017), available on the website of the Hague Conference at < www.hcch.net > under “Conventions”, then “1980 Hague Child Abduction Convention”, and “Special Commission meetings”.

Expl. Rep. 1980 – E. Pérez-Vera, “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, pp. 427-473; available at < www.hcch.net > under “Publications”, then “Explanatory Reports”.

Expl. Rep. 1996 – P. Lagarde, “Explanatory Report on the 1996 Hague Child Protection Convention”, in *Proceedings of the Eighteenth Session* (1996), Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605; available at < www.hcch.net > under “Publications”, then “Explanatory Reports”.

Expl. Rep. 2007 – A. Borrás & J. Degeling, with the assistance of W. Duncan and P. Lortie, Explanatory Report on the 2007 Hague Child Support Convention, The Hague, 2013; available at < www.hcch.net > under “Publications”, then “Explanatory Reports”.

Expl. Rep. 2007 HP – A. Bonomi, Explanatory Report on the 2007 Hague Maintenance Obligations Protocol, The Hague, 2013, available at < www.hcch.net > under “Publications”, then “Explanatory Reports”.

Handbook 1996 – Practical Handbook on the 1996 Hague Child Protection Convention, available at < www.hcch.net > under “Publications”, then “Practical Handbooks”.

Handbook 2007 – Practical Handbook for Caseworkers under the 2007 Child Support Convention, available at < www.hcch.net > under “Publications”, then “Practical Handbooks”.

Part I

I. An example of a Relocation Agreement

Important note: This agreement cannot be used as a template, since in practice any family agreement must be drafted in line with the requirements of the applicable law and the circumstances of the individual case which may vary considerably.

This relocation agreement that results from mediation, is done freely and takes into consideration the best interests of our child and acknowledges her right to express her views and wishes. The agreement is signed by us with informed consent and with the intent to be binding and enforceable.

We, the parents of **Alma P., born on 25.6.2010** in State A, have come to conclude the following agreement.

We currently habitually reside in State A. We are not married but have been cohabiting since the birth of our daughter and have joint rights of custody.

Relocation

We have decided to separate and agreed that Alma will together with her mother relocate in August 2018 to city X in State B with the intention to establish their habitual residence there. The costs of the relocation will entirely be borne by Alma's mother.

Joint exercise of custody

We will continue to exercise the rights of custody jointly. We will decide on important matters, such as our child's education or important health related questions jointly.

Education

We both agree that our child will continue to receive a bilingual education allowing her to remain completely fluent in both the language of State A and State B. We agree that as of September 2018 Alma will attend the State school in State B, which is generally cost free. Any extra charges relating to schooling will be borne by us on an equal basis. The mother will engage in finding a child carer, whose native language is that of State A and who will see Alma at least twice a week, in order to ensure that Alma remains fluent in the language of State A. The father will contribute 100 EUR per month, which is considered a part of the father's maintenance payment. The subject of additional classes in the language of State A will be discussed once Alma has settled in her new environment.

Contact

Alma and her father will maintain contact on a regular basis by phone and skype. The mother will provide time for a skype call of father and child at least every Wednesday between 18:00 and 18:30 and on Sundays (except visiting weekends) between 17:00 and 17:30. The father will come to see Alma in State B every third calendar weekend. Alma will spend half of all annual school holidays with her father. In even years, she will spend the first half with her mother and the second half with her father; in uneven years she will spend the first half with her father and the second with her mother. The summer holidays will be split in 2-weeks-sequences. When Alma visits her father in State A, it is agreed that she can also stay with the paternal grand-parents whenever she likes. The parents will set up a detailed calendar for each school year. When travelling between State A and B, Alma will be accompanied by her father unless the parents agree otherwise in relation to a specific journey. Since Alma has dual nationality, each parent will have a passport for Alma.

Travel costs

The travel costs associated with the father-child contact are born by the father, who will make the travel arrangements. However, the mother will transfer a sum of 400 EUR per calendar year to the father as contribution to the travel costs.

We recognise that the common contribution to the travel costs is crucial since this enables Alma to maintain regular personal contact with her father cross-border and we thus consider that the travel costs are part of the exercise of parental responsibility. None of us shall have the right to set-off the travelling costs and contribution thereto against any other amounts due or allegedly due between us, including maintenance payments.

Child maintenance

We wish to contribute to all child related costs on an equal basis. Given the fact that as of the date of relocation, the housing, clothing and food of our daughter will be provided by her mother, the agreed amount of child maintenance payable by the father is a monthly sum of 500 EUR. An additional 100 EUR will be provided by the father as contribution for the language education related costs (see above under education). Any adaptation of this monthly sum will be discussed between the parents when necessary. The father will transfer the total sum of 600 EUR as monthly child maintenance and his monthly contribution for the language education on the 1st day of each month to the account of the mother, starting in August 2018. The parties confirm that they have disclosed their income and assets to each other.

Informing our child

We agree that we will together explain our decision to our daughter. We have already explained to her that we are going to separate and that a relocation is envisaged. The mediator has talked to Alma in the course of the mediation and transmitted her worries to us.

Final clauses

We will undertake all steps necessary to render this agreement binding and enforceable in both State A and B before the relocation. Whenever a dispute may occur between us concerning provisions contained in this agreement or any other matters, we will engage in finding an amicable solution and will have recourse to mediation when needed.

Full name father

Full name mother

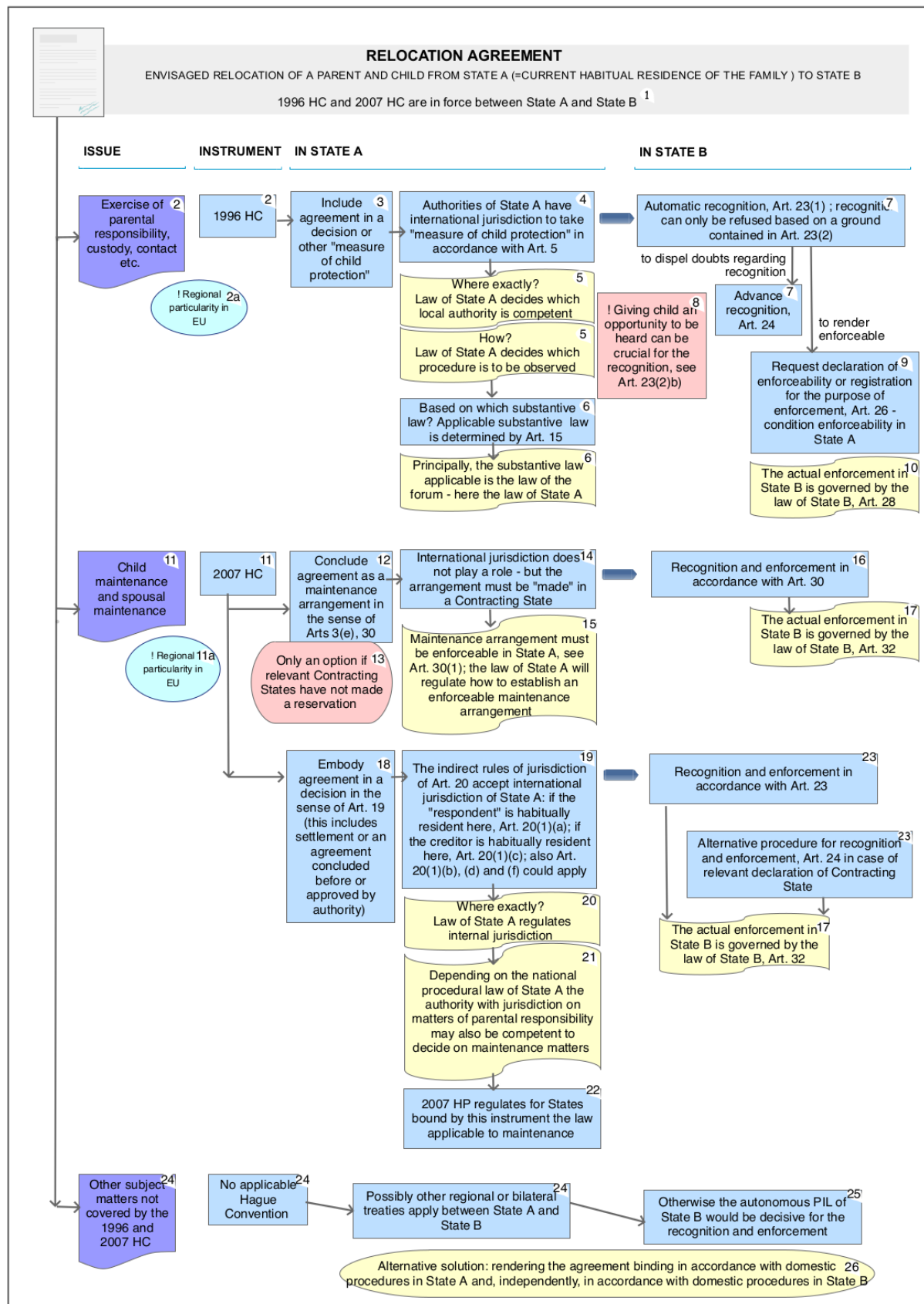
Signature father

Signature mother

Place, January 2018

Place, January 2018

Flowchart I – Relocation Agreement



Description of Flowchart 1 – Relocation Agreement:

Title

Note	Description	Further references
1	<p>The Flowchart description is based on the assumption that State A and State B are Contracting States to the 1996 and 2007 HC.</p> <p>To find out whether the relevant States concerned are Contracting States to the 1996 HC and / or the 2007 HC see the up-to-date status information at the Hague Conference website. For the 1996 HC, please note that where a State “accedes” to the Convention (instead of “ratifying” it), the accession will have effect only as regards the relations between the acceding State and those Contracting States that have not raised an objection within the timeframe set by the Convention (see Art. 58 of the 1996 HC). The same is true for the 2007 HC (see Art. 58 of the 2007 HC). For the 2007 HC, please further note that Contracting States can make a number of reservations and declarations, which can affect the scope of the Convention.</p>	<p>Status table Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “1996 Convention” or “2007 Convention” then “Status table”</p>

Recognition and enforcement with the help of the 1996 Hague Child Protection Convention

Note	Description	Further references
2	<p>The matters covered by the agreement falling within the scope of the 1996 HC can be rendered enforceable in State B with the help of the 1996 HC.</p> <p>The 1996 HC has a very wide scope. It was drafted to facilitate the cross-border recognition of all kinds of measures of child protection, which in accordance with the applicable national law may exist.</p> <p>Since national family law differs considerably from one State to another, not all measures of child protection known in one Contracting State may be known in the other. Furthermore, since the concept of “child protection measure” in the 1996 HC is wider than it may be under some national laws, a situation may occur, where the parental agreement deals with a subject that generally falls within the scope of the 1996 HC but that under the applicable substantive law may not be included in a child protection measure in State A. Therefore, should the authority with internal jurisdiction in State A apply a substantive law test to the agreement the authority might refuse or not be able to include certain provisions of the agreement into the child protection measure.</p> <p>Once the content of the agreement is included in the child protection measure in Contracting State A in accordance with the jurisdiction rules of the 1996 HC, the Convention allows it to “travel” to any other Contracting State and take effect there independent of whether the national law of the other Contracting States might provide for such a measure under their national law.</p> <p>In our example agreement the subject matters covered by the scope of the 1996 HC are generally the points agreed on under the sub-headings “Relocation”, “Joint Exercise of custody”, “Education”, “Contact” and “Travel costs”. Not covered is the agreement that the mother will cover the costs of relocation. Furthermore, the education related costs are part of the child maintenance, as the parents clearly point out. The “Travel costs” can fall within the scope of the 1996 HC if they are, as noted here by the parents, crucial to “enable Alma to maintain a regular personal contact with her father cross-border”. It will, however, depend on the substantive applicable law in State A whether the travel costs can be part of a child protection measure. It should be noted that provisions on travel costs could, depending on the reasons for their inclusion in the agreement, equally fall within the scope of the 2007 HC.</p> <p>Recommendation: Include a clear reasoning why travel cost arrangement is considered part of the exercise of parental responsibility.</p>	<p>Att. Expl. Note paras 114 <i>et seq.</i></p> <p>Att. Expl. Note paras 114 <i>et seq.</i></p> <p>Expl. Rep. 1996 paras 18 <i>et seq.</i> Handbook 1996 para. 1.1 and Chap. 3.</p> <p>See also C&R Oct 2017 SC Nos 29-32.</p> <p>See further regarding which matters typically addressed by family agreements can fall within the scope of the 1996 HC: Att. Expl. Note Chap. II, paras 52 <i>et seq.</i></p> <p>For “travel costs” see Att. Expl. Note paras 62 <i>et seq.</i>, see also C&R Oct 2017 SC No 53.</p>
2a	<p>In the European Union (EU), the Brussels IIa Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003) as a rule takes precedence over the 1996 HC as between EU Member States bound by this Regulation but in some areas, <i>e.g.</i> applicable law, the 1996 HC applies between EU Member States.</p>	<p>The Att. Expl. Note refers to the particularities of the Brussels IIa Regulation in a number of footnotes.</p>

3	<p>The 1996 HC does not define the term “measure of child protection”. The Convention includes a non-exhaustive enumeration of issues, which can be contained in such a measure, but not how the measure can be established. From the context, it is however clear that a parental agreement alone cannot constitute such a measure, the involvement of an “authority” is required. The procedural aspects are left to the national procedural law (see <i>infra</i> note 5).</p>	<p>Att. Expl. Note para. 102.</p>
4	<p>In accordance with Article 5(1) of the 1996 HC, the authorities of the State of habitual residence of the child have international jurisdiction. In our example agreement, State A is the State of habitual residence of the whole family including the child.</p> <p>Recommendation: In the agreement it is recommended that the agreed understanding of the habitual residence of each party (and especially the child’s habitual residence) should be expressed. Similarly, the decision or other child protection measure in which the agreement is later included should make reference to the basis of jurisdiction and note relevant important facts. This assists in dispelling doubts concerning the measure’s cross-border recognition: The 1996 HC provides that “[t]he authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction”, see Article 25.</p>	<p>Regarding the meaning of habitual residence see:</p> <p>Handbook 1996 paras 4.5-4.7 and 13.83-13.87,</p> <p>Att. Expl. Note Chap. III.3 with reference to jurisprudence & Chap. V.2.c).</p>
5	<p>The 1996 HC only regulates international jurisdiction. Which authority inside State A has internal competence to adopt a measure of child protection and what procedure shall be observed depend on the law of State A. Depending on the national law of State A there could be different parallel options as to how the agreement can be turned into a child protection measure in the sense of the 1996 HC. It could be that the agreements’ content is embodied in a court decision. It is also conceivable that the national law of State A provides a specific mechanism to homologate the agreement or have it approved by an authority.</p>	
	<p>Recommendation: Where a child protection measure is designed to take effect in another Contracting State, as is the case with our Relocation Agreement, certain additional considerations are recommended.</p> <p>(1) It is important to safeguard that none of the grounds of non-recognition listed in Article 23(2) of the 1996 HC could hinder the cross-border recognition. An adaptation of certain procedures is recommended to meet the (higher) procedural requirements of the State of recognition. See with regard to hearing the voice of the child <i>infra</i> note 8.</p> <p>(2) The child protection measure should be drafted in a way to ensure that enforcement in accordance with the legal requirements of the law of the State of enforcement is possible. A typical matter for which conditions of enforceability are very different in national law is the arrangement of parent child contact. Certain legal systems require very precisely prescribed modalities of contact for them to be considered enforceable, such as for example “The father picks up his daughter at the mother’s house at 12.30 on Saturdays”. When wanting to guarantee the enforceability of the child protection measure in another Contracting State, the requirements national law poses for the “precision” of the measure’s content must be considered.</p>	<p>Att. Expl. Note paras 115 <i>et seq.</i></p> <p>Regarding the requirements for an “enforceable” content of a contact arrangement in accordance with the national law of the enforcement State see also Att. Expl. Note Chap. V – Checklist and Country Profiles Chap. 18 Enforcement of rights of access.</p> <p>The Central Authorities 1996 may assist in providing information on what constitutes an “enforceable content”, see Arts 30(2) and 35(1) of the 1996 HC.</p>
	<p>The process of transforming the Relocation Agreement into a “measure of child protection” in State A will, as a side effect, also assist in rendering the agreement legally binding and enforceable in State A. Legal systems differ considerably as to what legal value they attribute to a family agreement as such, whether / which additional steps might be needed to render it legally binding and how it can become enforceable.</p> <p>Some legal systems give mediated agreements a privileged status if they result from a certified mediation. They may provide that mediated agreements are automatically enforceable or that they can be rendered enforceable in a simplified way.</p>	<p>For a brief overview of different approaches in national law see: Att. Expl. Note paras 26 <i>et seq.</i></p> <p>For rendering mediated agreements enforceable in national law see: Country Profiles 1980 Chap. 19.5 The enforceability of mediated agreements; see also Att. Expl. Note para. 36.</p>

6	<p>Article 15 of the 1996 HC determines the applicable substantive law. In accordance with Article 15(1), the authorities with jurisdiction under the Convention generally apply their own law. There are no indications in our case that another law would have a closer connection. Hence, the authorities in State A would apply the law of the forum.</p> <p>Recommendation: If a child protection measure is designed to take effect in another Contracting State it is important to take note of key legal rules of that other legal system. The child protection measure must not be manifestly contrary to the public policy of the other Contracting State, otherwise the measure might not be recognisable in that State, see Article 23(2)(d) of the 1996 HC.</p>	<p>For further details on determining the applicable law see: Handbook 1996 Chap. 9.</p> <p>Att. Expl. Note para. 119, Chap. V.2.d). The Central Authorities 1996 may assist in providing information on the public policy test applied in the other State.</p>
7	<p>The 1996 HC provides for automatic cross-border recognition of measures of child protection rendered in a Contracting State in accordance with the Convention rules. That is to say the child protection measure rendered in one Contracting State is generally immediately legally binding in all other Contracting States to the 1996 HC without the need of a procedure. However, recognition can be refused if one of the limited grounds of non-recognition listed in Article 23(2) of the 1996 HC applies. To dispel any doubts concerning the recognition, an advance recognition in accordance with Article 24 of the 1996 HC can be requested from the competent authorities of State B.</p>	<p>Handbook 1996 paras 10.1 <i>et seq.</i></p>
8	<p>Article 23(2)(b) of the 1996 HC provides that the recognition of the child protection measure could be refused if it “was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State”. This provision is directly inspired by Article 12 UNCRC, which confers upon “the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” National law, however, differs considerably as to the age as of which children are generally offered an opportunity to be heard and by whom they are heard (the judge directly, or indirectly through being heard by a social worker or a psychologist etc. who then makes a report to the judge and may be available to answer questions of the judge and/or the parties). It should be noted that the UN Committee on the Rights of the Child considers that the right of the child to be heard should also be respected in alternative dispute resolution mechanisms such as mediation.</p> <p>The right of the child to be heard does not imply that children of sufficient age <i>must</i> be given an opportunity to express their views in every case. Depending on the circumstances of the case, hearing the child might be considered harmful for the child and thus be considered contrary to the child’s best interests. Furthermore, Article 23(2)(b) of the 1996 HC implies that hearing the child in cases of urgency is not a necessity. It is also important to understand that the right of a child to be heard is the child’s right but not a duty.</p> <p>In our case, the facts do not give any indication as to a specific risk for the child when being heard. There are also no indications of urgency in our case. Problems can, in particular, occur, should the law of State B require children to be heard at a younger age than the law of State A or should the method of hearing the child be very different and thus the authorities of State B consider that the individual child has not been given a sufficient opportunity to be heard in the other State.</p> <p>Recommendation: Should State B have “stricter” requirements for hearing the child, those “stricter” requirements should, to the extent feasible and appropriate regarding the individual child, be applied in State A when adopting the measure of child protection. In any case, the way the individual child has been involved and how the child’s views and best interests have been considered should be reflected in the terms of the child protection measure. It is recommendable to also reflect the involvement of the child or consideration of the child’s views in the mediation process in the terms of the mediated agreement (as has been done in our example Relocation Agreement). Should the hearing of the individual child due to the child’s age and maturity or due to other circumstance be considered contrary to that child’s best interests, the reasons for not hearing the child should ideally be reflected in the reasoning of the child protection measure.</p>	<p>See further regarding the matter of hearing the child: Att. Expl. Note para 118, Chap. V.2.e).</p> <p>See for some indication of national law practice concerning hearing the child in proceedings relating to parental responsibility Country Profiles 1980 Chap. 17.3 Participation of the child.</p> <p>The Central Authorities 1996 may provide information on requirements of hearing the child in accordance with the law of State B, Art. 30(2) of the 1996 HC.</p> <p>See also C&R Oct 2017 SC No 50.</p>

9	<p>Rendering the child protection measures of State A enforceable in State B requires an extra step: obtaining a declaration of enforceability or registration for the purpose of enforcement. The law of State B regulates which authority in that State is competent and which procedure is followed, see Article 26(1) of the 1996 HC. However, the 1996 HC requires the procedure to be simple and rapid, see Article 26(2). The Central Authorities provide information on the competent authorities and relevant national procedure, Articles 30(2) and 35(1) of the 1996 HC.</p> <p>Please note, that the enforceability in State B requires that the child protection measure is enforceable in State A.</p>	<p>The Central Authorities 1996 provide assistance, see Arts 30(2) and 35(1) of the 1996 HC.</p>
10	<p>The actual enforcement takes place in accordance with the law of State B. As noted above, it is important to safeguard that the child protection measure adopted in State A has an “enforceable” content in the sense of the national enforcement law of State B, see <i>supra</i> note 5.</p>	<p>See for some indication of national enforcement law: Country Profiles 1980 Chap. 18 Enforcement of rights of access.</p>

Recognition and enforcement with the help of the 2007 Hague Child Support Convention

11	<p>The subject matters covered by the agreement falling within the scope of the 2007 HC can be rendered enforceable in State B with the help of the 2007 HC.</p>	<p>Att. Expl. Note paras 121 <i>et seq.</i></p>
	<p>The scope of the 2007 HC is defined in its Article 2. The Convention applies generally to child support arising out of a parent-child relationship towards children under the age of 21 years and to spousal support. However, spousal support does not benefit from the Central Authority support under the Convention with one exception: The application for recognition and enforcement of spousal support is made together with a claim for child support.</p> <p>It is very important to note that the Convention allows Contracting States to increase (by declaration) or restrict (by reservation) this general scope of application. Regarding child support, a Contracting State can restrict the applicability of the Convention to child support towards children under the age of 18 years. Contracting States can extend the application of Central Authority support to all applications for spousal support and / or extend application of the Convention (or parts of it) to other forms of family maintenance. As between any two given Contracting States the Convention applies only in relation to the “coinciding” scope.</p>	<p>See for a detailed elaboration on the scope: Handbook 2007, Chap. 3, Part 1 - The scope of the Convention.</p> <p>All declarations and reservations made by Contracting States are displayed at the Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “2007 Convention” then “Status table”.</p>
	<p>In our example Relocation Agreement, the provisions on child and spousal support fall within the general scope of the Convention.</p>	<p>Att. Expl. Note Chap. II, paras 52 <i>et seq.</i></p>
11a	<p>In the EU, the 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 (the EU Maintenance Regulation) takes precedence over the 2007 HC between all EU Member States. All EU Member States except Denmark and the United Kingdom apply, as part of the EU Maintenance Regulation, the 2007 HP to determine the law applicable to maintenance.</p>	<p>The Att. Expl. Note refers to the particularities of the EU Maintenance Regulation in a number of footnotes.</p>
12	<p>An agreement on child and spousal maintenance can “travel” cross-border with the help of the 2007 HC in the form of a “maintenance arrangement”. Article 3 of the 2007 HC defines a maintenance arrangement as “an agreement in writing relating to the payment of maintenance which i) has been formally drawn up or registered as an authentic instrument by a competent authority; or ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority”.</p> <p>Not all Contracting States provide for the possibility to establish such a maintenance arrangement in their legal system, but they will, unless they have made a reservation under Article 30(8) of the 2007 HC recognise maintenance arrangements of other Contracting States.</p> <p>Whether the maintenance provisions of our example Relocation Agreement can in State A be turned into a “maintenance arrangement” in the sense of the 2007 HC depends on the law of State A.</p>	<p>Att. Expl. Note paras 123, 138 <i>et seq.</i></p>

13	Contracting States to the 2007 HC can make a reservation under Article 30(8) that they will not recognise and enforce “maintenance arrangements”. Whether State A or State B have made such a reservation can be looked up in the status table at the Hague Conference website.	See the Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “2007 Convention” then “ Status table ”.
14	<p>The maintenance arrangement is established in accordance with the law of State A.</p> <p>It is important to note that the parties are free to establish their “maintenance arrangement” in any given Contracting State whose laws provide for such an option (and which has not made a reservation under Art. 30(8) of the 2007 HC). Article 30 of the 2007 HC requires only that the arrangement is “made in a Contracting State” – the Convention does not require a specific connection to the parties or the case. Of course, the national procedural law of a Contracting State might limit the access to the option of establishing a “maintenance arrangement” to parties with a certain proximity to that State’s legal system.</p> <p>For our example case this means, should the national law of State A not provide for the option of establishing a “maintenance arrangement” but the national law of State B does so, the parties could go to State B and have their maintenance agreement turned into an enforceable “maintenance arrangement” there. The arrangement would then be enforceable in State B and with the help of the 2007 HC also obtain enforceability in State A (provided neither State A nor State B have made a reservation under Art. 30(8) of the 2007 HC).</p>	<p>Att. Expl. Note paras 106 <i>et seq.</i>, para. 139.</p> <p>The Central Authorities 2007 may assist in providing information on how a maintenance arrangement can be established in the relevant Contracting State.</p>
15	The maintenance arrangement, which is meant to become enforceable in another Contracting State, should be drafted taking into consideration the grounds of non-recognition set out in Article 30(4) of the 2007 HC. In particular, taking note of the public policy test applied in the other Contracting State can be of importance.	The Central Authorities 2007 may assist in providing information on the public policy test applied in the other State.
16	The recognition and enforcement of maintenance arrangements under the 2007 HC follows principally the same rules as the recognition and enforcement of decisions, see Article 19(4) of the 2007 HC. However, Article 30 slightly modifies these rules. In particular, a much more limited set of grounds of non-recognition applies to maintenance arrangements.	An application can be made through the Central Authority 2007 to assist with the rendering enforceable of the maintenance arrangement.
17	<p>The enforcement itself is governed by the law of the State of enforcement. It is important to note that the demands on the precision of the maintenance claim for it to be considered “enforceable” under the national enforcement law can differ considerably. For example, in one legal system, the term “the debtor pays 10% of his monthly gross income” may be considered sufficiently precise, in other States the amount must be quantified exactly.</p> <p>Recommendation: The terms on maintenance drafted to be rendered enforceable in another legal system should be drafted with the aim to achieve an “enforceable” content in the understanding of the national enforcement law of the State of enforcement.</p> <p>In the case of our example Relocation Agreement, the terms on maintenance will most likely, if at all, have to be enforced in State A and not in State B, since the maintenance debtor remains in State A. It might therefore be sufficient to comply with the requirements of national enforcement law of State A.</p>	<p>For information on national enforcement law see the Country Profiles 2007 IV Information concerning the enforcement rules and procedures.</p> <p>See also Att. Expl. Note para. 55, Chap. V Checklist.</p>
18	The agreement can be embodied in a decision in the sense of Article 19(1) of the 2007 HC.	Att. Expl. Note paras 108, 121 <i>et seq.</i> , 137.
19	<p>The 2007 HC does not contain direct rules on international jurisdiction; however, the Convention contains negative rules on jurisdiction (in Art. 18) and indirect rules on jurisdiction (in Art. 20). A maintenance decision, meant to be rendered enforceable in another Contracting State, should be established in respect of these rules of jurisdiction. Otherwise the recognition might be refused.</p> <p>It is important to underline that not all grounds of jurisdiction referred to in Article 20 of the 2007 HC are applicable between all Contracting States. Reservations are, in accordance with Article 20(2), possible with regard to the grounds contained in Article 20(1)(c), (e) and (f).</p>	<p>Att. Expl. Note para. 121.</p> <p>See the Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “2007 Convention” then “Status table”.</p>

	Recommendation: Verify whether reservations under Article 20(2) of the 2007 HC have been made by State A or State B. Base international jurisdiction on the grounds that guarantee a recognition of the decision in State B. Include a reference to the facts that justify the use of the relevant ground of jurisdiction in the reasoning of the decision.	
20	The law of State A regulates which (administrative or judicial) authority is competent to embody the parental agreement in a decision in the sense of Article 19(1) of the 2007 HC. The procedure is equally governed by the law of State A.	For information on the national competent authority see: Country Profiles 2007 III 2.
21	Depending on the procedural law of State A, the authority in State A seized to deal with matters of parental responsibility might also have competency to deal with matters of maintenance.	
22	The substantive law applicable to maintenance matters is determined in accordance with the 2007 HP in all States bound by this treaty. The applicable law rules of the 2007 HP have universal application , they apply independent of whether another State with which the case has a link is a Contracting State and also independent of whether the law determined as applicable in accordance with the rules of the 2007 HP is the law of a Contracting State. The substantive law of the State of enforcement can indirectly play a role: the decision should be rendered taking into account the public policy test applied in the other Contracting State to avoid the recognition of the decision being refused.	Expl. Rep. 2007 HP paras 34,35.
23	The 2007 HC provides two different procedures for recognition and enforcement. Article 23 contains the default procedure. This procedure is replaced by Article 24, the alternative procedure, when a Contracting State makes a reservation in accordance with Article 24(1).	See the Hague Conference website < www.hcch.net > under "Instruments" then "Conventions" then "2007 Convention" then " Status table ".

Other subject matters

24	Rendering subject matters contained in a family agreement that fall neither in the scope of the 1996 HC nor the scope of the 2007 HC legally binding and enforceable in the two or more legal systems concerned by the agreement can be much more cumbersome. It is possible that regional or bilateral instruments in force between the relevant States facilitate the task.	Att. Expl. Note paras 49, 90, 147.
25	If there is no relevant international, regional or bilateral treaty in force between the States, it will depend on the autonomous private international law of State B, whether the agreement or the agreement's content embodied in a decision can be recognised and rendered enforceable in State B.	Att. Expl. Note para. 40.
26	If there is no possibility to have the agreement or its content recognised in the other State or if this process is too cumbersome or costly, the alternative of rendering the agreement enforceable in accordance with domestic procedures in both State A and State B should be considered.	Att. Expl. Note para. 50.

Part II.a. Child abduction case

Background info:

X and Y are parents of Leo K. born in 2011 in State B. The family habitually resided in State B. X and Y are married and have joint rights of custody in accordance with the rights of State B. For the last two years the spouses have been facing severe relationship problems. When, in summer 2017, Leo and his mother (X) spend part of the holidays with the maternal family in State A, X decides unilaterally not to go back to State B and enrolls Leo in school in State A. Y's requests to return Leo to State B remain unanswered; Y initiates Hague return proceedings in State A in October 2017. In the course of the Hague return proceedings specialised mediation leads to an agreement.

II.a. An example of a Return Agreement

Important note: This agreement cannot be used as a template, since in practice any family agreement must be drafted in line with the requirements of the applicable law and the circumstances of the individual case which may vary considerably.

This return agreement that results from mediation, is done freely and takes into consideration the best interests of our child and acknowledges his right to express his views and wishes. The agreement is signed by us with informed consent and with the intent to be binding and enforceable.

We, the parents of **Leo K., born on 4.5.2011** in State B, have come to conclude the following agreement as the result of mediation taking place in State A.

We are married and have in accordance with the law of State B joint rights of custody of our son. We have been cohabiting in State B until last summer.

We have decided to separate but we both want to play an equal role in the upbringing and education of our son. We want to end the Hague return proceedings with this agreement.

Return to State B

The mother will return with Leo to State B to end the "child-abduction" situation. They will return by train on 15 November 2017; the train ticket will be bought by the mother.

The father states that he has not brought a criminal claim against the mother in State B and promises to refrain from doing so. The father promises to consult with the Central Authorities to obtain, before the date of return, a confirmation that no criminal investigations / proceedings have been initiated against the mother in State B.

Arrangements upon arrival in State B

In the first (at least eight) weeks upon arrival in State B, mother and son will be able to reside in the family home, which is the father's property. The father will temporarily move into his parents' house until the mother has found a new apartment.

Exercise of parental responsibility

We will exercise the rights of custody jointly. We will decide on important matters, such as our child's education or important health related questions jointly.

Leo will live with his mother, who will from now on be the primary carer of Leo. Leo will spend every second weekend (even calendar week) with his father, who will pick him up after school on Fridays and bring him to school on Mondays following the weekend visit. Leo will spend half of his school holidays with his mother and the other half with his father. In even years, Leo will spend the first half with his mother and the second half with his

father; in uneven years the order switches. The summer holidays will be split in 2-weeks-sequences.

Visits of the maternal grandparents and extended family in State A

In the school holidays Leo spends with his mother, mother and son will also be allowed to travel to State A to visit the maternal family.

The mother recognises that her unilateral decision not to return Leo after the summer holidays 2017 has been a very painful experience for the father and the child that the father does not want to risk a repetition of this experience. The father recognises that Leo has very strong links with the maternal family and that visiting the maternal family in State A in the course of school holidays must remain an option.

Child maintenance and spousal maintenance

The father will provide a monthly sum of 400 EUR for child related expenses to the mother. The father will furthermore provide a monthly sum of 300 EUR of spousal support to the mother until the date the divorce decree is granted. The father will transfer the total amount of monthly spousal and child maintenance (700 EUR) on the 10th day of each month to the account of the mother, starting in November 2018. The parties confirm that they have disclosed their income and assets to each other.

Informing our child

We agree that we will explain to our son together what we have decided. We have already explained to him that we are going to divorce. The court seized with the return proceedings in State A ordered a hearing of our son by a social worker; we have been able to take note of the report.

Final clauses

We will undertake all steps necessary to render this agreement binding and enforceable in both State A and B ideally before the date of return. We will submit this agreement to the court seized with the Hague return proceedings and ask the court to end the proceedings by settlement. The father undertakes to end the ongoing custody proceedings in State B by immediately submitting this agreement to the court and asking the court to render a decision in line with the terms of this agreement. We agree to share the costs of the custody proceedings in State B.

We furthermore will, whenever a dispute may occur between us concerning provisions contained in this agreement or any other matters, try to find an amicable solution and will have recourse to mediation when needed.

Full name father

Full name mother

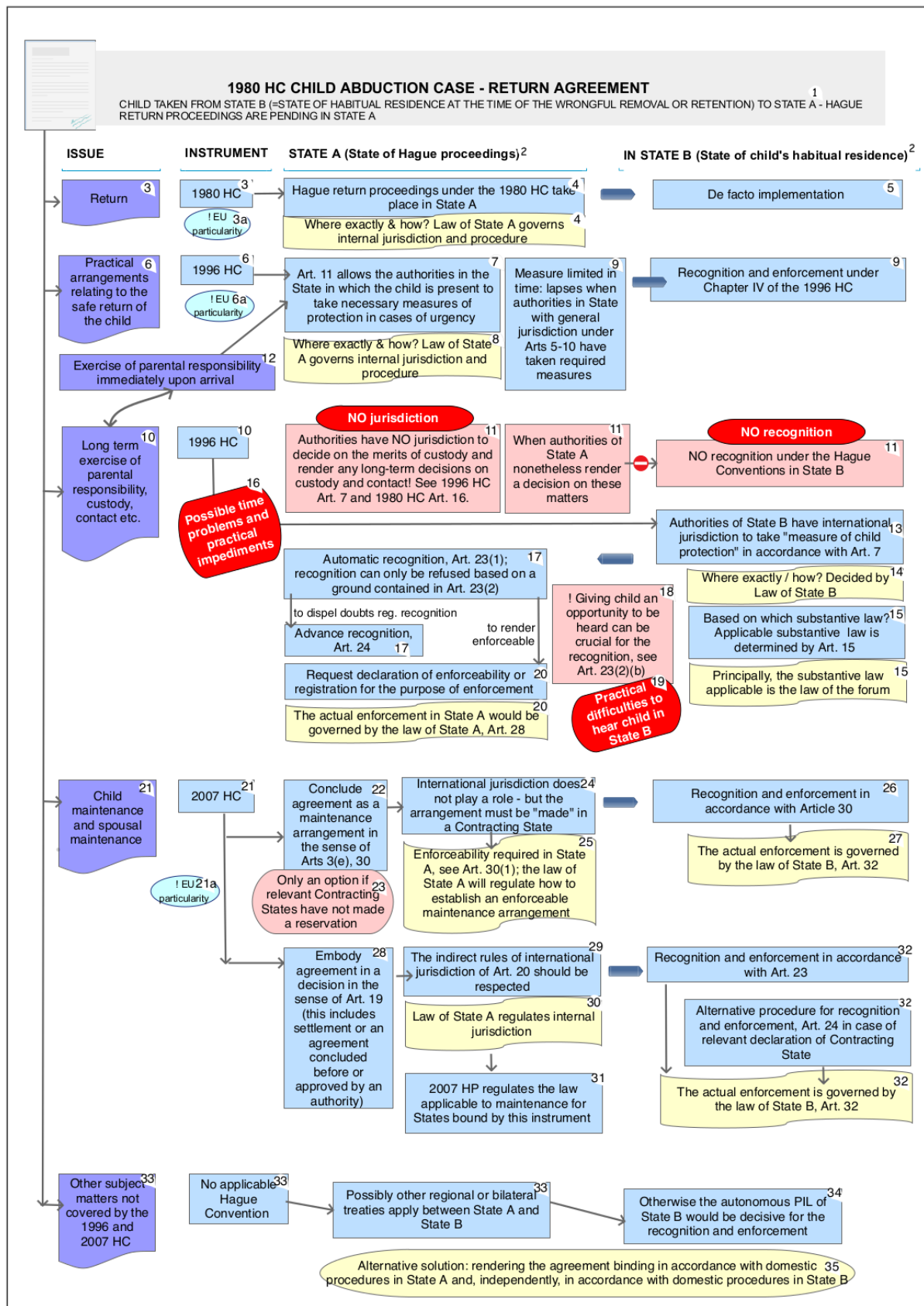
Signature father

Signature mother

Place, 5 November 2018

Place, 5 November 2018

Flowchart II.a. – Return Agreement



Description of Flowchart II.a. – Return Agreement:

Title / headings

Note	Description	Further references
1	<p>The Flowchart description is based on the assumption that State A and State B are Contracting States to the 1980, 1996 and 2007 HC.</p> <p>To find out whether the relevant States concerned are Contracting States to the 1980 HC and / or 1996 HC and / or the 2007 HC see the up-to-date status information at the Hague Conference website. For the 1980 HC, please note that a State's <i>accession</i> to the Convention needs to be accepted by a State Party to the Convention for it to enter into force as between these States. For the 1996 HC, please note that where a State "accedes" to the Convention (instead of "ratifying" it), the accession will have effect only as regards the relations between the acceding State and those Contracting States that have not raised an objection within the timeframe set by the Convention (see Art. 58 of the 1996 HC). The same is true for the 2007 Convention (see Art. 58 of the 2007 HC). For the 2007 HC, please further note that Contracting States can make a number of reservations and declarations, which can affect the scope of the Convention.</p>	<p>Status table Hague Conference website < www.hcch.net > under "Instruments" then "Conventions" then "1980" or "1996 Convention" or "2007 Convention" then "Status table".</p>
2	<p>The Flowchart addresses a situation in which Hague return proceedings are ongoing in State A with regard to a child, whose habitual residence immediately before the wrongful removal /retention was in State B</p>	<p>Regarding the meaning of habitual residence see: Handbook 1996 paras 4.5-4.7 and 13.83-13.87</p> <p>Att. Expl. Note Chap. III.3 with reference to jurisprudence & Chap. V.2.c).</p>

Return / non-return

Note	Description	Further references
3	<p>The term "return" in this box refers to the child's travelling back to State B, not to the question where the child will reside in the long-term and with whom.</p> <p>The return proceedings under the 1980 HC deal with the "return" of the wrongfully removed or retained child as a main subject.</p>	<p>Att. Expl. Note paras 96 <i>et seq.</i></p>
3a	<p>In the EU, the so-called Brussels IIa Regulation provides a number of additional provisions to the operation of the 1980 HC in EU Member States bound by the Regulation.</p>	<p>The Att. Expl. Note refers to the particularities of the Brussels IIa Regulation in a number of footnotes.</p>
4	<p>The courts of State A have the authority under the 1980 HC to decide on the matter of return of the child under the Convention.</p> <p>The national law of State A decides which court(s) can hear such Convention cases and which procedure is to be followed. Many States have introduced "concentrated jurisdiction" for return proceedings under the 1980 HC and this is highly recommended.</p>	<p>For details on the national particularities of Hague return proceedings see: Country Profile 1980 Chap. 10 - Proceedings for return.</p>
5	<p>The "return" in the sense of the 1980 HC does not need to be rendered enforceable in State B– it is implemented <i>de facto</i>.</p>	

Practical arrangements relating to the safe return of the child

Note	Description	Further references
6	<p>As concerns the provisions in the agreement that relate to the practical arrangements surrounding the return, one needs to distinguish:</p> <p>(1) First, return agreements regularly include provisions that relate to the preparation and details of the return itself, such as the date of return, the means of transport used and who pays for the required tickets. When a court seised with the Hague return proceedings renders a decision on return under the 1980 HC, these “modalities of the return” are regularly part of the decision under the 1980 HC and are covered by the court’s competency under the 1980 HC. These matters do not require enforceability in State B, since they will be implemented in State A. It should be noted that these matters equally fall within the scope of the 1996 HC as matters of child protection securing the child’s safe return. However, jurisdiction of the authorities in State A under the 1996 HC can, while Hague return proceedings are ongoing, only be based on Article 11 of the 1996 HC (see <i>infra</i> note 7).</p> <p>(2) Secondly, the agreement can include provisions that relate to details surrounding the return to be implemented in State B, such as for example, who will pick up the child from the station / airport should the child travel alone, or, where the child will be accommodated immediately upon return. This category of provisions can also regulate with whom the child will stay and have contact when arriving in State B (see for the differentiation to provisions relating to the merits of custody and long-term exercise of parental responsibility <i>infra</i> note 12). All these matters relate to securing the safe return of the child and fall within the scope of the 1996 HC. The authorities of State A can in the situation of ongoing Hague return proceedings exercise international jurisdiction under the 1996 HC solely based on Article 11 of the 1996 HC, presupposing a case of “urgency”.</p> <p>(3) Thirdly, the agreement can contain arrangements surrounding the return that relate directly to the parent returning with the child. The 1980 HC focuses on the return of the child. The return of the parent cannot be ordered. The 1996 HC focuses on child protection measures only. For this third category of terms to fall within the scope of the 1996 HC it would have to be argued that the provisions are part of ensuring the safe return of the child and can thus be part of a measure of child protection. If this is denied, other ways to render an agreement on these matters binding in State B would have to be explored.</p>	<p>Att. Expl. Note paras 82 <i>et seq.</i></p>
6a	<p>In the EU, the Brussels IIa Regulation takes precedence over the 1996 HC as between EU Member States bound by this Regulation.</p>	<p>The Att. Expl. Note refers to the particularities of the Brussels IIa Regulation in a number of footnotes.</p>
7	<p>While Hague return proceedings are ongoing, the authorities of State A do not have the right to decide on the merits of custody, see Article 16 of the 1980 HC. This rule is underpinned by Article 7 of the 1996 HC, which provides that the international jurisdiction on matters falling within the scope of the 1996 HC remains, as long as Hague return proceedings are ongoing, in the State where the child had his / her habitual residence immediately before the wrongful removal or retention. However, the authorities in the State to which the child was taken, here State A, can exercise jurisdiction under the 1996 HC based on Article 11 in cases of urgency, see also Article 7(3) if the 1996 HC. The Convention does not define what is a “case of urgency” nor does it define what constitutes a “necessary” measure. As indicated by the Handbook 1996, a classic example of cases involving a situation of “urgency” are cases of wrongful removal or retention of a child, where “in the context of proceedings brought under the 1980 Hague Child Abduction Convention, measures need to be put in place urgently to ensure the safe return of the child to the Contracting State of his / her habitual residence” (Handbook 1996 Chap. 6, para. 6.4). The “importance of the 1996 Convention in providing a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of the child, including in return proceedings under the 1980 Convention” was also noted by the SC 2011 (C&R No 57). As concerns the question of what constitutes a “case of urgency” in these circumstances, the Handbook 1996 highlights that “it is for the competent authority hearing the return application to determine whether, on the facts of the particular case before it, the case is one of ‘urgency’ such that Article 11 can be relied upon to take measures of protection to ensure the child’s safe return” (Handbook 1996 Chap. 6, para. 6.5). It is also for the “authorities in each Contracting State to determine, based upon the facts of each particular case, what measures (within the scope of the Convention) are ‘necessary’ to deal with the urgent situation at hand” (Handbook 1996 Chap. 6, para. 6.7).</p>	<p>For what situation can imply “urgency” in the sense of Art. 11 of the 1996 HC see: Expl. Rep. 1996 para. 68; Handbook 1996 Chap. 6, paras 6.2-6.5 and 13.5-13.12.</p> <p>For when a measure is “necessary” see: Handbook 1996 Chap. 6, paras 6.6-6.7.</p> <p>See also: Att. Expl. Note para. 157 and C&R June 2011 SC No 57.</p>

	Recommendation: The authority rendering a measure of child protection based on Article 11 of the 1996 HC should include clear reasoning why it considered that the circumstances of the case indicate a case of urgency and why it considers the child protection measure “necessary”.	
8	The national procedural law of State A regulates the internal jurisdiction and procedure. Therefore, it depends on the law of State A, whether an authority seised with the Hague return proceedings in State A has competence to render a necessary measure of child protection under Article 11 of the 1996 HC . In other words, in some States the authority seised with Hague return proceedings might, due to national procedural law constraints, be unable to render an urgent measure based on Article 11 of the 1996 HC and will have to liaise with or refer to another authority regarding this matter.	
9	<p>The child protection measure taken under Article 11 of the 1996 HC is limited in time: It lapses as soon as the authorities in the Contracting State with general jurisdiction under Articles 5-10 have taken measures required by the situation, see Article 11(2).</p> <p>The measure taken in accordance with Article 11 can be recognised and enforced in other Contracting States under the 1996 HC in accordance with the Convention provisions on recognition and enforcement.</p> <p>Recommendation: In order to safeguard the continued protection of the child, the authority which has taken a measure under Article 11 should communicate the measure to the authorities in the other Contracting State concerned. The communication can take place directly between competent authorities with the help of direct judicial communication. Similarly, a communication via the Central Authorities is an option.</p>	Handbook 1996 Chap. 6, paras 6.8 <i>et seq.</i>

Long-term decisions on exercise of parental responsibility, merits of custody

Note	Description	Further references
10	All subject matters addressed in the agreement that relate to the exercise of parental responsibility, custody and contact fall within the scope of the 1996 HC.	Att. Expl. Note paras 114 <i>et seq.</i>
11	<p>As stated above, in the situation of ongoing Hague return proceedings, the international jurisdiction on the merits of custody remains with the authorities in State B. The authorities in State A do not have jurisdiction to take a decision on these matters, see Article 16 of the 1980 HC and Article 7 of the 1996 HC.</p> <p>When an authority in State A despite the ban of Article 16 of the 1980 HC and in breach of the rules on international jurisdiction of the 1996 HC renders a decision on these matters, State B has no obligation to recognise the decision under the Hague Conventions.</p> <p>If parents regulate the long-term exercise of parental responsibility in their return agreement, the authority seised with the Hague return proceedings in State A cannot transform these provisions into a binding measure of child protection under the 1996 HC. The parents have to turn to the authorities of State B to have these terms of their agreement rendered binding for all 1996 HC Contracting States. Contrary to the situation explored in the description of the Flowchart II.b. Non-return Agreement at notes 12 <i>et seq.</i>, a shift of international jurisdiction from State B to State A does not happen here.</p>	Att. Expl. Note paras 157 <i>et seq.</i>
12	<p>However, the authorities in State A could use the jurisdiction under Article 11 of the 1996 HC to include provisional measures on the care and contact arrangement which are meant to apply immediately upon return if the conditions of Article 11 are met.</p> <p>In our example Return Agreement, the matters agreed on under the heading “Exercise of parental responsibility” are clearly aimed at regulating matters of custody and long-term contact. However, one could argue that these provisions include an agreement on the arrangement of care and contact immediately upon return. If the court seised with the Hague 1980 return proceedings considers the conditions of Article 11 of the 1996 HC as met it could include a provisional “upon arrival” care and contact arrangement in the measure of child protection under the 1996 HC (provided the Hague 1980 court has internal jurisdiction in accordance with the laws of State A). The care and contact arrangement would then be binding in both State A and B until the authorities with jurisdiction under Articles 5-10 of the 1996 HC replace or confirm it.</p>	<p>For further details on measures of protection under Art. 11 of the 1996 HC see:</p> <p>Handbook 1996 Chap. 6.</p> <p>Att. Expl. Note paras 85 and 157.</p>

13	<p>The terms of the Return Agreement on custody and long-term contact arrangements cannot be included in a binding way in a decision or other measure taken by the court seised with the Hague return proceedings in State A (nor by any other authority of State A as long as the Hague return proceedings are ongoing). The parties have to turn to State B whose authorities have jurisdiction under Article 7 of the 1996 HC.</p>	<p>Att. Expl. Note paras 156 <i>et seq.</i></p>
14	<p>The 1996 HC only regulates the international jurisdiction. Which authority inside State B has internal competency to adopt a measure of child protection and what procedure shall be observed depends on the law of State B. Depending on the national law of State B there could be different parallel options in terms of how the agreement can be turned into a child protection measure in the sense of the 1996 HC. It could be that the agreement's content is embodied in a court decision. It is also conceivable that the national law of State A provides a specific mechanism to homologate the agreement or have it approved by an authority. The Central Authorities 1996 provide information on the competent authorities and relevant national procedure, see Articles 30(2) and 35(1) of the 1996 HC.</p> <p>Very often in international child abduction cases, custody proceedings in the State from which the child was taken are already pending. This court would then have to be addressed when wanting to render the provisions on custody and long-term contact arrangements binding in State B and make them recognisable and enforceable with the help of the 1996 HC in other Contracting States.</p> <p>In our example Return Agreement the left-behind parent promises to ask the court seised with custody proceedings in State B (with jurisdiction under Art. 7 of the 1996 HC) to end the proceedings with a settlement reproducing the terms of the agreement.</p>	<p>The Central Authorities 1996 provide assistance, see Arts 30(2) and 35(1) of the 1996 HC.</p>
15	<p>Article 15 of the 1996 HC determines the applicable substantive law. In accordance with Article 15(1), the authorities with jurisdiction under the Convention generally apply their own law. The authorities in State B would apply the law of the forum.</p>	<p>For further details on determining the applicable law see: Handbook 1996 Chap. 9</p>
16	<p>PROBLEMS: In child abduction cases, parents often conclude comprehensive “package” agreements, such as the example Return Agreement, which regulates besides the return and the modalities of return also questions of custody and contact. The court seised with the Hague return proceedings is unable to render the entire agreement binding and enforceable with an effect for both State A and State B. The parties are forced to take the part of their agreement relating to custody and long-term contact arrangements to State B and have it included in a measure of child protection there.</p> <p>Certain practical impediments may make it difficult to obtain the measure of child protection in State B while the abduction situation is not solved in State A. The authorities in State B may request the presence of both parties in court and may wish to interview the child. Furthermore, problems in practice occur, where the procedure in State B is lengthy. The court seised with the Hague return proceedings has to act expeditiously and has to conclude the proceedings within a very short timeframe, whereas there are no such obligations under the 1996 HC. Even though courts in many States tend to deal with custody matters in a speedy way, the processes in State B may be too lengthy to keep the return proceedings under the 1980 Convention in State A pending. As a result, parents may find themselves with a partially valid agreement: all provisions on return and the modalities of return are binding, but the provisions on custody and contact are not. It is possible that the taking parent refuses to implement the return if the agreement is not fully binding. Furthermore, precarious situations can arise following the return of the child to State B, should the left behind parent and taking parent refuse to cooperate and respect the agreement.</p> <p>Recommendation: There are a number of good practices that can be recommended to the court seised with the Hague proceedings in such a situation. (1) A provision on a care and contact arrangement immediately upon return can be included in the settlement / decision based on the jurisdiction in accordance with Article 11 of the 1996 HC (provided the court considers the conditions of Article 11 are fulfilled); (2) Direct judicial communications can be used to inform the authorities (and in particular the authority competent under Articles 5-10 of the 1996 HC) of the State of return of the return agreement and the settlement / decision rendering part of the parental agreement binding. Direct judicial communications might also assist in encouraging swift action to give force to the custody and contact related terms of the agreement in State B (Where at all feasible, this result should be obtained within the tight time-frame of the Hague return proceedings in order to avoid the unsatisfactory occurrence of an only partially binding agreement.).</p>	<p>Att. Expl. Note paras 157 <i>et seq.</i></p> <p>For further details on Direct Judicial Communications see Att. Expl. Note para 160.</p>

17	<p>The 1996 HC provides for automatic cross-border recognition of measures of child protection rendered in a Contracting State in accordance with the Convention rules. That is to say the child protection measure rendered in one Contracting State is generally immediately legally binding in all other Contracting States to the 1996 HC without the need of a procedure. However, recognition can be refused if one of the limited grounds of non-recognition listed in Article 23(2) of the 1996 HC applies. To dispel any doubts concerning the recognition, an advance recognition in accordance with Article 24 of the 1996 HC of the decision rendered in State B upholding the agreement between the parties can be requested from the competent authorities of State A.</p> <p>In our case, the court seised with the Hague return proceedings in State A will be the first authority having knowledge of the agreement. They will be able to draw to the parties' attention any provisions that might be problematic with regard to the public policies of State A even though this authority will most likely not be the authority competent to decide upon an advance recognition of a child protection measure rendered in State B.</p>	<p>Handbook 1996 paras 10.1 <i>et seq.</i></p>
18	<p>Article 23(2)(b) of the 1996 HC provides that the recognition of the child protection measure could be refused if it "was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State". This provision is directly inspired by Article 12 UNCRC, which enshrines for "the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." National law, however, differs considerably as to the age as of which children are generally offered an opportunity to be heard and by whom they are heard (the judge directly, or indirectly through being heard by a social worker or a psychologist etc. who then makes a report to the judge and may be available to answer questions of the judge and/or the parties). It should be noted that the UN Committee on the Rights of the Child considers that the right of the child to be heard should also be respected in alternative dispute resolution mechanisms such as mediation.</p> <p>The right of the child to be heard does not imply that children of sufficient age <i>must</i> be given an opportunity to express their views in every case. Depending on the circumstances of the case, hearing the child might be considered harmful for the child and thus be considered contrary to the child's best interests. Furthermore, Article 23(2)(b) of the 1996 HC implies that hearing the child in cases of urgency is not a necessity. It is also important to understand that it is a right and not a duty for the child.</p>	<p>See further regarding the matter of hearing the child: Att. Expl. Note para 118, Chap. V.2.e). See for some indication of national law practice concerning hearing the child in proceedings relating to parental responsibility Country Profiles 1980 Chap. 17.3 Participation of the child.</p> <p>The Central Authorities 1996 may provide information on requirements of hearing the child in accordance with the law of State B, Art. 30(2) of the 1996 HC.</p>
19	<p>PROBLEM: The child is present in State A when the parents conclude the Return Agreement. If the parents try to render their agreement on custody and contact legally binding in front of the authorities of State B (having jurisdiction under Art. 7 of the 1996 HC) they will ideally want to do so before the return. This means the child is not present in State B, which creates practical difficulties for the deciding court to "hear the child". There are methods to overcome these difficulties, for example, video-conferencing or getting an independent expert to hear the child's views in the other State.</p>	
20	<p>When it comes to rendering the child protection measures of State B enforceable in State A, a declaration of enforceability or registration for the purpose of enforcement is required. As the advance recognition, the declaration of enforceability can only be refused if one of the grounds of non-recognition listed in Article 23(2) of the 1996 HC applies. It is the national procedural law of State A that regulates which authority is competent for the declaration of enforceability and which procedure is followed, see Article 26(1) of the 1996 HC. However, the 1996 HC requires the procedure to be simple and rapid, see Article 26(2). The Central Authorities provide information on the competent authorities and relevant national procedure, see Articles 30(2) and 35(1) of the 1996 HC.</p> <p>Please note, that the enforceability in State A requires that the child protection measure is enforceable in State B.</p> <p>In the case of the example Return Agreement, the State in which the care and contact arrangement would principally have to be implemented is State B. However, a recognition of the agreement in all Contracting States with which the family has a connection would be desirable, as might be enforceability of the agreement in State A to which the child will regularly travel in accordance with the terms of the agreement.</p>	<p>The Central Authorities 1996 provide assistance, see Arts 30(2) and 35(1) of the 1996 HC</p>

	The actual enforcement in State A takes place in accordance with the law of State A. As noted above, it is important to ensure that the child protection measure adopted in State B has an “enforceable” content in the sense of the national enforcement law of State A, see <i>supra</i> the description of the Flowchart I Relocation Agreement, at note 5.	See for some indication of national enforcement law: Country Profiles 1980 Chap. 18 Enforcement of rights of access
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Recognition and enforcement with the help of the 2007 Hague Child Support Convention

21	The matters covered by the agreement falling within the scope of the 2007 HC can be rendered enforceable in State B with the help of the 2007 HC. The Flowchart II.a. Return Agreement illustrates how the terms of the agreement on maintenance rendered binding and enforceable in State A could travel cross-border with the help of the 2007 HC. However, the 2007 HC could in our case equally be used to make the maintenance related content of the Return Agreement travel from State B to State A, <i>i.e.</i> , to have the agreement included in a decision in State B (provided the authorities of State B have international jurisdiction) or turned into a maintenance arrangement in State B and then use the 2007 HC to obtain recognition in State A.	Att. Expl. Note paras 121 <i>et seq.</i>
	The scope of the 2007 HC is defined in its Article 2. The Convention applies generally to child support arising out of a parent-child relationship towards children under the age of 21 years and to spousal support . However, spousal support does not benefit from the Central Authority support under the Convention with one exception: The application for recognition and enforcement of spousal support is made together with a claim for child support. It is very important to note that the Convention allows Contracting States to increase (by declaration) or restrict (by reservation) this general scope of application. Regarding child support, a Contracting State can restrict the applicability of the Convention to child support for children under the age of 18 years . Contracting States can extend the application of Central Authority support to all applications for spousal support and / or extend application of the Convention (or parts of it) to other forms of family maintenance. As between any two given Contracting States the Convention applies only within the “coinciding” scope.	See for a detailed elaboration on the scope: Handbook 2007 , Chap. 3, Part 1 - The scope of the Convention. All declarations and reservations made by Contracting States are displayed at the Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “2007 Convention” then “ Status table ”.
	In our example Return Agreement, the provisions on child and spousal support fall within the general scope of the Convention.	Att. Expl. Note Chap. II, paras 52 <i>et seq.</i>
21a	In the EU , the EU Maintenance Regulation takes precedence over the 2007 HC between all EU Member States. All EU Member States except Denmark and the United Kingdom apply, as part of the EU Maintenance Regulation, the 2007 HC to determine the law applicable to maintenance.	The Att. Expl. Note refers to the particularities of the EU Maintenance Regulation in a number of footnotes.
22	An agreement on child and spousal maintenance can “travel” cross-border with the help of the 2007 HC in the form of a “ maintenance arrangement ”. Article 3 of the 2007 HC defines a maintenance arrangement as “an agreement in writing relating to the payment of maintenance which i) has been formally drawn up or registered as an authentic instrument by a competent authority; or ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority”. Not all Contracting States provide for the possibility to establish such a maintenance arrangement in their legal system, but they will, unless they have made a reservation under Article 30(8) of the 2007 HC recognise maintenance arrangements of other Contracting States. Whether the maintenance provisions of our example Return Agreement can in State A be turned into a “maintenance arrangement” in the sense of the 2007 HC depends on the law of State A.	Att. Expl. Note paras 123, 138 <i>et seq.</i>

23	Contracting States to the 2007 HC can make a reservation under Article 30(8) that they will not recognise and enforce “maintenance arrangements”. Whether State A or State B have made such a reservation can be looked up in the status table at the Hague Conference website.	See the Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “2007 Convention” then “ Status table ”.
24	<p>The maintenance arrangement is established in accordance with the law of State A.</p> <p>It is important to note that the parties are free to establish their “maintenance arrangement” in any given Contracting State whose laws provide for such an option (and which has not made a reservation under Article 30(8) of the 2007 HC). Article 30 of the 2007 HC requires only that the arrangement is “made in a Contracting State” – the Convention does not require a specific connection to the parties or the case. Of course, the national procedural law of a Contracting State might limit the access to the option of establishing a “maintenance arrangement” to parties with a certain proximity to that State’s legal system.</p> <p>For our example case this means, the parties are generally free to establish a maintenance arrangement in either State A or State B. The Flowchart illustrates the mechanisms that apply if the maintenance arrangement is established in State A. However, should the national law of State A not provide for the option of establishing a “maintenance arrangement” but the national law of State B does so, the parties could go to State B and have their maintenance agreement turned into an enforceable “maintenance arrangement” there. The arrangement if enforceable in State B could then with the help of the 2007 HC be rendered enforceable in State A (provided neither State A nor State B have made a reservation under Art. 30(8) of the 2007 HC).</p>	<p>Att. Expl. Note paras 106 <i>et seq.</i>, para. 139.</p> <p>The Central Authorities 2007 may assist in providing information on how a maintenance arrangement can be established in the relevant Contracting State.</p>
25	The maintenance arrangement, which is meant to become enforceable in another Contracting State, should be drafted taking into consideration the grounds of non-recognition set out in Article 30(4) of the 2007 HC. In particular, taking note of the public policy test applied in the other Contracting State can be of importance.	The Central Authorities 2007 may assist in providing information on the public policy test applied in the other State.
26	The recognition and enforcement of maintenance arrangements under the 2007 HC follows principally the same rules as the recognition and enforcement of decisions, see Article 19(4) of the 2007 HC. However, Article 30 slightly modifies these rules. In particular, a much more limited set of grounds of non-recognition applies to maintenance arrangements.	An application can be made through the Central Authority 2007 to assist with the rendering enforceable of the maintenance arrangement.
27	<p>The enforcement itself is governed by the law of the State of enforcement. It is important to note that the demands on the precision of the maintenance claim for it to be considered “enforceable” under the national enforcement law can differ considerably. For example, in one legal system, the term “the debtor pays 10% of his monthly gross income” may be considered sufficiently precise, in other States the amount must be quantified exactly.</p> <p>Recommendation: The terms on maintenance drafted to be rendered enforceable in another legal system should be drafted with an “enforceable” content in the understanding of the national enforcement law of the State of enforcement.</p>	For information on national enforcement law see Country Profiles 2007 IV Information concerning the enforcement rules and procedures
28	The agreement can be embodied in a decision in the sense of Article 19(1) of the 2007 HC.	Att. Expl. Note paras 108, 121 <i>et seq.</i> , 137.
29	<p>The 2007 HC does not contain direct rules on international jurisdiction; however, the Convention contains negative rules on jurisdiction (in Art. 18) and indirect rules on jurisdiction (in Art. 20). A maintenance decision, meant to be rendered enforceable in another Contracting State, should be established in respect of these rules of jurisdiction. Otherwise the recognition might be refused.</p> <p>It is important to underline that not all grounds of jurisdiction referred to in Article 20 of the 2007 HC are applicable between all Contracting States. Reservations are, in accordance with Article 20(2), possible with regard to the grounds contained in Article 20(1)(c), (e) and (f).</p> <p>Recommendation: Verify whether reservations under Article 20(2) of the 2007 HC have been made by State A or State B. Base international jurisdiction on the grounds that</p>	Att. Expl. Note para. 121.

	guarantee a recognition of the decision in State B. Include a reference to the facts that justify the use of the relevant ground of jurisdiction in the reasoning of the decision.	
30	<p>The law of State A regulates which (administrative or judicial) authority is competent to embody the parental agreement in a decision in the sense of Article 19(1) of the 2007 HC. The procedure is equally governed by the law of State A.</p> <p>It will depend on the procedural law of State A, whether the court seised with the Hague return proceedings has the internal competency to include the agreement on matters of maintenance in the court settlement or decision terminating the Hague proceedings.</p>	For information on the national competent authority the Country Profiles 2007 III 2.
31	<p>The substantive law applicable to maintenance matters is determined in accordance with the 2007 HP in all States bound by this treaty. The applicable law rules of the 2007 HP have universal application, they apply independently of whether another State with which the case has a link is a Contracting State and also independent of whether the law determined as applicable in accordance with the rules of the 2007 HP is the law of a Contracting State.</p> <p>The substantive law of the State of enforcement can indirectly play a role: the decision should be rendered taking into account the public policy test applied in the other Contracting State to avoid the recognition of the decision being refused.</p>	Expl. Rep. 2007 HP paras 34,35.
32	<p>The 2007 HC provides two different procedures for recognition and enforcement. Article 23 contains the default procedure, which is replaced by Article 24, the alternative procedure, if a Contracting State makes a reservation in accordance with Article 24(1).</p> <p>The actual enforcement is governed by the law of State B, Article 32 of the 2007 HC.</p>	

Other subject matters

33	Rendering subject matters contained in a family agreement that fall neither in the scope of the 1996 HC nor the scope of the 2007 HC legally binding and enforceable in the two or more legal systems concerned by the agreement can be much more cumbersome. It is possible that regional or bilateral instruments in force between the relevant States facilitate the task.	Att. Expl. Note paras 49, 90, 147.
34	If there is no relevant international, regional or bilateral instrument in force between the States, it will depend on the autonomous private international law of State B, whether the agreement or the agreement's content embodied in a decision can be recognised and rendered enforceable in State B.	Att. Expl. Note para. 40.
35	If there is no possibility to have the agreement or its content recognised in the other State or if this process is too cumbersome or costly, the alternative of rendering the agreement enforceable in accordance with domestic procedures in both State A and State B should be considered.	Att. Expl. Note para. 50.

Part II.b. Child abduction case

Background info:

X and Y are parents of Leo K. born in 2011 in State B. The family habitually resided in State B. X and Y are married and have joint rights of custody in accordance with the rights of State B. For the last two years the spouses have been facing severe relationship problems. When, in summer 2017, Leo and his mother (X) spend part of the holidays with the maternal family in State A, X decides unilaterally not to go back to State B and enrolls Leo in school in State A. Y's requests to return Leo to State B remain unanswered; Y initiates Hague return proceedings in State A in October 2017. In the course of the Hague return proceedings specialised mediation leads to an agreement.

II.b. An example of a Non-Return Agreement

Important note: This agreement cannot be used as a template, since in practice any family agreement must be drafted in line with the requirements of the applicable law and the circumstances of the individual case which may vary considerably.

This non-return agreement that results from mediation is done freely and takes into consideration the best interests of our child and acknowledges his right to express his views and wishes. The agreement is signed by us with informed consent and with the intent to be binding and enforceable.

We, the parents of **Leo K., born on 4.5.2011** in State B, have come to conclude the following agreement as the result of mediation taking place in State A.

We are married and have in accordance with the law of State B joint rights of custody of our son. Until last summer, we have been cohabiting in State B, where Leo's father still habitually resides.

We have decided to separate but we both want to play an equal role in the upbringing and education of our son. We want to end the Hague return proceedings with this agreement.

Non-Return and new habitual residence

We have come to agree that Leo and his mother will remain in State A and we acknowledge that Leo is now habitually resident in State A. Leo is resident in State A since July 2017 and he and his mother have integrated into the life of State A (Leo has been attending school in State A since August 2017 and frequents the local football club) and as his parents (the only holders of parental responsibility) we are agreed that Leo has become and should remain habitually resident in State A. We want to end the Hague return proceedings with this settlement.

Exercise of parental responsibility

We will continue to exercise the rights of custody jointly. We will decide on important matters, such as our child's education or important health related questions jointly.

Leo will live with his mother, who will from now on be the primary carer of Leo.

Contact

Leo and his father will maintain contact on a regular basis by phone and skype. The mother will provide time for a skype call of father and child at least every Wednesday between 18:00 and 18:30 and on Sundays (except visiting weekends) between 17:00 and 17:30. The father will come to see Leo in State A every third calendar weekend. Leo will spend half of all annual school holidays with his father in State B (or any other State where Leo's father chooses to take Leo on holiday with the consent of Leo's mother). In even years, he will spend the first half with his mother and the second half with his father; in uneven years he will spend the first half with his father and the second with his mother. The summer holidays will be split in 2-weeks-sequences. When Leo visits his father in State B, it is agreed that he can also stay with the paternal grandparents whenever he likes. The

parents will engage in setting up a detailed calendar for each school year. When travelling between States A and B, Leo will be accompanied by his father unless the parents agree otherwise in relation to a specific journey. Since Leo has dual nationality, each parent will have a passport for Leo.

The father states that he has not brought a criminal claim against the mother in State B and promises to refrain from doing so. The father promises to consult with the Central Authorities to obtain before the mother first travels to State B a confirmation that no criminal investigations / proceedings have been initiated against the mother in State B.

Travel costs

The father will take over all costs for his visits to State A. The mother recognises that the travel costs are a heavy burden on the father's budget and accepts these costs will be counted as a part of the father's contribution to the child's maintenance.

Child maintenance and spousal maintenance

We wish to contribute to all child related costs on an equal basis. Given the fact that the housing, clothing and food of our son will be provided by his mother, the appropriate amount of child maintenance payable by the father would be a monthly sum of 500 EUR. However, since the father is bearing the entire travel costs, the father will only pay a monthly sum of 300 EUR. The father will furthermore provide a monthly sum of 300 EUR of spousal support to the mother until the date the divorce decree is granted. The father will transfer the total amount of monthly spousal and child maintenance (600 EUR) on the 10th day of each month to the account of the mother, starting in November 2018. The parties confirm that they have disclosed their income and assets to each other.

Divorce

We agree to prepare filing a joint divorce application in State B.

Informing our child

The mediator has assisted in organising a contact meeting between father and son in the offices of the mediation service. In connection with this meeting we as parents have already had the chance to give some explanation to our child. We agree that we will explain to our son together what we have decided.

Final clauses

We promise to undertake all steps necessary to render this agreement binding and enforceable in both State A and B as quickly as possible. We will submit this agreement to the court seised with the Hague return proceedings and ask the court to end the proceedings by settlement. The father undertakes to end the ongoing custody proceedings in State B.

We furthermore promise, whenever a dispute may occur between us concerning provisions contained in this agreement or any other matters, we will try to find an amicable solution and will have recourse to mediation when needed.

Full name father

Full name mother

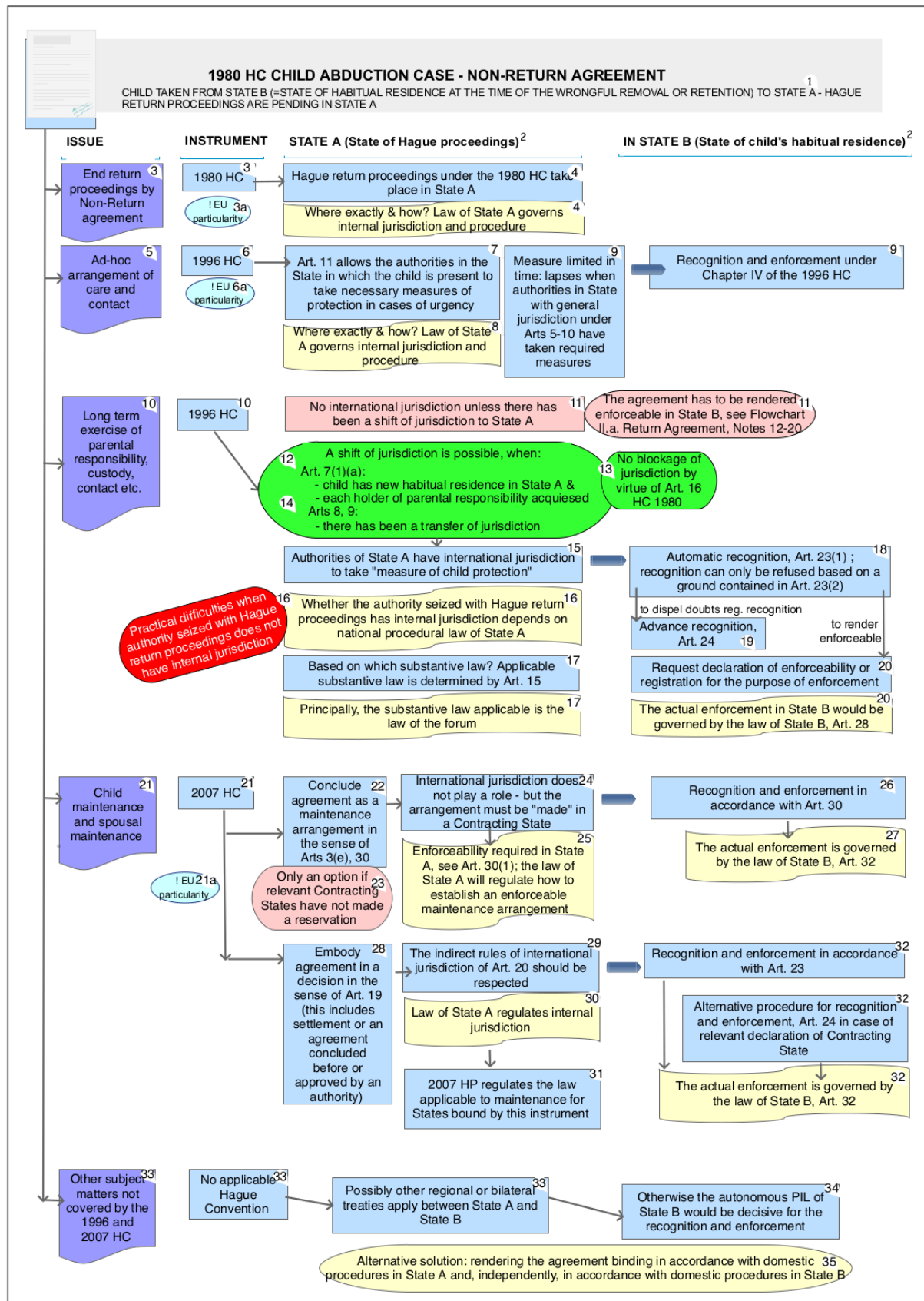
Signature father

Signature mother

Place, 5 November 2018

Place, 5 November 2018

Flowchart II.b. – Non-Return Agreement



Description of Flowchart II.b. – Non-Return Agreement:**Title / headings**

Note	Description	Further references
1	<p>The Flowchart description is based on the assumption that State A and State B are Contracting States to the 1980, 1996 and 2007 HC.</p> <p>To find out whether the relevant States concerned are Contracting States to the 1980 HC and / or 1996 HC and / or the 2007 HC see the up-to-date status information at the Hague Conference website. For the 1980 HC, please note that a State's <i>accession</i> to the Convention needs to be accepted by a State Party to the Convention for it to enter into force as between these States. For the 1996 HC, please note that where a State "accedes" to the Convention (instead of "ratifying" it), the accession will have effect only as regards the relations between the acceding State and those Contracting States that have not raised an objection within the timeframe set by the Convention (see Art. 58 of the 1996 HC). The same is true for the 2007 Convention (see Art. 58 of the 2007 HC). For the 2007 HC, please further note that Contracting States can make a number of reservations and declarations, which can affect the scope of the Convention.</p>	<p>Status table Hague Conference website < www.hcch.net > under "Instruments" then "Conventions" then "1980 Convention" or "1996 Convention" or "2007 Convention" then "Status table"</p>
2	<p>The Flowchart addresses a situation in which Hague return proceedings are ongoing in State A with regard to a child, whose habitual residence immediately before the wrongful removal /retention was in State B</p>	<p>Regarding the meaning of habitual residence see: Handbook 1996 paras 4.5-4.7 and 13.83-13.87, Att. Expl. Note Chap. III.3 with references to jurisprudence & Chap. V.2.c).</p>

Return / non-return

Note	Description	Further references
3	<p>The 1980 HC deals with the return of the wrongfully removed or retained child as the main subject. The return must be ordered unless one of the limited exceptions applies. However, the 1980 HC promotes and supports party autonomy. A court seised with Hague return proceedings can terminate the Hague proceedings with a settlement or consent order in accordance with a parental agreement.</p>	<p>Att. Expl. Note paras 96 <i>et seq.</i></p>
3a	<p>In the EU, the Brussels IIa Regulation provides a number of additional provisions to the operation of the 1980 HC in EU Member States bound by the Regulation.</p>	<p>The Att. Expl. Note refers to the particularities of the Brussels IIa Regulation in a number of footnotes.</p>
4	<p>The courts of State A have authority under the 1980 HC to decide on the matter of return of the child under the Convention.</p> <p>The national law of State A decides which court has internal jurisdiction and which procedure is to be followed. Many States have introduced "concentrated jurisdiction" for return proceedings under the 1980 HC.</p>	<p>For details on the national particularities of Hague return proceedings see: Country Profile 1980 Chap. 10 - Proceedings for return</p>

Ad hoc arrangement of care and contact

Note	Description	Further references
5	<p>A parental non-return agreement always contains by its very nature an agreement on the child's future place of living: The child will remain in State A and will no longer be living in State B. The parents regularly include detailed provisions on the exercise of parental responsibility, including who will be the primary carer and what contact arrangements will be put in place.</p>	
6	<p>All matters addressed in the agreement that relate to the exercise of parental responsibility, custody and contact fall within the scope of the 1996 HC.</p>	<p>Att. Expl. Note paras 114 <i>et seq.</i></p>

6a	In the EU, the Brussels IIa Regulation takes precedence over the 1996 HC as between EU Member States bound by this Regulation.	The Att. Expl. Note refers to the particularities of the Brussels IIa Regulation in a number of footnotes.
7	<p>While Hague return proceedings are ongoing, the authorities of State A do not have the right to decide on the merits of custody, see Article 16 of the 1980 HC. This rule is underpinned by Article 7 of the 1996 HC, which provides that the international jurisdiction on matters falling within the scope of the 1996 HC remains, as long as the Hague return proceedings are ongoing, in the State where the child had his / her habitual residence immediately before the wrongful removal or retention. This situation will only change, when there has been a shift of international jurisdiction to State A (see <i>infra</i> notes 12 <i>et seq.</i>)</p> <p>However, in absence of international jurisdiction under the Articles 5-9 of the 1996 HC, the authorities in the State to which the child was taken, here State A, can exercise jurisdiction under the 1996 HC based on Article 11 in cases of urgency and take “necessary measures”, see also Article 7(3) if the 1996 HC. The Convention does not define what is a case of “urgency”, nor does it define what constitutes a “necessary measure”.</p> <p>The “importance of the 1996 Convention in providing a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of the child, including in return proceedings under the 1980 Convention” was also noted by the SC 2011 (C&R No 57). As concerns the question of what constitutes a “case of urgency” in these circumstances, the Handbook 1996 highlights that “it is for the competent authority hearing the return application to determine whether, on the facts of the particular case before it, the case is one of ‘urgency’” (Handbook 1996 Chap. 6, para. 6.5).</p> <p>It is also for the “authorities in each Contracting State to determine, based upon the facts of each particular case, what measures (within the scope of the Convention) are ‘necessary’ to deal with the urgent situation at hand” (Handbook 1996 Chap. 6, para. 6.7).</p> <p>Recommendation: The authority rendering a measure of child protection based on Article 11 of the 1996 HC should include clear reasoning as to why it considers that the circumstances of the case indicate a case of urgency and why the child protection measure is “necessary”.</p>	<p>For what situation can imply “urgency” in the sense of Art. 11 of the 1996 HC see: Expl. Rep. 1996 para. 68; Handbook 1996 Chap. 6, paras 6.2-6.5 and 13.5-13.12.</p> <p>For when a measure is “necessary” see: Handbook 1996 Chap. 6, paras 6.6-6.7 See also: Att. Expl. Note para. 157.</p>
8	The national procedural law of State A regulates the internal jurisdiction and procedure. Therefore it depends on the law of State A, whether an authority seised with the Hague return proceedings in State A has competency to render a necessary measure of child protection under Article 11 of the 1996 HC . In other words, in some States the authority seised with Hague return proceedings might, due to national procedural law constraints, be unable to render an urgent measure based on Article 11 of the 1996 HC and will have to liaise with or refer to another authority regarding this matter.	
9	<p>The child protection measure taken under Article 11 of the 1996 HC is limited in time: It lapses as soon as the authorities in the Contracting State with general jurisdiction under Articles 5-10 have taken measures required by the situation, see Article 11(2).</p> <p>The measure taken in accordance with Article 11 can be recognised and enforced in other Contracting States under the 1996 HC in accordance with the Convention provisions on recognition and enforcement.</p>	Handbook 1996 Chap. 6, paras 6.8 <i>et seq.</i>

Long-term decisions on exercise of parental responsibility, merits of custody

Note	Description	Further references
10	All matters addressed in the agreement that relate to the long-term exercise of parental responsibility, custody and contact fall within the scope of the 1996 HC.	Att. Expl. Note paras 114 <i>et seq.</i>
11	As stated above, in the situation of ongoing Hague return proceedings, the international jurisdiction on the merits of custody remains with the authorities in State B. The authorities in State A will not have international jurisdiction to take a decision on these matters, unless a shift of jurisdiction has occurred in accordance with Article 7 of the 1996 HC (see <i>infra</i> note 12).	Att. Expl. Note paras 162 <i>et seq.</i>

	<p>When an authority in State A despite the ban of Article 16 of the 1980 HC and in breach of the rules on international jurisdiction of the 1996 HC renders a decision on these matters, State B has no obligation to recognise the decision under the Hague Conventions.</p> <p>If the conditions for a shift of international jurisdiction (described <i>infra</i> notes 12 and 14) are not met, the agreement on custody and long-term contact arrangements must be taken to State B whose authorities have jurisdiction under Article 7 of the 1996 HC. Once the competent authority in State B has rendered an enforceable child protection measure embodying the agreement, this measure will automatically be recognised in State A. See for the details <i>supra</i> the Flowchart II.a. and Description, notes 13-20.</p> <p>Very often in international child abduction cases, custody proceedings are already pending before a court in the State from which the child was taken. This court could then be addressed when wanting to render the provisions on custody and long-term contact arrangements binding in State B and achieve recognition and enforceability with the help of the 1996 HC in other Contracting States.</p> <p>Under the conditions detailed above (see <i>supra</i> the description of the Flowchart II.a. Return Agreement, at note 12 regarding the requirements of urgency and necessity) an interim measure of protection regulating the immediate custody and care situation can be taken by the authorities of State A in a situation where the authorities of State B retain international jurisdiction under Article 7 of the 1996 HC.</p>	
12	<p>A shift of international jurisdiction on the merits of custody from State B to State A (both Contracting States to the 1980 and 1996 HC) can in our case occur when the conditions of Article 7 of the 1996 HC for a shift of jurisdiction are fulfilled.</p> <p>Article 7(1)(a) requires first that the child has acquired a new habitual residence in State A. Habitual residence is in accordance with prevailing views at least a partially fact-based concept. The child must thus have established some links with the new environment; a shift of habitual residence by mere parental agreement without a factual base seems excluded. Of course, the factual basis can be the presence of the child in State A since the wrongful removal or retention (and all the connections that the child has made in State A while present there) coupled with the fact that the holders of parental responsibility are now agreed that State A is where the child is habitually resident and should remain habitually resident. As a second condition, Article 7 requires the acquiescence of “each person, institution or other body having rights of custody”. It would have to be explored whether in the individual case there are persons, institutions or bodies other than the parties to the agreement that need to give their approval.</p> <p>Recommended good practices:</p> <p>(1) Good practice for parties: Where parents conclude a non-return agreement it is highly recommended that they indicate therein clearly that they agree that State A, <i>i.e.</i>, the State in which the child shall remain, is and will be the new habitual residence of the child. It is furthermore advisable for the parents to record in their agreement any circumstances (the child’s presence, integration, schooling or the like) that underpin a factual connection of the child to the new place of habitual residence.</p> <p>(2) Good practice for courts: Where a court in State A renders a non-return agreement legally binding and in doing so issues a child protection measure in the sense of the 1996 HC based on a shift of jurisdiction under Article 7 of the 1996 HC, the court should record the findings of fact on which it bases its international jurisdiction. These findings of fact will in accordance with Article 25 of the 1996 HC be recognised by the authorities in the Contracting State of enforcement.</p>	<p>Att. Expl. Note para. 172.</p> <p>Regarding the meaning of habitual residence see: Handbook 1996 paras 4.5-4.7 and 13.83-13.87, Att. Expl. Note Chap. III.3 with references to jurisprudence & Chap. V.2.c).</p>
13	<p>Of course, the fact that the 1996 HC is in force between the two relevant States and that a shift of international jurisdiction on the merits of custody has occurred under this Convention does not alter Article 16 of the 1980 HC.</p> <p>However, Article 16 of 1980 HC only prevents the court from deciding “on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention” (emphasis added).</p> <p>Furthermore, it can be argued that in the light of a literal, systematic and teleological interpretation of Article 16 of the 1980 HC, this provision should not be an obstacle to the Hague court’s giving effect to the agreement simultaneously with ending the Hague return proceedings. As set out by the 1980 HC Explanatory Report, Article 16 is meant to “promote the realization of the Convention’s objects regarding the return of the child” (see para. 121 of the Expl. Rep. 1980). The Article aims to avoid the misuse of custody proceedings by the taking parent in the State to which the child was taken bringing about conflicting custody decisions and circumventing the Convention’s return mechanism. Where the court seised with the Hague return proceedings ends the proceedings by</p>	<p>Expl. Rep. 1980, para. 121</p>

	<p>approving a parental agreement on non-return, this is a correct use of the 1980 HC and not a circumvention of it. Hence, Article 16 of the 1980 HC should not prevent the court from approving the agreement. Support for this argument can be found in the 1980 HC Explanatory Report which in setting forth the objective of Article 16 notes that " it is perfectly logical to provide that this obligation [prohibition against deciding upon the merits of custody rights] will cease as soon as it is established that the conditions for a child's return have not been met, either because the parties have come to an amicable arrangement or because it is appropriate to consider on the exceptions provided for in articles 13 and 20." (See para. 121 of the Expl. Rep. 1980).</p> <p>To dispel any doubts with regard to the "lawfulness" of the court's approval of a long-term custody agreement in view of Article 16 of the 1980 HC, the court seized with Hague return proceedings could (if the national procedural law allows) end the Hague return proceedings by implementing the agreement on non-return and immediately open new proceedings to approve the remainder of the agreement.</p>	
14	<p>Another possibility to establish a shift of international jurisdiction on the merits of custody from State B to State A is a transfer of jurisdiction in accordance with Articles 8 or 9 of the 1996 HC.</p> <p>It must be highlighted that the transfer of jurisdiction is an option still scarcely used in practice. Due to the fact that it can be time-consuming to arrange for a transfer of jurisdiction this tool might not necessarily be fit for the tight time-frame of Hague return proceedings. However, judges should not hesitate to explore this option in appropriate cases, ideally assisted by direct judicial communication. Should transfer of jurisdiction be more frequently used it could become an effective tool.</p> <p>For details on why Article 16 of the 1980 HC would in the situation of a shift of international jurisdiction under the 1996 HC not be an obstacle for a decision on the merits of custody in State A, see <i>supra</i> note 13.</p>	Att. Expl. Note para. 172.
15	<p>If the conditions for a shift of international jurisdiction concerning matters of custody and long-term parent child contact under the 1996 HC from State B to State A have been met, the authorities of State A can decide on these matters. However, the 1996 HC only regulates the international jurisdiction and does not touch upon the question, which administrative or judicial authority in State A can take such decisions.</p>	
16	<p>Which authority inside State A has internal competency to adopt a measure of child protection and what procedure must be observed depends on the law of State A. The options national law provides to turn an agreement on custody and contact into a child protection measure in the sense of the 1996 HC may differ and may comprise: homologation or approval by a competent authority or inclusion of the agreement's content in a court decision. The Central Authorities 1996 provide information on the competent authorities and relevant national procedure, Articles 30(2) and 35(1) of the 1996 HC.</p> <p>It would be ideal if the parties could obtain enforceability of their entire non-return agreement simultaneously with the decision or consent order rendered by the court seized with the Hague return proceedings when ending the return proceedings.</p> <p>PROBLEM: It is not certain whether the authority seized with Hague return proceedings, when finding that the child's habitual residence has changed to State A and that the conditions for a shift of jurisdiction in accordance with Article 7 of the 1996 HC are met, will have internal jurisdiction to approve the agreement on custody and render the agreement enforceable simultaneously with ending the return proceedings. It could be, that the national procedural law requires the authority seized with Hague return proceedings to refer the parties to a different authority in State A. This is problematic since the other authority is most likely not under the same obligation to act swiftly as is the court seized with the Hague return proceedings. Measures have to be taken to avoid that as a result, the Hague return proceedings would have to be ended before the agreement on custody is rendered binding and enforceable. Because this would mean that the left-behind parent will be forced to agree to a non-return of the child before knowing whether the agreement on custody and cross-border contact will become binding, which would be a highly unsatisfactory result.</p> <p>Recommended good practices:</p> <p>Depending on the national procedural law, the following options might be considered to avoid the unsatisfactory result of a partially binding non-return agreement.</p> <p>Two separate motions could be filed requesting the court seized with the Hague return proceedings (1) to withdraw the pending return application under the 1980 HC on the condition that the non-return agreement is given force of law / homologated and, simultaneously, (2) to give force of law / homologate the non-return agreement. It might</p>	<p>The Central Authorities 1996 may provide assistance, see Arts 30(2) and 35(1) of the 1996 HC.</p>

	<p>also be possible to ask the court seized with the Hague return proceedings to include the terms of the agreement in the consent order or other form of decision that ends the Hague return proceedings. As set forth above (<i>supra</i> note 12), it is important for the court to record the findings of fact on which it bases its international jurisdiction in accordance with a shift of jurisdiction under Article 7 of the 1996 HC.</p> <p>If the court seized with the Hague return proceedings cannot render the non-return agreement binding simultaneously with ending the Hague return proceedings or in rapid succession, the Hague return proceedings should be kept pending until the agreement is given force of law. Depending on national procedural law, the Hague return proceedings might be stayed or the return application could be withdrawn upon the condition that the non-return agreement is given force of law. In that case, all necessary steps must be taken to speed up the process of rendering the agreement binding in order to not cause undue delay to the conclusion of the Hague return proceedings.</p>	
17	Article 15 of the 1996 HC determines the applicable substantive law. In accordance with Article 15(1), the authorities with jurisdiction under the Convention generally apply their own law. The authorities in State A would apply the law of the forum.	For further details on determining the applicable law see: Handbook 1996 Chap. 9.
18	<p>The 1996 HC provides for automatic cross-border recognition of measures of child protection rendered in a Contracting State in accordance with the Convention rules. That is to say the child protection measure rendered in one Contracting State is generally immediately legally binding in all other Contracting States to the 1996 HC without the need of a procedure. However, recognition can be refused if one of the limited grounds of non-recognition listed in Article 23(2) of the 1996 HC applies.</p> <p>Particular attention is drawn to Article 23(2)(b) of the 1996 HC which provides that the recognition of the child protection measure could be refused if it “was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State”. This provision is directly inspired by Article 12 UNCRC, which enshrines the right of “the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” National law, however, differs considerably as to the age as of which children are generally offered an opportunity to be heard and by whom they are heard (the judge directly, or indirectly through being heard by a social worker or a psychologist etc. who then makes a report to the judge and may be available to answer questions by the judge and/or the parties). It should be noted that the UN Committee on the Rights of the Child considers that the right of the child to be heard should also be respected in alternative dispute resolution mechanisms such as mediation.</p> <p>The right of the child to be heard does not imply that children of sufficient age <i>must</i> be given an opportunity to express their views in every case. Depending on the circumstances of the case, hearing the child might be considered harmful for the child and thus be considered contrary to the child’s best interests. Furthermore, Article 23(2)(b) of the 1996 HC implies that hearing the child in cases of urgency is not a necessity. It is also important to understand that it is a right and not a duty for the child.</p>	<p>Handbook 1996 paras 10.1 <i>et seq.</i></p> <p>See further regarding the matter of hearing the child: Att. Expl. Note para 118, Chap. V.2.e). See for some indication of national law practice concerning hearing the child in proceedings relating to parental responsibility Country Profiles 1980 Chap. 17.3 Participation of the child.</p> <p>The Central Authorities 1996 may provide information on requirements of hearing the child in accordance with the law of State B, Art. 30(2) of the 1996 HC.</p>
19	To dispel any doubts concerning the recognition, an advance recognition in accordance with Article 24 can be requested from the competent authorities of State B.	
20	<p>Rendering the child protection measures of State A enforceable in State B requires an extra step: obtaining a declaration of enforceability or registration for the purpose of enforcement. The law of State B regulates which authority is competent and which procedure is followed, see Article 26(1) of the 1996 HC. However, the 1996 HC requires the procedure to be simple and rapid, see Article 26(2). The Central Authorities provide information on the competent authorities and relevant national procedure, 30(2) and 35(1) of the 1996 HC.</p> <p>Please note, that the enforceability in State B requires that the child protection measure is enforceable in State A.</p>	The Central Authorities 1996 provide assistance , see Arts 30(2) and 35(1) of the 1996 HC.
	The actual enforcement takes place in accordance with the law of State B. As noted above, it is important to ensure that the child protection measure adopted in State A has an “enforceable” content in the sense of the national enforcement law of State B, see <i>supra</i> the description of the Flowchart I Relocation Agreement, at note 5.	See for some indication of national enforcement law: Country Profiles 1980 Chap. 18 Enforcement of rights of access.

Recognition and enforcement with the help of the 2007 Hague Child Support Convention

21	<p>The matters covered by the agreement falling within the scope of the 2007 HC can be rendered enforceable in State B with the help of the 2007 HC.</p> <p>The Flowchart II.a. Non-Return Agreement illustrates how the terms of the agreement on maintenance rendered binding and enforceable in State A could travel cross-border with the help of the 2007 HC. However, The 2007 HC could in our case equally be used to make the maintenance related content of the Non-Return Agreement travel from State B to State A, <i>i.e.</i>, to have the agreement included in a decision in State B (provided the authorities of State B have international jurisdiction) or turned into a maintenance arrangement in State B and then use the 2007 HC to obtain recognition in State A.</p> <p>The scope of the 2007 HC is defined in its Article 2. The Convention applies generally to child support arising out of a parent-child relationship towards children under the age of 21 years and to spousal support. However, in accordance with the default scope of the Convention, the spousal support does not benefit from the Central Authority support under the Convention with one exception: The application for recognition and enforcement of spousal support is made together with a claim for child support.</p> <p>It is very important to note that the Convention allows Contracting States to increase (by declaration) or restrict (by reservation) this general scope of application. Regarding child support, a Contracting State can restrict the applicability of the Convention to child support for children under the age of 18 years. Contracting States can extend the application of Central Authority support to all applications for spousal support and /or extend the application of the Convention (or parts of it) to other forms of family maintenance. As between any two given Contracting States the Convention applies only within the “coinciding” scope.</p> <p>In our example Non-Return Agreement, the provisions on child and spousal support fall within the general scope of the Convention. Equally the agreement that the travel costs paid by the father should be considered part of his provision of child maintenance is a provision that can fall within the scope of the 2007 HC.</p>	<p>Att. Expl. Note paras 121 <i>et seq.</i></p> <p>See for a detailed elaboration on the scope: Handbook 2007, Chap. 3, Part 1 - The scope of the Convention.</p> <p>All declarations and reservations made by Contracting States are displayed at the Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “2007 Convention” then “Status table”.</p> <p>Att. Expl. Note Chap. II, paras 52 <i>et seq.</i></p>
21a	<p>In the EU, the EU Maintenance Regulation takes precedence over the 2007 HC between all EU Member States. All EU Member States except Denmark and the United Kingdom apply, as part of the EU Maintenance Regulation, the 2007 HC to determine the law applicable to maintenance.</p>	<p>The Att. Expl. Note refers to the particularities of the EU Maintenance Regulation in a number of footnotes.</p>
22	<p>An agreement on child and spousal maintenance can “travel” cross-border with the help of the 2007 HC in the form of a “maintenance arrangement”. Article 3 of the 2007 HC defines a maintenance arrangement as “an agreement in writing relating to the payment of maintenance which i) has been formally drawn up or registered as an authentic instrument by a competent authority; or ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority”.</p> <p>Not all Contracting States provide for the possibility to establish such a maintenance arrangement in their legal system, but they will, unless they have made a reservation under Article 30(8) of the 2007 HC recognise maintenance arrangements of other Contracting States.</p> <p>Whether the maintenance provisions of our example Non-Return Agreement can in State A be turned into a “maintenance arrangement” in the sense of the 2007 HC depends on the law of State A.</p>	<p>Att. Expl. Note paras 123, 138 <i>et seq.</i></p>
23	<p>Contracting States to the 2007 HC can make a reservation under Article 30(8) that they will not recognise and enforce “maintenance arrangements”. Whether State A or State B have made such a reservation can be looked up in the status table at the Hague Conference website.</p>	<p>See the Hague Conference website < www.hcch.net > under “Instruments” then “Conventions” then “2007 Convention” then “Status table”.</p>

24	<p>The maintenance arrangement is established in accordance with the law of State A.</p> <p>It is important to note that the parties are free to establish their “maintenance arrangement” in any given Contracting State whose laws provides for such an option (and which has not made a reservation under Art. 30(8) of the 2007 HC). Article 30 of the 2007 HC requires only that the arrangement is “made in a Contracting State” – the Convention does not require a specific connection to the parties or the case. Of course, the national procedural law of a Contracting State might limit the access to the option of establishing a “maintenance arrangement” to parties with a certain proximity to that State’s legal system.</p> <p>For our example case this means, should the national law of State A not provide for the option of establishing a “maintenance arrangement” but the national law of State B does so, the parties could go to State B and have their maintenance agreement turned into an enforceable “maintenance arrangement” there. The arrangement if enforceable in State B could then with the help of the 2007 HC also obtain enforceability in State A (provided neither State A nor State B have made a reservation under Art. 30(8) of the 2007 HC).</p>	<p>Att. Expl. Note paras 106 <i>et seq.</i>, para. 139.</p> <p>The Central Authorities 2007 may assist in providing information on how a maintenance arrangement can be established in the relevant Contracting State.</p>
25	<p>The maintenance arrangement, which is meant to become enforceable in another Contracting State, should be drafted taking into consideration the grounds of non-recognition set out in Article 30(4) of the 2007 HC. In particular, taking note of the public policy test applied in the other Contracting State can be of importance.</p>	<p>The Central Authorities 2007 may assist in providing information on the public policy test applied in the other State.</p>
26	<p>The recognition and enforcement of maintenance arrangements under the 2007 Convention follows principally the same rules as the recognition and enforcement of decisions, see Article 19(4) of the 2007 HC. However, Article 30 slightly modifies these rules. In particular, a much more limited set of grounds of non-recognition applies to maintenance arrangements.</p>	<p>An application can be made through the Central Authority 2007 to assist with the rendering enforceable of the maintenance arrangement.</p>
27	<p>The enforcement itself is governed by the law of the State of enforcement. It is important to note that the demands on the precision of the maintenance claim for it to be considered “enforceable” under the national enforcement law can differ considerably. For example, in one legal system, the term “the debtor pays 10% of his monthly gross income” may be considered sufficiently precise, whereas in other States the amount must be quantified exactly.</p> <p>Recommendation: The terms on maintenance intended to be rendered enforceable in another legal system should be drafted with an “enforceable” content in the understanding of the national enforcement law of the State of enforcement.</p>	<p>For information on national enforcement law see the Country Profiles 2007 IV Information concerning the enforcement rules and procedures.</p> <p>See also Att. Expl. Note Chap. V.1. Checklist.</p>
28	<p>The agreement can be embodied in a decision in the sense of Article 19(1) of the 2007 HC.</p>	<p>Att. Expl. Note paras 108, 121 <i>et seq.</i>, 137.</p>
29	<p>The 2007 HC does not contain direct rules on international jurisdiction; however, the Convention contains negative rules on jurisdiction (in Art. 18) and indirect rules on jurisdiction (in Art. 20). A maintenance decision, meant to be rendered enforceable in another Contracting State, should be established in respect of these rules of jurisdiction. Otherwise recognition might be refused.</p> <p>It is important to underline that not all grounds of jurisdiction referred to in Article 20 of the 2007 HC are applicable between all Contracting States. Reservations are, in accordance with Article 20(2), possible with regard to the grounds contained in Article 20(1)(c), (e) and (f).</p> <p>Recommendation: Verify whether reservations under Article 20(2) of the 2007 HC have been made by State A or State B. Base international jurisdiction on the grounds that guarantee a recognition of the decision in State B. Include a reference to the facts that justify the use of the relevant ground of jurisdiction in the reasoning of the decision.</p>	<p>Att. Expl. Note para. 121.</p>
30	<p>The law of State A regulates which (administrative or judicial) authority is competent to embody the parental agreement in a decision in the sense of Article 19(1) of the 2007 HC. The procedure is equally governed by the law of State A.</p> <p>It will depend on the procedural law of State A, whether the court seised with the Hague return proceedings has the internal competency to include the agreement on matters of maintenance in the court settlement or decision terminating the Hague proceedings.</p>	<p>For information on the national competent authority the Country Profiles 2007 III 2.</p>

31	<p>The substantive law applicable to maintenance matters is determined in accordance with the 2007 HP in all States bound by this treaty. The applicable law rules of the 2007 HP have universal application, they apply independently of whether another State with which the case has a link is a Contracting State or not and also independently of whether the law determined as applicable in accordance with the rules of the 2007 HP is the law of a Contracting State.</p> <p>As a basic rule, the 2007 HP determines the law of the habitual residence of the creditor as the law applicable to the maintenance matter. Thus, an authority with subject matter jurisdiction in State A seised to include the maintenance terms of the Non-Return Agreement into a decision would in case of a substantive law control of the agreement apply its own substantive law.</p> <p>However, the substantive law of the State of enforcement can come to play an indirect role: the decision should be rendered taking into account the public policy test applied in the other Contracting State to avoid recognition of the decision being refused.</p>	Expl. Rep. 2007 HP paras 34,35.
32	<p>The 2007 HC provides two different procedures for the recognition and enforcement. Article 23 contains the default procedure, which is replaced by Article 24, the alternative procedure, if a Contracting State makes a reservation in accordance with Article 24(1).</p> <p>The actual enforcement is governed by the law of State B, Article 32 of the 2007 HC.</p>	

Other subject matters

33	<p>Rendering subject matters contained in a family agreement that fall neither in the scope of the 1996 HC nor the scope of the 2007 HC legally binding and enforceable in the two or more legal systems concerned by the agreement can be much more cumbersome. It is possible that regional or bilateral instruments in force between the relevant States facilitate the task.</p>	Att. Expl. Note paras 49, 90, 147.
34	<p>If there is no relevant international, regional or bilateral instrument in force between the States, it will depend on the autonomous private international law of State B, whether the agreement or the agreements' content embodied in a decision can be recognised and rendered enforceable in State B.</p>	Att. Expl. Note para. 40.
35	<p>If there is no possibility to have the agreement or its content recognised in the other State or if this process is too cumbersome or costly, the alternative of rendering the agreement enforceable in accordance with domestic procedures in both State A and State B should be considered.</p>	Att. Expl. Note para. 50.

A N N E X

**Explanatory Note 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 Hague Child Abduction Convention,
the 1996 Hague Child Protection Convention and
the 2007 Hague Child Support Convention**

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OBJECTIVES AND SCOPE OF THE EXPLANATORY NOTE

1. The Explanatory Note aims to give detailed background information on how agreements made in the area of family law involving children can be recognised and enforced in a foreign State. The Explanatory Note will explore, in particular, the solutions offered by the 1980 Hague Child Abduction Convention,¹ the 1996 Hague Child Protection Convention² and the 2007 Hague Child Support Convention.³ The particularities resulting from the application of certain regional instruments will be added in the footnotes.⁴

2. It must be highlighted that questions of how agreements on family law matters can be (rendered) legally binding and enforceable in a given legal system are questions that also relate to substantive family law and national procedural law. This is why the Explanatory Note will not be able to provide comprehensive answers to all aspects of “giving force to agreed solutions in family law international disputes concerning children”. The note will rather focus on how to assist in the drafting of agreements and possible steps to take with a view to improving the agreement’s chances of being rendered legally binding and enforceable in the two or more States concerned by the dispute with the help of existing global private international law instruments: the 1980, 1996 and 2007 Conventions. The Explanatory Note explores the subject matter from different angles which inevitably brings about some repetition but allows problem-oriented reading. See for details on the focus of each Chapter under “Structure” at paragraphs 19 *et seq.*

3. Even though the need for assistance with rendering agreements binding and enforceable was first discussed in the context of international child abduction, the subject matter explored in the Explanatory Note is broader in scope. The Explanatory Note will deal with agreements made in the area of family law involving children in general. The Explanatory Note focusses on agreements on child related matters but also touches upon agreements in the context of divorce and separation made in respect of matrimonial property issues. However, only for matters falling within the scope of the 1980, 1996 and 2007 Conventions will the Explanatory Note be able to provide detailed guidance. Nothing in this Explanatory Note shall be read as legal or professional advice.

TERMINOLOGY

Parental responsibility⁵

4. As defined in the 1996 Hague Child Protection Convention, the term “parental responsibility” refers to “parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child”.⁶ In other words, “parental

¹ **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction** (hereinafter, “the 1980 Hague Child Abduction Convention” or “the 1980 Convention”).

² **Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children** (hereinafter, “the 1996 Hague Child Protection Convention” or “the 1996 Convention”).

³ **Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance** (hereinafter, “the 2007 Hague Child Support Convention” or “the 2007 Convention”).

⁴ In the European Union, in particular the following two Regulations are of relevance, since they have predominance over the international rules at least for intra-EU matters: **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** (hereinafter, “the Brussels IIa Regulation”); and **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** (hereinafter, “the EU Maintenance Regulation”).

⁵ The clarification of the term “parental responsibility” has been taken from the Guide to Good Practice on Mediation, see Permanent Bureau of the Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation*, The Hague, 2012 (hereinafter, “Guide to Good Practice on Mediation”).

⁶ See Art. 1(2) of the 1996 Convention.

responsibility” includes all legal rights and duties a parent, a guardian or other legal representatives have in respect of a child with a view to raising the child and ensuring the child’s development. The concept of “parental responsibility” encompasses “rights of custody” as well as “rights of contact”, but is much broader than these two. Where parental rights and duties are referred to as a whole, many legal systems as well as regional and international instruments today refer to the term “parental responsibility”.

5. As concerns the term “rights of access”, the Explanatory Note gives preference to the term “rights of contact” which reflects a child-centred approach in line with the modern concept of “parental responsibility”.⁷ The term “contact” is used in a broad sense to include the various ways in which a non-custodial parent (and sometimes another relative or established friend of the child) maintains personal relations with the child, whether through periodic visitation or access, by distance communication or by other means.⁸ The Explanatory Note uses the term “rights of custody” in accordance with the terminology of the 1980 Hague Child Abduction Convention.

Family agreement

6. The term “family agreement” is used in this Explanatory Note to refer to an agreement in the area of family law involving children. The term family is thereby used in a broad sense in line with the understanding promoted by the General Comments No 14(2013) of the Committee on the Rights of the Child including “biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom”.⁹ Where the Explanatory Note for reasons of simplification refers to “parental agreements” the terms stand for agreements between “holders of parental responsibility”.

Package agreement

7. The term “package agreement” is used in this Explanatory Note to refer to family agreements related to parental responsibility, custody, access, relocation and/or child support and which may include spousal support and other financial matters, such as property issues.

BACKGROUND

8. All modern Hague Family Conventions¹⁰ encourage the amicable settlement of cross-border family disputes as do a number of relevant regional instruments.¹¹ Mediation and conciliation are processes expressly referred to by several of these instruments. The Hague Conference on Private International Law has in recent years undertaken considerable work to promote the use of mediation and similar means, in particular, in the context of international child abduction. This work involved the elaboration of a Guide to Good Practice on Mediation¹² and Principles for the Establishment of Mediation Structures.¹³ Both support the establishment

⁷ This is in line with the terminology used by the General Principles and Guide to Good Practice on Transfrontier Contact concerning Children, see Hague Conference on Private International Law, *Transfrontier Contact concerning Children. General Principles and a Guide to Good Practice*, Bristol, Family Law (Jordan Publishing Limited), 2008, at p. xxvi (hereinafter, “Guide to Good Practice on Transfrontier Contact”).

⁸ *Ibid.*

⁹ See “General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, by the Committee on the Rights of the Child, para. 59, available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf > (last consulted on 23 January 2019).

¹⁰ See Art. 7 of the 1980 Convention; Art. 31(b) of the 1996 Convention; Arts 6(2)(d), 34(2)(i) of the 2007 Convention and also Art. 31 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*.

¹¹ See Recital 25 and Art. 55 e) of the Brussels IIa Regulation and Art. 51(2) d) of the EU Maintenance Regulation (*op. cit.* note 4).

¹² Guide to Good Practice on Mediation (*op. cit.* note 5).

¹³ “Working Party on mediation in the context of the Malta Process. Principles for the Establishment of Mediation Structures in the Context of the Malta Process”, drawn up by the Working Party with the assistance of the Permanent Bureau, November 2010 (hereinafter, “Principles for the Establishment of Mediation Structures”).

of “specialised international family mediation services”¹⁴ and promote the good practice that an agreed solution in a cross-border family dispute should be made binding and (where possible) enforceable in both / all legal systems concerned.¹⁵

9. Mediation in the context of cross-border family disputes involving children and particularly in child abduction cases was also a subject given considerable attention at the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (Part I, June 2011; Part II, January 2012). The discussions revealed that rendering a mediated agreement binding and enforceable in the two or more States concerned by the case can be a complex undertaking in practice.¹⁶ Due to the fact that agreements drawn up to resolve a cross-border family dispute regularly touch upon a number of different subject matters that fall within the scope of different private international law instruments the legal situation is quite complex.¹⁷ Particularly, in the situation of a cross-border child abduction the question arose how an agreement between the taking and left-behind parent which involved not only a short term agreement on how to end the “abduction situation” but also a long term decision on matters of parental responsibility could obtain legal effect and enforceability in the two States concerned.¹⁸ Mediation in those cases is regularly taking place in the State¹⁹ to which the child has been abducted and this is the State where the parents then seek to render their agreement binding, ideally, simultaneously with ending the 1980 Convention return proceedings. The courts of that State however, lack international jurisdiction on matters of parental responsibility, at least as long as the Hague return proceedings are ongoing.²⁰ The topic was revisited at Part II of the Sixth Meeting of the Special Commission in the wider context of discussing a possible need for a simplification of recognition and enforcement of agreements in family law.

10. Following a Recommendation of the Sixth Meeting of the Special Commission,²¹ the Council on General Affairs and Policy of the Conference (hereinafter, “the Council”) mandated the Permanent Bureau in 2012 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” indicating that “[s]uch 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-

¹⁴ See Chap. 3 of the Guide to Good Practice on Mediation (*op. cit.* note 5); see Part B of the Principles for the Establishment of Mediation Structures (*op. cit.* note 13). The Guide recommends that mediation in international child abduction cases, due to their particular nature, should only be conducted by “experienced family mediators preferably having received specific training for international family mediation and, more specifically, mediation in international child abduction cases”, para. 98 of the Guide. For further details on principles and models of international family mediation see Chap. 6 of the Guide.

¹⁵ See in particular Chap. 12 of the Guide to Good Practice on Mediation (*op. cit.* note 5) and Part C of the Principles for the Establishment of Mediation Structures (*op. cit.* note 13).

¹⁶ “Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions (Annex)”, Prel. Doc. No 13 of December 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, Chapter IV A “Cross-border / international recognition and enforcement of agreements resulting from mediation” at paras 29-58 (hereinafter, “Guide to Part II of the 2012 SC”) (available on the Hague Conference website at < www.hcch.net > under “Conventions”, then 1980 Hague Child Abduction Convention, then “Special Commission meeting”).

¹⁷ *Ibid.*, at paras 43 *et seq.*

¹⁸ *Ibid.*

¹⁹ Mediation in international child abduction cases could also take place in a different State or via long-distance mediation; see, however, for the practical challenges Chap. 4.4. “Place of mediation” of the Guide to Good Practice on Mediation (*op. cit.* note 5).

²⁰ See for further details on the early discussions of the matter in the course of the Special Commission, in particular, “Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)”, C&R Nos 247 *et seq.* (hereinafter, “C&R of Part I of the 2011 SC”) (available on the Hague Conference website at < www.hcch.net > under “Conventions”, then 1980 Hague Child Abduction Convention, then “Special Commission meeting”) and Guide to Part II of the 2012 SC (*op. cit.* note 16).

²¹ See “Conclusions and Recommendations of the Sixth Meeting of the Special Commission (Part II – January 2012)”, C&R No 77 (available on the Hague Conference website at < www.hcch.net > under “Conventions”, then 1980 Hague Child Abduction Convention, then “Special Commission meeting”).

binding, in this area".²²

11. The Experts' Group held four meetings, taking place in November 2013, December 2015, in June 2017 and June 2018.²³ After the first meeting a Questionnaire was circulated on the subject matter and the results of which were taken into account at the second meeting. As a result of the second meeting, the Experts' Group recommended 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."²⁴

12. In March 2016, the Council mandated the Permanent Bureau, *inter alia*, "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 Conventions". The Council further concluded that it would revisit the "need for and feasibility of developing a binding instrument in this field" "based on further information which will result from the work on the navigation tool".²⁵

13. The Experts' Group concluded its third meeting in June 2017 with confirming "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."²⁶

14. The Experts' Group noted that "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

²² 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 Hague Conference website at < www.hcch.net > under "Governance" then "Council on General Affairs and Policy".

²³ 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 (available on the Hague Conference website at < www.hcch.net > under "Governance" then "Council on General Affairs and Policy") (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 (available on the Hague Conference website at < www.hcch.net > under "Governance" then "Council on General Affairs and Policy") (hereinafter, "Report of the 2013 Experts' Group Meeting").

²⁴ *Ibid.*

²⁵ See "Conclusions & Recommendations of the Council on General Affairs and Policy of the Conference (15-17 March 2016)", C&R Nos 16-18, available on the Hague Conference website at < www.hcch.net > under "Governance" then "Council on General Affairs and Policy".

²⁶ 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", available on the HCCH website at < www.hcch.net > under "Family agreements involving children".

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."²⁷

15. The Experts' Group therefore recommended 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."²⁸

16. The Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (10-17 October 2017) noted the "progress of the Experts' Group on the cross-border recognition and enforcement of agreements reached in the course of family matters involving children".²⁹

17. In its fourth meeting in June 2018, the Experts' Group finalised the Draft Practical Guide to Family Agreements under the Hague Conventions "having taken account of the input on a previous draft of the 7th meeting of the Special Commission of October 2017 on the Practical Operation of the 1980 and 1996 Conventions"³⁰ and invited the Council to approve the Guide. The Draft was circulated to the Hague Conference Members for comments in the autumn of 2018.

18. The Experts' Group furthermore addressed the following recommendations to the Council:

- "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.
- 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."³¹

STRUCTURE

19. The Explanatory Note contains five Chapters which explore the subject matter from different angles. To start with, "Chapter I. Preliminary Considerations" briefly distinguishes legal aspects of rendering an agreement in family law legally binding and enforceable that are purely matters of domestic substantive and domestic procedural law from those that can be addressed in this Explanatory Note. This Chapter is meant to provide a general introduction to the subject matter.

20. "Chapter II. Subject matters addressed in agreements" lists the different substantive matters regularly addressed in agreements drawn up to settle family disputes concerning

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ See "Conclusions and Recommendations of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention (10-17 October 2017)", C&R No 52 (available on the website of the Hague Conference at < www.hcch.net > under "Conventions", then 1980 Hague Child Abduction Convention, then "Special Commission meetings").

³⁰ See "Conclusions and Recommendations of the Experts' Group meeting of 28 to 29 June 2018 for the attention of the Council on General Affairs and Policy of March 2019", available on the HCCH website at < www.hcch.net > under "Family agreements involving children".

³¹ *Ibid.*

children. The Chapter also discusses which subject matters fall within the scope of which Hague Convention. Chapter II is particularly helpful when wanting to distinguish subject matters contained in a family agreement and identify the relevant Hague Convention that could be of assistance in making the content of the agreement travel cross-border.

21. In “Chapter III. The 1980, 1996, 2007 Conventions – what they offer” a brief analysis is made of what importance the 1980, 1996 and 2007 Conventions grant to agreement and to what extent they promote and respect party autonomy. In a second part, Chapter III summarises the mechanisms offered by the Conventions to let the content of an agreement embodied in a decision or equivalent measure or in form of a “maintenance arrangement” “travel” cross-border. Chapter III provides the reader with details on the mechanisms offered by the 1980, 1996 and 2007 Conventions.

22. “Chapter IV. Approaching typical cross-border family conflict situations” analyses the particularities concerning agreements made in the context of an envisaged cross-border relocation, in cross-border contact cases and in the context of international child abduction and spells out consequences resulting from the analysis made under Chapter III for these situations. Chapter IV provides assistance when trying to make best use of the Hague Family Conventions in rendering agreements legally binding and enforceable in the legal systems concerned in one of the typical groups of cross-border family disputes explored.

23. Finally, “Chapter V” provides a non-comprehensive checklist as well as recommendations for the preparation of agreements in cross-border family disputes involving children. This Chapter is of particular assistance when drafting a family agreement whose content is meant to travel cross-border with the help of the Hague Family Conventions.

I. PRELIMINARY CONSIDERATIONS

24. How best to render an agreement concerning a number of different international family law matters binding and enforceable in two or more States can be a complex question in practice. There are a number of layers to this question that must be distinguished in order to allow for clarity in the discussion of the related legal problems. The responses received by the Permanent Bureau to the Expert Group Questionnaire of 2015 have revealed a certain degree of uncertainty even among specialised practitioners on how to best approach the matter. This underlines the necessity to explore the question at stake in all its facets before entering the analysis of assistance given by the 1980, 1996 and 2007 Conventions and presenting best practices.

1. Agreements in a purely national context

25. To better distinguish the different layers of our topic, a brief look shall be taken at an agreement in a family dispute covering different subject matters in a purely national context.

a) *Limits to party autonomy in family law*

26. In a purely domestic context, the first question to pose is: with regard to which subject matters does the domestic law³² grant the parties party autonomy and what are the limits to party autonomy?

27. A legally binding agreement, which ultimately can be rendered enforceable, presupposes that the rights and duties determined or modified by the agreement are, indeed, at the disposal of the parties. In this context it must be highlighted that parental agreements in family disputes concerning children are not simply agreements between two parties, they are agreements directly affecting a vulnerable third party: the child.

³² For the sake of this sub-chapter, it shall be assumed that the example State is one with uniform family and procedural law, *i.e.*, not a State with different territorial units having different rules on family and procedural law.

28. The past decades have, without a doubt, brought about a greater importance granted to party autonomy in domestic family law as well as in international family law.³³ As noted by the Experts' Group, an increased willingness can be observed in family law practice "to accept that parents are in principle best placed to order their family's affairs, considering their children's best interests."³⁴ This trend is, at the same time, accompanied by a major shift in the perception of the child's role in national and international family law induced by a number of important Human Rights and Children's Rights treaties.³⁵ Today, children are recognised as subjects of rights and their role in proceedings has considerably changed. The change in perception is also illustrated by a change of terminology in family law: today the term "parental responsibility" has widely replaced the "rights of custody" and the term "contact rights" is used instead of "access rights" - both with the notion of better reflecting a reciprocal rights-relationship.³⁶

29. The fundamental principle that the best interests of the child shall be a primary consideration in all proceedings concerning children (Art. 3 of the UNCRC) has been taken up and further elaborated in international and national legislation as well as in relevant case law. Furthermore, the right of the child to express his / her views in all matters concerning the child and to have these views taken into consideration in accordance with the age and maturity of the child (Art. 12 of the UNCRC) is given particular importance in the resolution of cross-border family disputes.

30. Therefore, it is not surprising that domestic law may impose certain limits or control mechanisms when it comes to parental agreements on child related matters such as matters of parental responsibility. Such agreements might have to be validated by a judge who will verify that the agreement is not in conflict with the best interests of the child in order for the agreement to obtain legal effect. In the course of an agreement's assessment by the judge, the child, depending on age and maturity, might have to be given an opportunity to be heard.

31. A comparative overview of relevant domestic law provisions clearly goes beyond what can be offered by this Explanatory Note. By contrast, the note can address which law or laws is/are to be considered when drafting the agreement. Inquiries into the requirements of the relevant national law(s) will then have to be made by the parties to the agreement with the assistance of their legal advisers or other sources of specialist legal advice. The Country Profiles under the 1980 Convention, which address under points 19.5 and 19.6 the rendering enforceable of mediated agreements, can be a helpful source of information.³⁷ Furthermore, Central Authorities under the 1980 and 1996 Conventions as well as the "Central Contact Points" created in the context of the Principles for the Establishment of Mediation Structures³⁸ could be of assistance.

b) Distinguishing legal validity and enforceability

32. It is important to distinguish legal validity and enforceability. An agreement (or parts of it) might have immediate legal effect / legal validity, but for the enforceability a further step can be required. Sometimes, the legal validity and enforceability will be obtained simultaneously. Sometimes a matter can have legal validity but not be enforceable.

³³ See also the Report of the 2015 Experts' Group Meeting (*op. cit.* note 23), at para. 5, for the assessment made by the Experts' Group.

³⁴ *Ibid.*

³⁵ The most important treaty in this context is without a doubt the **United Nations Convention of 20 November 1989 on the Rights of the Child** (hereinafter, "the UNCRC") ratified by nearly all States of the world. Furthermore, a number of important regional Human Rights and Children's Rights instruments underpin the fundamental principles set forth by the UNCRC. These instruments include: The **African Charter on the Rights and Welfare of the Child** adopted by the Organisation of African Unity on 1 July 1990; the **Charter of Fundamental Rights of the European Union** (2010/C 83/02), Art. 24; the **European Convention on the Exercise of Children's Rights of 25 January 1996**.

³⁶ See also, *supra*, under "Terminology" and then "Parental responsibility".

³⁷ The Country Profiles are available on the Hague Conference website at < www.hcch.net > under "Conventions" then "1980 Hague Child Abduction Convention" and "Country Profiles".

³⁸ See Part A of the Principles for the Establishment of Mediation Structures (*op. cit.* note 13). As at January 2019, the following 10 States have established a Central Contact Point: Australia, Brazil, France, Germany, Hungary, Netherlands, Pakistan, Russian Federation, Slovak Republic and the United States of America, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Cross-border family mediation" and "Central Contact Points for international family mediation".

33. When one wants to be able to rely on the terms of an agreement in practice, the necessary minimum that needs to be obtained is the legal validity of the agreement. Should one of the parties to the agreement not comply with the terms, enforcement might become necessary. This requires the agreement's enforceability, which, as said, might have to be obtained through additional (procedural) steps.³⁹

34. In a purely domestic context, one would consult the domestic law to find out, what conditions must be met to produce an agreement with legal effect and what additional steps might be needed to render the agreement enforceable.

35. Enforceability might be obtained by concluding the agreement before a notary or registering it with an authority. Furthermore, the approval of the agreement by a court or the inclusion of the agreement's content in a decision may be options to render the agreement enforceable. Concerning the agreement's inclusion in a court decision or court settlement several variations are conceivable. The decision or court settlement could embody the agreement as such, without a change to the wording. It could take up the essence of what was agreed but reformulate the agreement. The decision or court settlement could also take up additional matters and / or slightly vary the agreement. Furthermore, from a procedural point of view, different *modi operandi* are imaginable. The court's or authority's intervention could be considered of mere formal importance or the inclusion of the agreement in the decision or court settlement could be considered a decision on the merits presupposing subject matter jurisdiction.⁴⁰ National law greatly varies with regard to the available options.

36. In this context it should be noted that the law of some countries grants importance to the process that accompanies the agreement's elaboration when it comes to rendering the agreement enforceable. Agreements that result from a mediation conducted by a certified mediator are given a privileged status: These agreements are either automatically enforceable or can be rendered enforceable more easily in that State.⁴¹

37. The Explanatory Note cannot give a complete overview of all mechanisms existing under national law to render agreements legally binding and enforceable. Exploring the relevant domestic substantive and procedural law requirements is a task for the parties to the agreement or respectively their legal advisers. Again, attention shall be drawn to the useful information provided in the Country Profiles under the 1980 Convention.⁴²

38. It needs to be highlighted, that for different subject matters included in the agreed solution different requirements may apply to render the agreement binding and enforceable. A question that is likely to play a role should a part of the agreement require "approval" of an authority in order to obtain legal effect, is the question of partial validity of the agreement. What is envisaged by the parties should part of the agreement not obtain effect? Should the remainder of the agreement persist or is it the underlying wish of the parties to abandon the whole agreement in case of a partial invalidity? This is a matter that can be addressed in the agreement itself (see also below under Chapter V.2.f)).

³⁹ Besides, the enforceability of the agreement can be required when it comes to giving the agreement legal effect abroad with the help of private international law; this topic is addressed, *infra*, under I.2., see paras 43-44.

⁴⁰ Obviously in international cases, subject matter jurisdiction presupposes international jurisdiction.

⁴¹ For example, in Belgium, a mediated agreement resulting from a mediation conducted by a certified mediator can be homologated by the court on the request of one party only, see Art. 1733 of the Belgian "Code judiciaire". Similarly in Mexico City, when mediation is conducted by a public mediator or a private certified mediator, the mediated agreement is legally binding and enforceable, see N. Gonzalez-Martin, BJV, Instituto de Investigaciones Juridicas-UNAM, 2017, pp. 129 *et seq.*, at p. 133.

⁴² See, *supra*, note 37.

2. Agreements in a purely national context which later need to be rendered legally binding and enforceable abroad

39. A purely national family law case can, following the dispute settlement by agreement, become a cross-border case when one of the parties moves abroad. An example is a maintenance agreement drawn up in a purely national context, which, following the debtor's relocation to another State now needs to be enforced abroad.⁴³

40. In addition to what was discussed under I.1., a number of supplementary questions are to be addressed. How can the agreement become legally binding and enforceable in the other State? Are there relevant international and / or regional or bilateral instruments in force between the two States concerned that assist in rendering the agreement enforceable abroad? If not, the autonomous rules of private international law of the State addressed will decide whether and how the agreement can be rendered enforceable in that State.⁴⁴

41. When having identified relevant rules of private international law (be it rules of an international, regional or bilateral instrument or the autonomous private international law rules) the conditions for rendering the agreement enforceable need to be identified.

42. Two "methods" of rendering the agreement enforceable should be distinguished for the sake of our considerations: (A) rendering the agreement enforceable as such⁴⁵, and (B) rendering the content of the agreement embodied in a decision or court settlement or similar measure enforceable.

43. Conditions imposed by private international law instruments to rendering an agreement as such (method A) enforceable in another State bound by the instrument, could, for example, include, that the agreement was "made" ⁴⁶ in a State bound by the instrument and that the agreement is enforceable in the State of origin.⁴⁷ Furthermore, it could be that certain "safeguards" in the establishment of the agreement might have to be fulfilled. For example, it may be required that the child concerned by the agreement has been given an opportunity to be heard.⁴⁸ In addition, the rules of private international law are likely to require that the content of the agreement is not considered contrary to the public policy of the foreign State.

44. With regard to method B, private international law rules will most certainly require the enforceability of the decision / court settlement in the State of origin. Furthermore, it is probable that matters of international jurisdiction play a role when it comes to considering grounds of non-recognition as well as certain "safeguards" in relation to the establishment of the decision.⁴⁹ Coming back to the above case example: the agreement was drawn up in a purely national context with all parties residing in the same State; it is unlikely that matters of international jurisdiction will pose a problem for the enforceability abroad of a decision embodying the agreement (provided the agreement was already embodied in the decision before the case acquired an international element). As a further condition, the rendering of the decision

⁴³ It is understood that it only makes sense to make the agreement "travel" to another legal system if its content can be executed despite the change of circumstances brought about by the relocation of one party to that legal system. For instance, contact arrangements drafted for contact between a child and parent living next door, will most likely have to be adapted should the parent move to another State.

⁴⁴ See also, *infra*, para. 50 concerning constellations in which the applicable rules of private international law do not assist in rendering the agreement binding and enforceable abroad and the agreement has to be rendered binding and enforceable "anew" in accordance with the domestic law of the second State.

⁴⁵ See Art. 46 of the Brussels IIa Regulation for the enforceability of agreements (*op. cit.* note 4).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* For the question on how to render the agreement enforceable in the State of origin, see *supra*, paras 35 *et seq.* Obviously, if the only way to render the agreement enforceable in the State of origin, is the inclusion in a court decision, rendering the agreement enforceable in the other State can directly follow method B.

⁴⁸ For example, in accordance with Art. 46 of the Brussels IIa Regulation, enforceable agreements can be recognised and rendered enforceable in other EU Member States under exactly the same conditions as judgments. Art. 23 of the Regulation which is consequently also applicable to the recognition of agreements states that the recognition of a decision can be refused "if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought" (*op. cit.* note 4).

⁴⁹ See for example Art. 23(2)(b) of the 1996 Convention in accordance with which the recognition of a measure of child protection can be refused "if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State".

enforceable abroad will most likely presuppose that the content of the decision is not considered contrary to the public policy of the foreign State.

45. The above listed conditions are, of course, mere examples. The exact test to be applied for rendering the agreement or a decision embodying the agreement enforceable will depend on the applicable private international law rules in the individual case. Again, it has to be highlighted that different subject matters included in the agreement might fall within the scope of different rules, which is why different conditions for rendering the agreement enforceable abroad could apply to different parts of the agreement.

46. The Explanatory Note will explore which subject matters regularly contained in agreements made in the area of family law involving children fall within the scope of which Hague Convention and what this implies concerning the conditions for rendering the agreement (or its content) enforceable abroad. By contrast, the Explanatory Note does not address in more detail the conditions of rendering enforceable parts of the agreement that concern matters falling outside the scope of the 1980, 1996 and 2007 Conventions.

3. Agreements in family disputes that have a cross-border element from the outset

47. Settling an ongoing cross-border family dispute involving children by agreement and wanting to obtain for this agreement legal effect and enforceability in all States with a link to the dispute and/or its resolution is, without doubt, a challenging undertaking. When drafting the agreement all questions raised under points I.1. and I.2. have to be anticipated. But in accordance with which law or laws will these questions have to be assessed? What is the substantive law relevant to indicate whether party autonomy exists with regard to certain subject matters and what are the limits of party autonomy? Which law will determine the additional steps that might be needed to give legal validity to the content of the agreement (or respectively the part of the agreement that is not immediately valid) and to render the agreement enforceable in one State? What are the applicable rules of private international law that determine the requirements for cross-border recognition and obtaining enforceability abroad?

48. For the drafting of a sustainable agreement in international family law, strategic thinking is required. To start with, the agreement needs to meet the requirements of validity in the legal system in which it shall first be rendered binding and enforceable. This “first” legal system should be “chosen”⁵⁰ wisely out of the legal systems with which the case has a connection. As an initial step, the rules of private international law of all these legal systems including the applicable international, regional or bilateral private international law instruments need to be assessed to identify the legal system most suitable to be the “starting point” with a view to rendering the agreement (or its content embodied in a decision or other measure) enforceable in all States concerned. Furthermore, the private international law rules will have to be looked at to assess the conditions they pose for the cross-border enforceability including matters of international jurisdiction (see above paras 43 and 44). These conditions may have an impact on the content⁵¹ of the agreement itself and on the procedural safeguards and steps that have to be kept in mind when rendering the agreement binding and enforceable in the first State.

49. Obviously, the legal situation is simplified considerably, where international or regional instruments creating uniform rules on private international law, such as the 1996 Convention and the 2007 Convention, are in force between the relevant States.⁵²

50. In some cases it may happen, that cross-border recognition and enforcement with the help of private international law is impossible between the States concerned no matter which State would be used as a “starting point”. In those cases, the agreement might have to be

⁵⁰ Whether an actual “choice” of this first legal system (“starting point” legal system) is possible in the individual case, will depend on the circumstances of the case. However, it should be noted that the “starting point” legal system must not necessarily be the one where mediation or a similar process is taking place; see concerning the “place” of the agreement further below under Chap. V.2.a).

⁵¹ For example, the agreement should be able to pass the “public policy” test of the foreign State.

⁵² See for up to date information on which States are Contracting States to these Conventions the Hague Conference website at < www.hcch.net > under “Instruments” then “Conventions”, and then when having chosen the relevant Convention under “Status table”. A complete overview of States having ratified Hague Conventions can furthermore be found on the Hague Conference website at < www.hcch.net > under “Instruments” then “Status chart”.

rendered binding and enforceable anew in accordance with the domestic law in each of the States concerned. This might equally be necessary, in cases where a State was chosen as “starting point” whose authorities are not considered to have international jurisdiction in accordance with applicable private international law rules in force in the other State. It should not be left unmentioned that in some cases using domestic procedures to render the agreement legally binding in the two legal systems concerned can be quicker than using private international law mechanisms for recognition and enforcement.

51. The Explanatory Note provides a strategic analysis of the 1980, 1996 and 2007 Conventions to assist in identifying the “starting point” legal system for rendering agreements on subject matters falling within these Conventions’ scope legally binding and enforceable. Furthermore, the Explanatory Note examines the rules for cross-border recognition and enforceability under the Hague Conventions with a view to identifying any particular conditions the agreement or respectively decision or measure embodying the agreement should fulfil.

II. SUBJECT MATTERS ADDRESSED IN INTERNATIONAL FAMILY LAW AGREEMENTS

52. In this Chapter, subject matters⁵³ typically addressed in the amicable resolution of cross-border family conflicts involving children shall be explored. It shall be analysed which of these matters fall within the scope of which Hague Convention. For some of these matters, such as matrimonial property issues, no Hague Convention offering a mechanism for cross-border recognition and enforcement exists.⁵⁴

53. It should be highlighted that the way the agreement is drafted may influence whether a particular subject may be considered as falling within the scope of a certain Convention. Furthermore, it should be noted that it can be possible for certain subject matters to fall, at the same time, within the scope of two different Conventions, *i.e.*, be able to benefit from the recognition and enforcement mechanisms of both Conventions.

1. Parental responsibility

a) Exercise of parental responsibility including rights of custody and contact

54. An agreement settling a cross-border family conflict involving children typically regulates matters of exercise of parental responsibility.⁵⁵ The agreement may relate to the rights of custody, determine who among the holders of parental responsibility will be the “primary carer” of the child and in which State the child will live. The agreement may regulate cross-border parent-child contact and contact with other family members. Contact can besides physical contact include contact by means of long-distance communication, such as telephone and videocall or internet.

Example: Our child, S. will move with her mother to Rome, Italy in September 2017 where they intend to habitually reside. ... She will spend the first 6 weeks of the annual summer holidays with her father and the paternal grandparents in Belgium. For all other school holidays, the following model will apply: In even years, the first half of school-holidays, S. will spend with her father, the second half with her mother. In uneven years the order switches. ...

⁵³ This Chapter focuses on substantive law subject matters only; no reference is made to choice of court or choice of law agreements.

⁵⁴ The **Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes** only regulates applicable law issues and has in practice little influence since it is merely in force between three States. It should be noted that in a number of EU Member States two new Regulations in this area of law apply from April 2018: The **Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes** and the **Council Regulation (EU) No 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships**.

⁵⁵ For the term “parental responsibility” used in this Explanatory Note see, *supra*, “Terminology” and then “Parental responsibility”.

55. All the above matters fall within the scope of the 1996 Convention. For the question of rendering the agreement or the content of the agreement embodied in a decision or other measures enforceable abroad with the help of the Convention, see below Chapters III and IV. Attention should be drawn to the fact that the actual enforcement in the other legal system takes place in accordance with the national law of that legal system, see Article 28 of the 1996 Convention. This also means that the agreement (embodied in the decision or other measure) must have an “enforceable content” as understood in that legal system.

b) Attribution of parental responsibility

56. The agreement could furthermore address the question of attribution of parental responsibly.

Example: We hereby declare that we wish to have joint parental responsibility for our common child, S. (This could be relevant in cases where an unmarried father might not by operation of law have parental responsibility).

57. This is equally a matter that falls within the scope of the 1996 Convention. For further details, see below Chapter III.1.b).

2. Maintenance

58. An agreement in a cross-border family conflict involving children is moreover likely to touch upon matters of child maintenance and, possibly, spousal or ex-spousal maintenance. When it comes to spousal or ex-spousal maintenance sometimes a differentiation from property matters can be necessary. Particularly in cases where the agreement is drawn up in the context of a separation or divorce there is a risk that matters of maintenance between ex-spouses and matters of separation of property blend into one other. Good drafting is required to make a clear distinction by giving details on the purpose the agreed provision of payment is meant to fulfil.⁵⁶

Example: The father promises to transfer, on a monthly basis, a sum of 350 EUR to the account of mother (bank details:...) in order to contribute to the child related expenses as child maintenance. Since it is understood that the mother will not work fulltime before the child has reached the age of 2 years, the father furthermore promises to transfer an additional sum of 200 EUR monthly to the mother as maintenance for her.

59. Matters of child and spousal / ex-spousal maintenance fall within the scope of the 2007 Convention. In view of the above-mentioned important differentiation from property matters it can be useful if the terms of the agreement spell out that the parties consider a certain subject matter as “maintenance” falling within the scope of the 2007 Convention (or, respectively, another applicable private international law instrument, such as the EU Maintenance Regulation).

60. It is important to note, that many legal systems set certain limits to party autonomy in maintenance matters. According to the law of some legal systems a maintenance agreement will not be binding should the parties not have disclosed their assets and income to each other and omit to include a notice in this regard in their agreement. Furthermore, waiving child maintenance for the future or agreeing on child maintenance below the legal maintenance minimum can be considered invalid.

61. In Contracting States to the 2007 Hague Protocol the law applicable to maintenance matters is determined in accordance with this instrument.

⁵⁶ By way of example, the leading Court of Justice of the European Union (hereinafter, “CJEU”) decision of *Van den Boogaard v. Laumen* (judgment of the 27 February 1997, C-220/95, EU:C:1997:91) shall be referred to. The CJEU had to decide whether a lump sum payment was to be considered “maintenance” in the sense of the Brussels Convention, later transformed into the Brussels I Regulation, now replaced in respect of maintenance by the EU Maintenance Regulation. The Court noted that the payment would be considered maintenance if it was clear from the reasoning that it was “designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses [were] taken into consideration in the determination of its amount”.

3. Financing travel arrangements of regular cross-border parent-child visits

62. In many cross-border family disputes furthermore the subject matter of travel costs in relation to cross-border parent-child visits is raised. In cases where one parent envisages relocating with the common child to another State, an agreement on how to “finance” the future cross-border parent-child contact can even be the condition for the other parent’s consent to relocation.

63. Regulating the issue of travel costs in parental agreements is delicate since a non-compliance with a travel cost payment obligation may result in a factual obstruction of the cross-border contact. Difficulties in the implementation of the agreement may also arise due to the fact that the actual amount of travel costs is unknown when the agreement is concluded.

Example: The parents agree to share equally the costs for the child’s annual summer holiday stay in the USA. The father undertakes to book an economy class flight ticket each year at the latest by the end of January. The mother will advance a pre-defined sum each year by 1 January to the account of the father (account details...): For the first travel booking the advanced sum will be 400 EUR. Immediately after the father booked the ticket and informed the mother of the actual price, the mother will transfer the remaining sum owed, or respectively, the father will transfer the overpaid sum. In the following years, the advance payment due by the mother will correspond to half the actual ticket price of the previous year...

64. At first glance, it may not be obvious whether travel costs for cross-border visits could fall within the scope of the 2007 Convention or within the scope of the 1996 Convention. However, when considering how closely the matter of travel costs can be linked with maintaining the parent-child contact across borders, it must be asked whether a decision obliging a parent to pay or contribute to travel costs could not be considered “modalities of contact” and as such fall under the 1996 Convention and⁵⁷ consequently, whether an agreement on travel costs for cross-border visits embodied in a decision or other measure could not benefit from the recognition and enforcement mechanism offered by that Convention. After all, guaranteeing that parent-child contact across borders remains feasible in practice, means safeguarding the right of the child “[...] to maintain on a regular basis [...] personal relations and direct contacts with both parents” as enshrined in Article 10(2) of the UNCRC.

65. In order to help travel costs for cross-border visits to qualify as a part of “the exercise of parental responsibility”⁵⁸ in the individual case, the decision or other measure of child protection should ideally expressly note this connection. See also below under Chapter V.2.b).

66. To dispel any doubts as to whether a decision or other measure embodying a travel cost agreement can benefit from the recognition and enforcement mechanism of the 1996 Convention, an application for advance recognition in accordance with Article 24 of the Convention is recommended.

67. It might furthermore be conceivable to consider travel costs as a part of maintenance payments depending on the individual circumstances of the case and the law applicable.⁵⁹ For example, should it be evident from the grounds of a decision ordering a parent to bear the child’s travel costs that this payment is considered part of child maintenance in accordance with

⁵⁷ See also the Report of the 2015 Experts’ Group Meeting (*op. cit.* note 23), at para. 14 referring to the broad scope of the 1996 Convention. See also Conclusions and Recommendations of the 7th Meeting of the Special Commission (*op. cit.* note 29) C&R No 53 “The Special Commission takes note of the finding of the Experts’ Group that, depending on the individual circumstances of the case, the applicable law or the wording of the agreement or decision, the travel expenses associated with the exercise of cross-border access / contact may fall within the scope of the 1996 Convention.”

⁵⁸ A contribution to travel costs for parent-child contact as an obligation arising out of parental responsibility is discussed, for example, in national jurisprudence from Germany. While the German courts note that in accordance with German law the costs for the contact are normally born by the contact-parent, a few decisions indicate that, particularly in cases of expensive cross-border contact a cost contribution by the primary carer can be expected, see OLG Brandenburg, NJW-RR 2010, 148 and OLG Nürnberg, NJW-RR 2014, 644. However, not all German courts follow this view.

⁵⁹ In Germany, there is jurisprudence indicating that the high expenses for contact born by one parent could be special expenses reducing that parent’s net income on which the calculation of maintenance is based. Here, the travel costs would not themselves be part of “maintenance” but would be a factor that affects the determination of the maintenance owed under German law.

the applicable law, the decision could benefit from the recognition and enforcement mechanism of the 2007 Convention.

68. It should be noted that it is possible for a subject matter to fall within the scope of both the 1996 Convention and the 2007 Convention depending on its characterisation in the light of the circumstances of the individual case.

4. Costs of education

69. Particularly in cross-border family disputes involving mixed couples with different mother tongues, a major concern following a separation can be how to best guarantee that the child will continue learning both languages and maintain a close link with the cultures of both parents. Costs for relevant private or bi-lingual schooling or other language and culture related education can be considerable.

Example: The parents agree that their child S. shall attend the French school in Rome (school details:...); the parents will share the costs for the schooling (annual fee:...) equally. ...

70. Parents' education choices for their child are clearly part of the exercise of parental responsibility and thus fall within the scope of the 1996 Convention. A decision or other measure determining the parents' contribution for schooling or other education costs, can depending on the measure's characterisation equally fall within the scope of the 1996 Convention, given its broad scope.⁶⁰

71. Besides, education costs could as child related expenses fall under "maintenance" and as such come within the scope of the 2007 Convention.

5. Property of the child

72. Agreements in cross-border family disputes involving children could in rare cases moreover touch upon matters related to the child's property.

Example: The parents agree that the immovable property of the child in State A (details ...) is to be sold. The father, who will keep his habitual residence in State A, undertakes to task a real estate agent ... The proceeds of the sale are to be transferred directly to the account of the child in State B. (Could be relevant in a relocation case.)

73. The 1996 Convention applies to measures of protection that deal with the "administration, conservation or disposal of the child's property".⁶¹ As the Explanatory Report points out, "[t]his very broad formulation encompasses all the operations concerned with the minor's property, including acquisitions, considered as investments or as assignments disposing of the property transferred in consideration of the acquisition".⁶² The Practical Handbook details "that the Convention does not encroach on systems of property law and does not cover the substantive law relating to the content of rights over property, such as disputes in relation to ownership / title of property".⁶³

74. It should be noted that with a view to effectively protecting the best interests of the child, the laws of some States provide for certain control mechanisms when it comes to a disposal by parents of their child's property. The 1996 Convention does not affect the domestic law's choices. By contrast, once a measure of child protection concerning the disposal of the child's

⁶⁰ See also, *supra*, note 23. At least in cases where the education costs are necessary to guarantee the child's link with both parents' cultures it might seem conceivable that a decision embodying an agreement on sharing education costs be considered a measure of child protection in the sense of the 1996 Convention.

⁶¹ See Art. 3(g) of the 1996 Convention.

⁶² See P. Lagarde, "Explanatory Report on the 1996 Hague Child Protection Convention", in *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605, para. 25.

⁶³ See Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, The Hague, 2014, at para. 13.72 (hereinafter, "Practical Handbook on the 1996 Convention").

property is taken by a competent authority in a Contracting State, this measure will be automatically recognised in all other Contracting States.⁶⁴

6. Separation of property in the context of divorce

75. Agreements drawn up in the context of divorce will in addition to child related matters regularly deal with matters of property separation between the spouses. As noted above, a clear distinction should be drawn in the agreement between maintenance and property issues. As concerns agreements on the separation of property there is no Hague Convention offering a mechanism for cross-border recognition and enforcement.⁶⁵ Solutions may be offered by other international, regional or bilateral instruments in force between the States concerned or by the relevant autonomous private international law rules.

7. Particular subject matters relevant in international child abduction cases

76. In the particular situation of cross-border child abduction, a number of additional subject matters play a role in parental agreements.

a) Return, non-return

77. The subject matter of "return" or "non-return" will be the predominant topic in agreements in the context of international child abduction.

78. It is important to understand exactly what the parties have in mind, when they use the term "return" and "non-return" in an agreement. It is not necessarily the same meaning these terms would have when used in Hague return proceedings.

79. When "return" is ordered in proceedings under the 1980 Convention, the child is sent back to his/her State of habitual residence immediately before the abduction in order to restore the *status quo ante* the "abduction". The return decision is without prejudice as to the decision on the merits of custody. Once the child is returned, the court with jurisdiction in matters of parental responsibility can decide with which parent and in which State the child will live. It is possible, that the return is followed by a lawful relocation to the State that had ordered the Hague return. As is the case with a return decision, a non-return decision in Hague proceedings is not a decision on the merits of custody even though it may lay the basis for a change of circumstances that influences the decision on parental responsibility in the future.

80. When parents discuss an amicable solution in an international abduction situation they are likely to focus not only on how to remedy the immediate abduction situation but also to address the underlying family dispute (concerning custody, access and/or relocation) which escalated into the child abduction. In other words, they want to end the Hague return proceedings and, at the same time, find an agreed solution to the underlying conflict. Hence, the use of the term "return" or "non-return" in parental agreements is likely to stipulate in which State the child is to live long term. In addition, the agreements regularly determine who will be the primary carer of the child in the long run and include a contact arrangement with the non-primary carer.

Example: We agree that our daughter S. will return to State A. with her mother on S. will live with her mother. S. will spend the second and fourth weekend of every month with her father. For the school holidays, the following arrangement will apply...

⁶⁴ However, the 1996 Convention "does not encroach on systems of property law and does not cover the substantive law relating to the content of rights over property"; this means, if for example, "there are requirements relating to the sale or purchase of land or buildings that are imposed by a Contracting State generally on all vendors or purchasers of certain land [...] and have nothing to do with the fact that property is being bought or sold by a child's representative, granting these authorisations for sale will not fall within the material scope of the Convention", see further paras 13.72 *et seq.* of the Practical Handbook on the 1996 Convention (*op. cit.* note 63).

⁶⁵ See, *supra*, note 54.

81. All parts of the agreement relating to return or non-return implying a long-term decision of the parents as to where the child will live, with whom the child will live and what might be the contact arrangements, fall within the scope of the 1996 Convention.

b) Practical arrangement of return including one-time travel costs for the return

82. In international child abduction cases a number of issues surrounding the return of the child and the taking parent sometimes play an important role in the settlement of the dispute. The arrangements considered as necessary by the parents to prepare and implement the return can be manifold and are influenced by the circumstances of the individual case. Three categories of practical arrangements shall be distinguished here.

83. First, return agreements regularly include provisions that relate to the preparation and details of the return itself, such as the date of return, the means of transport used and who pays for the required tickets.

Example: The father agrees to purchase the train ticket for daughter S.

84. When a court seised with the Hague return proceedings renders a decision on return under the 1980 Convention, these matters are regularly part of the decision under the 1980 Convention and are covered by the court's competence under the 1980 Convention. These matters also fall within the scope of the 1996 Convention as they relate to the safe return of the child to the State from which he or she was unlawfully taken. A decision or other measure embodying these matters would therefore also qualify as a measure of child protection under the 1996 Convention. However, since these provisions solely require enforcement in the State to which the child was taken and not in the State of return a cross-border recognition of these provisions will not be required.

85. Secondly, the agreement can include provisions that relate to details surrounding the return to be implemented in the State of return, such as for example, who will pick up the child from the station / airport should the child travel alone, or, where will the child be accommodated immediately upon return. This category of provisions can also regulate with whom the child will stay and have contact immediately upon return (before a new decision on the merits of custody is in place or an agreement on this matter is rendered enforceable by the authorities with international jurisdiction). All these matters relate to securing the safe return of the child and fall within the scope of the 1996 Convention.

86. Thirdly, the agreement can contain provisions surrounding the return that relate to the parent returning with the child. These are not directly covered by the Hague Conventions. The 1980 Convention focuses on the return of the child; the return of the parent cannot be ordered. The 1996 Convention deals with child protection measures only. However, this third category of practical arrangements surrounding the return may fall within the scope of the 1996 Convention if it can be argued that these arrangements are part of safeguarding the safe return of the child and can thus become part of a measure of child protection. If this is denied, the Hague Conventions cannot assist in rendering these matters binding in the State of return.

c) Criminal charges

87. In many States international parental child abduction is a criminal offence⁶⁶ which is meant to deter potential wrongful cross-border removal or retention. However, as discussed in the course of several Meetings of the Special Commission to review the operation of the 1980 Convention,⁶⁷ criminal charges against the taking parent in a Hague child abduction case in the State from which the child was taken can also have problematic consequences in individual cases. Particularly if imprisonment is the penalty to be expected in criminal proceedings, the fact that prosecution is ongoing or that criminal proceedings have been initiated, is likely to

⁶⁶ For an overview on facets contained in national law in this regard, see Chapter "1.3 Criminal Law" of the Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part III – Preventive Measures, The Hague, Jordan Publishing, 2005 (hereinafter, "Guide to Good Practice on Preventive Measures").

⁶⁷ See for example the discussions at Part I of the Sixth Meeting of the Special Commission, C&R Nos 52 *et seq.* of Part I of the 2011 SC.

deter the abducting parent from returning to that State and from travelling to that State in the future for child-parent contact. This may in certain cases also have a negative effect on the outcome of the Hague return proceedings.⁶⁸ Depending on the circumstances of the case, criminal charges in the State of abduction can, if the child is to be returned to that State, lead to a complete interruption of direct contact between the taking parent and the child.

88. When wanting to end a dispute involving cross-border parental child abduction amicably, the topic of criminal charges regularly adds additional and sometime insurmountable difficulties. Contrary to the initiation of criminal prosecution, which could, depending on the State concerned, commence on the left-behind parent's request, the discontinuation of prosecution is in many States solely in the discretion of the authorities concerned. However, an agreement might include a left-behind parent's commitment to cooperate and take all steps possible to bring about the withdrawal of criminal charges. The latter might also be defined as a condition for the agreement to take effect. Furthermore, in cases where the law of the State provides for criminal prosecution of parental child abduction, but no steps have yet been taken to initiate prosecution, the agreement may contain a commitment of the left-behind parent to refrain from initiating such prosecution.

Example: The father agrees to refrain from taking any steps that may lead to a criminal prosecution of the mother for child abduction. ...

89. Criminal law issues fall outside the scope of the 1980, 1996 and 2007 Conventions. See for further information on how to best deal with the matter of criminal charges when trying to reach a family agreement, the Guide to Good Practice on Mediation.⁶⁹

8. Other matters

90. There are, of course, further matters that agreements in the area of family law involving children may address. For matters not falling within the scope of the Hague Family Conventions, solutions may be offered by other international, regional or bilateral instruments in force between the States concerned or by the relevant autonomous private international law rules.

91. A group of agreements which should not be left unmentioned are parental agreements concerning disabled children having reached the age of majority. Here, in addition to the 2007 Convention,⁷⁰ the **Hague Convention of 13 January 2000 on the International Protection of Adults** can be of assistance in making the agreement or the content of the agreement embodied in a measure of protection "travel" cross-border.

III. THE 1980, 1996, 2007 CONVENTIONS – WHAT THEY OFFER

1. General remarks – How the Conventions respect and promote agreement and assist in making the agreement itself "travel" cross-border

92. As a first step, a brief analysis shall be made of what importance the 1980, 1996 and 2007 Conventions grant to agreements and to what extent they promote and respect party autonomy.

⁶⁸ See *inter alia* Guide to Good Practice on Transfrontier Contact (*op. cit.* note 7) at note 108, and Guide to Good Practice on Preventive Measures (*op. cit.* 66), at page 31.

⁶⁹ *Op. cit.* note 5, at Chap. 2.8, paras 85 *et seq.*

⁷⁰ The default scope of application of the 2007 Convention covers maintenance obligations arising from a parent-child relationship towards a person under 21 years. The Convention therefore already applies to parental maintenance obligations towards vulnerable persons having reached the age of maturity and being no older than 21 years of age. In addition, decisions made while the vulnerable person was under 21 can be given ongoing recognition and enforcement under the Convention when they provide for maintenance for the vulnerable person when they become older than 21, see Art. 37(3) of the 2007 Convention. Furthermore, the Convention expressly allows for Contracting States to extend its scope even further to maintenance obligations in respect of vulnerable adults, see Art. 2(3) and Art. 3(f) of the 2007 Convention.

a) *The 1980 Hague Child Abduction Convention*

93. When reading the 1980 Convention in detail, it becomes clear that the instrument is open to respect party autonomy in matters of parental responsibility, at least to a certain extent.

94. First of all, the 1980 Convention expressly mentions in Article 3 the possibility that rights of custody may arise “by reason of an agreement having legal effect under the law of [the] State [in which the child was habitually resident immediately before the removal or retention]”.⁷¹ The Explanatory Report notes: “In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have legal effect’ according to the law of the State of habitual residence was inserted [...] in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has ‘legal effect’ in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities.”⁷²

95. The 1980 Convention focussing on situations of cross-border child abduction is limited in scope. Nonetheless, one should retain the Convention’s readiness to sanction a breach of custody rights arising from an agreement. All that is required is that the agreement has “legal effect” under the law of the State of habitual residence of the child immediately before the removal or retention.

96. Furthermore, the Convention is equipped to allow that weight is given to a parental agreement in the course of Hague return proceedings. There is no obligation to return the child under the Convention if the “left-behind parent” has consented to or acquiesced in the moving of his/her child to another State (Art. 13(1)(a)), which illustrates the Convention’s capacity to have the parental agreement to relocation taken into account.

97. It should be highlighted that the option of “acquiescence” to a removal or retention, allows an amicable settlement of the cross-border family dispute based on the non-return of the child to the State from where he/she was taken. As is underlined by the Guide to Good Practice on Mediation, the 1980 Convention does not limit parents when contemplating an amicable solution in a child abduction situation “to discussing the modalities of the immediate return”.⁷³ They can also decide to discuss the “possibility of a non-return, its conditions, modalities and connected issues, *i.e.*, the long-term decision of the child’s relocation”.⁷⁴ As the Guide emphasises “mediation does not face the same jurisdictional restrictions as judicial proceedings”.⁷⁵ Article 16 of the 1980 Convention blocking jurisdiction on “the merits of custody” of courts in the State to which the child was taken does not prevent parents discussing these matters in mediation. The question to what extent Article 16 affects the modalities on how to render an agreement binding and enforceable in the two States concerned shall be addressed later (see Chapter IV.3). The 1980 Convention is ready to give weight to agreed solutions even when they envisage the non-return of the child, allowing the return-proceedings to be ended by reference to acquiescence in the sense of Article 13(1)(a).⁷⁶

98. Finally, Article 7(c) of the 1980 Convention contains a strong statement encouraging dispute resolution by agreement. The provision requests Central Authorities under the Convention “to secure the voluntary return of the child or to bring about an amicable resolution of the issues”. Many Central Authorities today provide parties with information on specialist

⁷¹ See Art. 3 of the 1980 Convention and Art. 7(2) of the 1996 Convention with the same wording.

⁷² See E. Pérez-Vera, “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. 70 (hereinafter, the “Explanatory Report on the 1980 Convention”).

⁷³ See Chap. 5 “Scope of mediation in international child abduction cases” of the Guide to Good Practice on Mediation (*op. cit.* note 5), at para. 186.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, para. 187.

⁷⁶ Of course, the left-behind parent can always choose to withdraw the Hague return proceedings and may, depending on the national procedural law, be able to do so on the condition that the family agreement is given effect to in that jurisdiction simultaneously.

mediation⁷⁷ where available and / or facilitate access to helpful information, such as information on how an agreement can be rendered binding and enforceable in accordance with domestic law. The obligation contained in Article 7(c) applies equally in contact cases in the sense of Article 21 of the 1980 Convention, where a parent applies to the Central Authority for assistance with organising or securing the effective exercise of cross-border contact.

b) The 1996 Hague Child Protection Convention

99. As is the case with the 1980 Convention, the framework of the 1996 Convention supports two kinds of agreements on substantive law matters. The first are agreements which establish rights of custody in the first place, and the second are agreements which settle disputes on matters falling within the scope of the Convention.

100. In copying the definition of “wrongful removal or retention” of the 1980 Convention, the 1996 Convention integrates equally the notion that rights of custody can be based on an agreement having legal effect in the State of the child’s habitual residence, see Article 7(2) of the 1996 Convention.

101. The 1996 Convention, however, goes a step further. The notion of attribution of parental responsibility by agreement is taken up in Article 16(2). Reading this provision in connection with Article 16(3) of the Convention, gives agreements attributing parental responsibility a much broader sphere of influence. Article 16(3) safeguards that a change of habitual residence does not lead to the loss of a person’s parental responsibility due to a different legal situation in the new State. Thus, an agreement validly attributing parental responsibility in accordance with the law of the State of the child’s habitual residence at the time when the agreement takes effect is given force in any new State of habitual residence of the child. Of course, the agreements that are enabled to “travel” cross-border by Article 16(3) are limited in scope: only an agreed attribution of parental responsibility is to be respected in the new State not including the modalities of an agreed exercise of parental responsibility.

102. Turning to agreements on the exercise of parental responsibility, one could ask whether they could be considered a “measure of protection” in the sense of the 1996 Convention. The term “measures of protection” was already used in the predecessor Convention, the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants*. Neither the old nor the new Convention contain a definition of the term “measures of protection”, even though the 1996 Convention includes “an enumeration of the issues on which these measures might bear”.⁷⁸ In the light of this, considering a parental agreement on the exercise of parental responsibility a “measure of protection” appears possible. But the overall scheme of the Convention clearly illustrates that the term “measures of protection” was meant to refer to a measure taken by “an authority” of a Contracting State, see in particular Articles 1(1)(a) and 23(1) of the 1996 Convention. A parental agreement on the exercise of parental responsibility thus requires the involvement of an “authority” before it can become a “measure of protection” in the sense of the 1996 Convention and “travel” cross-border supported by the recognition and enforcement mechanism of the Convention.⁷⁹ However, an “homologation” by a competent authority, could, depending on the available options in the Contracting State, suffice to create a “measure of child protection” taken by an authority.

103. As concerns agreements on international jurisdiction, the 1996 Convention provides very limited party autonomy. The Convention centralises, with very few exceptions, jurisdiction in the authorities of the State of the child’s habitual residence. The assumption being that the authorities with proximity to the child’s habitual social and family environment are the best suited to take decisions on matters of child protection. Article 10 of the Convention allows the parents of a child, under very confined conditions, to agree that the court dealing with their divorce or legal separation may equally exercise jurisdiction on measures of child protection.

⁷⁷ See on the matter of specialist family mediation in international child abduction cases the Guide to Good Practice on Mediation (*op. cit.* note 5).

⁷⁸ See P. Lagarde (*op. cit.* note 62), at para. 18.

⁷⁹ It should be noted that the Brussels IIa Regulation, a regional instrument which among EU Member States (except Denmark) replaces part of the 1996 Convention, goes a step further: It contains a provision that allows agreements as such to travel across borders, see Art. 46 of the Regulation (*op. cit.* note 4).

As Article 10(1)(b) clarifies that the choice of jurisdiction by the parents must be in the “best interests of the child”.⁸⁰ It is important to note that the agreed change of jurisdiction will in accordance with Article 15 of the 1996 Convention generally lead to the application of a different law, *i.e.*, constituted an indirect choice of law.

104. Like the 1980 Convention, the 1996 Convention promotes the amicable settlement of cross-border disputes concerning parental responsibility by requesting Central Authorities under the Convention to “facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies”.⁸¹

c) *The 2007 Hague Child Support Convention*

105. Among the modern Hague Family Conventions, the 2007 Convention goes furthest with regard to expressly allowing for the recognition and enforcement of agreements concerning the matters covered by the Convention.

106. First of all, Article 30 of the 2007 Convention provides a mechanism for recognition and enforcement of so-called “maintenance arrangements”. Article 3 of the Convention defines “maintenance arrangement” as “an agreement in writing relating to the payment of maintenance which – i) has been formally drawn up or registered as an authentic instrument by a competent authority; or ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority”. Included are therefore not only authentic instruments but also private agreements. Article 30(1) of the 2007 Convention requires that the maintenance arrangement be made in a Contracting State and that it is enforceable in the State of origin. The maintenance arrangement can be enforced as a decision in other Contracting States.

107. Contracting States to the 2007 Convention may exclude, by way of reservation, the recognition and enforcement of maintenance arrangements. However, practice shows that the majority of States joining the Convention are ready to accept the recognition and enforcement of maintenance arrangements.⁸²

108. Independently of the option to recognise and enforce a maintenance arrangement by virtue of Article 30 of the 2007 Convention, the Convention provides in Article 19(1) that a “settlement or agreement concluded before or approved by [a judicial or administrative] authority” can be recognised and enforced as a “decision” under Chapter V of the Convention.⁸³

⁸⁰ Wider party autonomy is possible under Art. 12(3) of the Brussels IIa Regulation based on the child having a “substantial connection” with the chosen State. Another way to widen the basis of jurisdiction through party autonomy is to ask the chosen court to request a transfer of jurisdiction to it under Art. 9 of the 1996 Convention or Art. 15 of the Brussels IIa Regulation.

⁸¹ See Art. 31(b) of the 1996 Convention.

⁸² Out of the currently (status January 2019) 39 States bound by the 2007 Convention, only two made a reservation in accordance with Art. 30(8), namely Turkey and Ukraine, see the Status table available on the Hague Conference website at < www.hcch.net > under “Child Support Section” then “Status table”. Norway and Albania, made a declaration in accordance with Art. 30(7) as a consequence of which applications for recognition and enforcement of a maintenance arrangement can only be made through Central Authorities.

⁸³ The term “settlement” as referred to by Art. 19(1) of the 2007 Convention was already included in the predecessor Hague Convention, the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. As the Explanatory Report to that Convention notes the inclusion of settlements accommodated a need in practice. The Report depicts the task to define exactly the concept of “settlement” in the instrument as perilous “since the national systems differ so much one from another” but roughly describes it as a “contract made under private law inter partes before an authority having jurisdiction – generally, a court – in order to put an end to litigation”, see M. Verwilghen, “Explanatory Report on the 1973 Hague Maintenance Conventions”, in *Actes et documents de la Douzième session (1972)*, Tome IV, *Obligations alimentaires*, The Hague, Imprimerie Nationale, 1975, at paras 28-29. The 2007 Convention adds “agreements” in Art. 19(1) but this does not seem to imply an extension of scope of the Chapter on recognition and enforcement but rather a clarification, see A. Borrás & J. Degeling, with the assistance of W. Duncan & P. Lortie, “Explanatory Report on the 2007 Hague Child Support Convention”, The Hague, 2013, at para. 433 (hereinafter, “Explanatory Report on the 2007 Convention”).

109. In individual cases in certain countries careful attention may be required to see whether the applicable provision is Article 19(1) or Article 30 of the 2007 Convention.⁸⁴

110. As with the other Hague Family Conventions, the 2007 Convention tasks the Central Authorities to assist in bringing about an agreed solution. Article 6 (2)(d) of the Convention asks Central Authorities “to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes”.

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”.⁸⁵ This kind of agreement is expressly not envisaged for maintenance obligations in respect of children.⁸⁶

112. When talking about the promotion of party autonomy through the 2007 Convention, it should not be forgotten that the applicable law instrument created together with that Convention, namely the 2007 Hague Protocol⁸⁷ introduces, as a novelty,⁸⁸ the possibility of a choice of law for maintenance matters (even though almost completely excluded for child maintenance).⁸⁹ This is yet more evidence that the matter of party autonomy was given much attention at the negotiations.

2. How can the content of an agreement embodied in a decision, other measure or a “maintenance arrangement” “travel” cross-border with the assistance of the 1996 and 2007 Conventions?

113. Among the three Hague Conventions in the focus of the Explanatory Note, only the 1996 Convention and the 2007 Convention set up recognition and enforcement mechanisms.

a) The 1996 Hague Child Protection Convention

114. An agreement on any matters falling within the scope of the 1996 Convention can, if embodied in a “measure of child protection” in the sense of the Convention, easily “travel” from one Contracting State to another. To benefit from the recognition and enforcement mechanism under the 1996 Convention, the measure must, as stated above, be taken by an authority of a Contracting State. The measure of child protection could be a decision taken by a court or any other measure that an authority of the Contracting State by virtue of the national procedural law is allowed to take. Recognising that the national law of States differs considerably with regard to the available “measures” of child protection and intending to be inclusive, the broad term “measures” was already used in the predecessor Convention.⁹⁰ Hence, it will depend on the options available in the relevant Contracting State how the agreement on matters within the scope of the Convention can be transformed into a “measure of child protection” taken by an authority.

⁸⁴ Art. 19(1) is the narrower provision: only settlements or agreements concluded before or approved by an authority are included, while “maintenance arrangements covers a range of different situations in which a competent authority intervenes in the context of agreements relating to the payment of maintenance”, see para. 74 of the Explanatory Report on the 2007 Convention (*op. cit.* note 83) for further details.

⁸⁵ See Arts 18(2)(a) and 20(1)(e) of the 2007 Convention.

⁸⁶ It should be noted that the EU Maintenance Regulation which introduces comprehensive rules on jurisdiction for maintenance matters and which allows explicitly for a choice of court, also excludes agreements on jurisdiction for child maintenance (*op. cit.* note 4).

⁸⁷ *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter, the “2007 Hague Protocol”).

⁸⁸ See A. Bonomi, “Explanatory Report on the 2007 Hague Maintenance Obligations Protocol”, The Hague, 2013, at paras 109 and 110.

⁸⁹ The choice of law is not applicable for child maintenance, see Art. 8(3), unless it applies only for a particular proceeding, see Art. 7.

⁹⁰ See W. de Steiger, “Explanatory Report on the 1961 Hague Protection of Minors Convention”, in *Actes et documents de la Neuvième session (1960)*, Tome IV, *Protection des mineurs*, The Hague, Imprimerie Nationale, 1961, at pp. 8-9.

115. Once a “measure of child protection” in the sense of the 1996 Convention has been obtained, this measure is recognised by operation of law in any other Contracting State to the Convention.⁹¹

116. However, there are a number of grounds of non-recognition listed in Article 23(2) of the Convention, which should not be overlooked. Three of these grounds shall be given particular attention in the Explanatory Note.

117. The first one is Article 23(2)(a) of the 1996 Convention in accordance with which the recognition of a measure can be refused if it was taken by an authority that had no international jurisdiction under the Convention. Strategically, it should therefore be a Contracting State having international jurisdiction under the 1996 Convention in which the agreement should be “transformed” into a “measure of child protection”. Since the 1996 Convention, apart from minor exceptions, “centralise[s] jurisdiction in the authorities of the State of the child’s habitual residence [to] avoid all competition of authorities having concurrent jurisdiction”⁹², it should generally be the Contracting State of habitual residence of the child where the measure of child protection should be obtained.⁹³ It must be highlighted that “[t]he authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction”.⁹⁴ The particularities of international child abduction cases are further explored below, see Chapter IV2.c).

118. The second ground of non-recognition that may play a role in the recognition of a measure of child protection embodying a parental agreement is Article 23(2)(b) of the 1996 Convention. The provision states that the recognition of the measure of child protection can be refused if “the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State”. As the Explanatory Report points out this ground for refusal is “directly inspired by Article 12, paragraph 2, of the United Nations Convention on the Rights of the Child”.⁹⁵ The Explanatory Report further clarifies that this provision does not imply a necessity to hear the child in every case. The report states “that it is not always in the interest of the child to have to give an opinion, **in particular if the two parents are in agreement** on the measure to be taken. It is only where the failure to hear the child is contrary to the fundamental principles of procedure of the requested State that this may justify a refusal of recognition”.⁹⁶ It should be noted that “hearing the voice of the child” can be a subject matter of importance when it comes to the recognition of a measure of child protection. The topic is further discussed below under Chapter V.2.e).

119. The third ground of non-recognition to be highlighted is Article 23(2)(d) of the 1996 Convention, which states that the recognition of the measure can be refused “if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child”. When drafting the agreement (which later is meant to be turned into a measure of child protection) one must consider whether the agreement’s content is likely to create public policy constraints in the State in which recognition and enforceability is to be achieved. The weight given to the “best interest of the child” in the assessment of whether the measure’s recognition would be contrary to public policy, is yet another incentive to consider the child’s perspective when drafting the agreement. See further below under Chapter V.2.d).

120. To dispel any doubts about possibly existing grounds of non-recognition, any interested person can request advance recognition in accordance with Article 24 of the 1996 Convention. For the measure of child protection to become enforceable in the other State a declaration of enforceability in accordance with Article 26 of the Convention has to be obtained.

⁹¹ See Art. 23(1) of the 1996 Convention.

⁹² See P. Lagarde (*op. cit.* note 62), at para. 37. See also Art. 5 of the 1996 Convention.

⁹³ See paras 13.49-13.50 of the Practical Handbook on the 1996 Convention (*op. cit.* note 63).

⁹⁴ See Art. 25 of the 1996 Convention.

⁹⁵ See P. Lagarde (*op. cit.* note 62), at para. 123.

⁹⁶ *Ibid.* (emphasis added).

b) The 2007 Hague Child Support Convention

121. If an agreement on maintenance matters falling within the scope of the 2007 Convention is embodied in a decision or court-settlement or is concluded before or approved by an authority (Art. 19(1) of the Convention), it benefits from the recognition and enforcement mechanism of the Convention. However, as a condition, the involved authority must base its jurisdiction on one of the listed “indirect grounds of jurisdiction” in Article 20(1). It should be noted that Contracting States may make reservations regarding some of these “bases of jurisdiction”, see Article 20(2) of the Convention. Strategically, it is, as a general rule, safest to have a decision rendered in a State whose authorities have international jurisdiction in accordance with Article 20(1)(a), (b) or (d),⁹⁷ since Contracting States cannot make a reservation with regard to these grounds of jurisdiction.

122. Among the grounds of non-recognition contained in Article 22 particular attention shall be drawn to Article 22(a) which states that the recognition and enforcement of the decision can be refused if it “is manifestly incompatible with the public policy (*“ordre public”*) of the State addressed”. As said above, when drafting the agreement it should be considered whether the agreement’s content is manifestly incompatible with the “public policy” of the foreign State in which recognition and enforceability will be sought. See also below under Chapter V.2.d).

123. For the recognition and enforcement of a “maintenance arrangement” in the sense of Article 3(e) of the 2007 Convention generally the same provisions apply as for decisions, see Article 19(4) of the Convention. However, Article 30 modifies these rules slightly. In particular, the grounds of non-recognition are not the same, see Article 30(4) of the Convention. It is important to note that the indirect rules of international jurisdiction of the Convention do not play a role for the recognition and enforcement of maintenance arrangements. But, also maintenance arrangements have to “pass” the same public policy test as decisions.

3. Habitual residence as a central concept

124. In international family disputes concerning children the issue of “habitual residence” regularly plays an important role. The parents’ disagreement on where their child should habitually reside in the future is often the very source of the dispute. Conflicts surrounding cross-border relocation or international child abduction are classic examples of this category of cases. As the main connecting factor for international jurisdiction and applicable law, the habitual residence of the child can have an influence on which State’s authorities can be seised and on what basis these authorities will decide.

125. All Hague Family Law Conventions use “habitual residence” as a connecting factor but none of them defines the concept. It is up to the national authorities to determine where a person has his or her place of habitual residence based on the circumstances of the individual case. The test applied in different States is not necessarily the same. As much as a uniform autonomous interpretation of the connecting factor “habitual residence” in all Contracting States to the 1980 Convention is desirable (and similarly regarding other Hague Family Conventions), different States’ jurisprudence interpreting this term is not binding on other Contracting States’ courts. However, certain trends can be observed and courts are indeed taking note of other States’ jurisprudence on this matter to assist in establishing uniform practice.⁹⁸

⁹⁷ In accordance with Art. 20(1)(a), (b) and (d) a “decision made in one Contracting State (“the State of origin”) shall be recognised and enforced in other Contracting States if –

- a) the respondent was habitually resident in the State of origin at the time proceedings were instituted;
- b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

[...];

- d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there; [...].”

⁹⁸ The Hague Conference on Private International Law has been facilitating a uniform interpretation of the 1980 Convention by collecting and summarising case law under the 1980 Hague Abduction Convention in the database “INCADAT”, available at < www.incadat.com >.

126. The recent decision of the Canadian Supreme Court *Office of the Children's Lawyer v. Balev*⁹⁹ discusses the three main approaches identifiable in the international case-law: (1) parental intention approach determining "the habitual residence of a child by the intention of the parents with the right to determine where the child lives",¹⁰⁰ (2) child centred approach which "determines a child's habitual residence [...] by the child's acclimatization in a given country, rendering the intentions of the parents largely irrelevant",¹⁰¹ and (3) hybrid approach "which treats the circumstances of the children and the intentions of the parents as factors to be considered in achieving a just result which fulfils the objectives of the Hague Convention"¹⁰².

127. In the case decided by the Canadian Supreme Court, the majority favoured the hybrid approach partly because it is the emerging approach in other jurisdictions. The court was anxious to try to give a uniform international interpretation to the 1980 Convention, noting that a prime consideration in interpreting [international] treaties is the principle of harmonisation. The court underlined that the "aim of treaties like the Hague Convention is to establish uniform practices in the adhering countries"¹⁰³ and that thus the interpretation to be preferred is the one "that has gained the most support in other courts and will therefore best ensure uniformity of state practice across Hague Convention jurisdictions".¹⁰⁴

128. Without categorising its approach the CJEU¹⁰⁵ actually uses the hybrid approach. In accordance with the CJEU jurisprudence, habitual residence of a child "corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a [...] State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration".¹⁰⁶ "In addition to the physical presence of the child in a [...] State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent"¹⁰⁷ and that "the parents' intention to settle permanently with the child in another [...] State, manifested by certain tangible steps such as the purchase or lease of a residence in the host [...] State, may constitute an indicator of the transfer of the habitual residence".¹⁰⁸ In a case where the habitual residence of a two months old infant was discussed, the CJEU highlighted the importance of considering the factors comprising the social and family environment in the light of the child's age¹⁰⁹ and stated that an "infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent" so that the integration of those persons is to be assessed.¹¹⁰

129. In *OL v. PQ* the CJEU¹¹¹ decided that a new born child did not have the habitual residence where his parents lived before the child was born because the child was only ever present in the State to which the mother went to have her baby. Even though the parents had agreed before the child's birth that mother and child would return to the spousal residence in the other State some time after the birth. In *UD v. XB* the CJEU¹¹² reiterated the minimum requirement of the child's presence, at some point, as a factual link in order to establish habitual residence.

130. In practice this means, where parents agree that their child shall live in another State, a certain factual connection of the child's life to that State (the child's presence, integration, schooling or the like) might be considered necessary by a court when exploring whether the

⁹⁹ *Office of the Children's Lawyer v. Balev*, 2018 SCC 16.

¹⁰⁰ *Ibid.*, at para. 40.

¹⁰¹ *Ibid.*, at para. 41.

¹⁰² *Ibid.*, at para. 4.

¹⁰³ *Ibid.*, at para. 49.

¹⁰⁴ *Ibid.*

¹⁰⁵ The CJEU has in several decisions set forth very detailed factors that assist in the determination of the "habitual residence" of a child in the context of the Brussels IIa Regulation. Even though the CJEU's jurisprudence is only binding with regard to EU law, the guidance given for the determination of habitual residence inside the EU is clearly influencing the national jurisprudence in Europe.

¹⁰⁶ Judgment of 2 April 2009, *A*, C-523/07, EU:C:2009:225, para. 44.

¹⁰⁷ *Ibid.*, para. 38.

¹⁰⁸ *Ibid.*, para. 40.

¹⁰⁹ Judgment of 22 December 2010, *Mercredi v. Chaffe*, C-497/10 PPU, EU:C:2010:829, para. 53.

¹¹⁰ *Ibid.*, para. 55.

¹¹¹ Judgment of 8 June 2017, *OL*, C-111/17 PPU, EU:C:2017:436.

¹¹² Judgment of 17 October 2018, *UD v. XB*, C-393/18 PPU, EU:C:2018:835.

child's habitual residence has changed.¹¹³ However, given that a child does not have any autonomy in determining where he or she lives (and therefore the adult or adults looking after the child at a given time are in fact determining where the child is living) it is important for courts in 1980 Hague Convention cases to give as much effect as possible to the recently established shared wishes of the parents at least where the child is present at the relevant date in the jurisdiction which according to the parents' agreement is and should remain the child's habitual residence. In a hybrid approach particular weight should be given to **shared** parental intention to encourage parents to agree about where their child should live and to avoid one parent being able to effectively unilaterally determine the habitual residence of the child in violation of that parent's recent agreement with the other parent.

131. When trying to ascertain parental intention as part of the hybrid approach an agreement between the parties as to where the child should live on a permanent basis is proof of the parents' intention regarding the habitual residence of the child. For recommendations for the preparation of agreements see further Chapter V.2.c).

IV. APPROACHING TYPICAL CROSS-BORDER FAMILY CONFLICT SITUATIONS

132. This Chapter analyses the particularities concerning agreements made in the context of an envisaged cross-border relocation, in cross-border contact cases and in the context of international child abduction and spells out consequences resulting from the assessment made in Chapter III for these situations.

1. Agreements in the context of cross-border relocation

133. The term cross-border relocation is understood as referring to situations where one parent moves abroad with his / her minor child(ren) envisaging to establish the habitual residence in the State of relocation. Only lawful relocation is meant here, not the taking of a child to another State in breach of custody rights (these situations are referred to below under "International child abduction").

134. Besides the actual consent to the relocation, a parental agreement in the context of cross-border relocation is likely to address, contact arrangements and other matters of exercise of parental responsibility. Furthermore, the agreement might deal with matters of child and spousal/ex-spousal maintenance, travel costs and education costs.¹¹⁴

135. All subject matters falling within the scope of the 1996 Convention, can if contained in a "measure of child protection" taken by an authority in a Contracting State having international jurisdiction, benefit from the efficient recognition and enforcement mechanism of the Convention. Recalling that the 1996 Convention as a general rule¹¹⁵ centralises international jurisdiction in the State of habitual residence of the child, it is this State in which the parents should approach the authorities to obtain a "measure of child protection" based on their agreement. Depending on the options available in the relevant Contracting State the agreement could be turned into a consent-order or be otherwise included in a decision. It might suffice that the agreement is homologated by a competent authority. Once the parents have obtained a "measure of child protection", this measure is, by operation of law recognised in all other Contracting States. To dispel any doubt concerning possibly existing grounds of non-recognition, advance recognition can be requested in accordance with Article 24 of the Convention.

136. As concerns matters falling within the scope of the 2007 Convention, two avenues can be followed to use the Convention's recognition and enforcement mechanism.

¹¹³ The fact that the parents' views and intentions regarding their child's place of habitual residence contained in an agreement are not binding on the courts in their deliberations is illustrated by the above cited Canadian Supreme Court decision, which underlines that "parents cannot contract out of the court's duty [...] to make factual determinations of the habitual residence of children at the time of their alleged wrongful retention or removal" (*op. cit.* note 99), at para. 73.

¹¹⁴ See for the subject matters typically contained in agreements made in international family disputes concerning children above Chap. II.

¹¹⁵ Prorogation of jurisdiction is possible in the divorce, legal separation or marriage annulment court of the parents of the child under the conditions set out in Art. 10 of the 1996 Convention and transfer of jurisdiction is possible under Arts 8 and 9 of the 1996 Convention.

137. Firstly, the agreement could be included in a decision or court settlement, or has been concluded before or approved by an authority of a Contracting State in the sense of Article 19(1) of the 2007 Convention. The Contracting State chosen should have international jurisdiction on the subject matter in light of the indirect rules of jurisdiction under the 2007 Convention. Here, also possible reservations that Contracting States concerned by the individual case may have made, must be considered. To be on the safe side, international jurisdiction should be based on the grounds of jurisdiction referred to in either Article 20(1)(a), (b) or (d) of the 2007 Convention, because no reservation is possible concerning these grounds.

138. Secondly, the agreement could be rendered enforceable abroad as a maintenance arrangement under Article 30 of the 2007 Convention. This presupposes that the agreement is drawn up or registered as an authentic instrument or that it has been authenticated by, or concluded, registered or filed with a competent authority in the sense of Article 3(e) of the 2007 Convention. Attention has to be drawn to the fact that Article 30 cannot be used between all Contracting States to the Convention since a reservation is possible.¹¹⁶ Furthermore, it has to be highlighted that not all legal systems know the concept of “authentic instruments” or other kinds of “maintenance arrangements” as described in Article 3(e) of the Convention. It might therefore not be possible to produce such an arrangement in each Contracting State. By contrast, also States not knowing such maintenance arrangements in their own system will, unless they made a reservation under Article 30(8), have to recognise and enforce the maintenance arrangements of other Contracting States.

139. The recognition and enforcement of maintenance arrangements under the 2007 Convention follows principally the same rules as the recognition and enforcement of decisions, see Article 19(4). However, Article 30 slightly modifies these rules. Of particular importance in our context is the different set of grounds of non-recognition that applies to maintenance arrangements. While, as stated above, the recognition of a decision founded on a ground of jurisdiction not supported by the indirect rules of jurisdiction of the Convention can be refused, for maintenance arrangements international jurisdiction does not play a role. Consequently, a maintenance arrangement from any given Contracting State can benefit from the recognition and enforcement mechanism under the Convention.

140. After analysing the mechanisms offered by the 1996 and 2007 Conventions the following conclusions can be drawn for an agreement on cross-border relocation.

141. First of all, it should be emphasised that should the relocation agreement only deal with matters falling within the scope of the 1996 Convention, the agreement could very easily travel cross-border with the help of this Convention. Likewise, should the agreement drawn up in the context of the relocation only deal with matters falling within the scope of the 2007 Convention, this Convention offers efficient mechanisms for cross-border recognition and enforcement. Complexity is added when the agreement made in the context of relocation is a so-called “package agreement”.¹¹⁷

142. For all matters of the package agreement falling within the scope of the 1996 Convention, the ideal “starting point” legal system to first render the agreement binding and enforceable is the State of the current habitual residence of the child. In this State, the agreement would have to be integrated into a “measure of child protection” in the sense of the Convention. This measure would then by operation of law be recognised in all other Contracting States. How the agreement can be included in or be transformed into a “measure of child protection” in the State of the habitual residence of the child will depend on that State’s law.

143. As concerns matters in the agreement falling within the scope of the 2007 Convention, the State of current habitual residence of the child is equally a good “starting point” legal system to first render the agreement enforceable. Should the agreement be embodied in a decision or court-settlement or approved by an authority in the sense of Article 19(1) of the Convention, international jurisdiction founded on grounds referred to in Article 20(1)(a), (b) or (d) of the 2007 Convention would be the safe options: namely seizing the court in the State of the habitual

¹¹⁶ *Ibid.*, Art. 30(8).

¹¹⁷ See for the term “package agreement” the “Terminology” above.

residence of the respondent¹¹⁸ (*i.e.*, here the debtor, who is the respondent for the purpose of the recognition and enforcement procedure under Chapter V of the Convention), seizing the court of another State which the respondent¹¹⁹ submits to the jurisdiction of, or seizing the court in the State of habitual residence of the child given the respondent¹²⁰ has lived with the child in that State or has resided in that State and provided support for the child there.

144. Should the law of that State know the concept of “maintenance arrangements” as defined in Article 3 of the 2007 Convention, the relevant steps could be taken to obtain such a maintenance arrangement. The maintenance arrangement could then be rendered enforceable with the help of the Convention in all Contracting States, independent of rules on international jurisdiction for maintenance.

145. Summarising it can be stated that, in principle, it would be feasible to give force to a relocation agreement including provisions on maintenance with the assistance of the 1996 and 2007 Conventions in all Contracting States when the “starting point” legal system is the legal system of habitual residence of the child and one of the grounds of jurisdiction referred to in Article 20 of the 2007 Convention is applicable or the parties have entered into a valid “maintenance arrangement” in terms of Articles 3(e) and 30 of the 2007 Convention.

146. Whether in practice the rendering of a relocation agreement, including provisions on maintenance, legally binding and enforceable in the above identified “starting point” jurisdiction is an easy or cumbersome process, depends to a large extent on the procedural law of the relevant Contracting State. The process can be costly and time consuming. And it may be that the authorities competent to render a measure of child protection in the sense of the 1996 Convention and those competent to render a decision or court-settlement on matters of maintenance or respectively approve an agreement or make a maintenance arrangement under the 2007 Convention are different authorities. The parties may therefore have to turn to two different authorities, which can also have cost implications.

147. Obviously, where the agreement includes matters¹²¹ not falling within the scope of the 1996 and 2007 Conventions or where these Conventions are not in force¹²² between the relevant States, the task of rendering the agreement legally binding and enforceable in all States concerned is more challenging.

148. In the best of cases, the 1996 and the 2007 Conventions are in force between all States concerned by the dispute, all matters treated in the agreement fall within the scope of either Convention and the same authority in the “starting point” legal system is in accordance with national procedural law competent to give the necessary force to the agreement under both Conventions. To complete the “best case scenario”, the competent authority acts expeditiously and free of charge or imposes reasonable charges only.¹²³

¹¹⁸ It must be noted that Art. 20(1)(a), (b) and (d) refers to the term “respondent” (and not to the “debtor” for the purpose of Art. 10(1) applications and the “creditor” for the purpose of Art. 10(2) applications). In view of the fact that Art. 20 also applies to agreements concluded before or approved by a competent authority in the sense of Art. 19(1), *i.e.*, in cases where no proceedings against a “respondent” were brought, the term “respondent” does not fit perfectly. By way of teleological interpretation, Art. 20 could, however, be read to refer to the “respondent” for the purpose of the recognition and enforcement procedure under Chap. V of the Convention, which for a maintenance claim would be the debtor. As the very minimum, one should be able to apply Art. 20(1)(b) to cases where both parties have submitted to the jurisdiction of the court by seeking a consent order, all the more if all parties are habitually resident in the State of jurisdiction.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ This may, for example, be the case if the agreement on relocation is made in conjunction with a divorce and the parents also address matters of separation of matrimonial property in their agreement. See further above under Chap. II. Of course, the 1996 and 2007 Conventions can for all matters falling within their scope always be used to give partial force to the agreement in all Contracting States. As for the other matters, relevant rules on private international law will have to be identified, see *supra*, paras 47 *et seq.*

¹²² The considerable advantages offered by the 1996 and 2007 Conventions in making agreements or their content “travel” cross-border have been demonstrated in this Explanatory Note. States that have not yet joined the 1996 Convention and / or 2007 Convention should be encouraged to do so.

¹²³ It could be helpful if States were to consider the development of good practices with a view to achieving the described “best case scenario”.

2. Agreements in cross-border contact cases

149. The category of cases considered in this sub-chapter are those where one holder of parental responsibility lives in a State other than the State of habitual residence of the child and other parent. Disputes can arise in such cases for example, if one of the parent's wishes to alter the contact arrangement or if the primary carer obstructs the contact.

150. A dispute could, however, also arise concerning matters of maintenance. Even though the right to maintenance and contact rights are legally two distinct issues, in practice, it is not rare that a delay in maintenance payment brings about difficulties in the implementation of contact arrangements and *vice versa*.

151. The legal setting discussed in the sub-chapter on cross-border relocation is nearly the same. The difference is that the child and one parent habitually reside in one State and the other parent habitually resides in another. Assuming that both the 1996 Convention and the 2007 Convention are in force between all States concerned by the dispute, the following recommendation for contact agreements including a maintenance component can be given. The ideal "starting point" jurisdiction for rendering agreements on matters falling within the 1996 Convention legally binding and enforceable is the State of habitual residence of the child. If it is possible to establish in that State an enforceable "maintenance arrangement" in the sense of the 2007 Convention, this might be the ideal option to choose concerning any parts of the agreement that concern maintenance, provided none of the States concerned has made a reservation in accordance with Article 30(8) of the 2007 Convention. Otherwise, the parts of the agreement concerning maintenance must be made part of a decision or court-settlement or the agreement must be concluded before or approved by an authority in the sense of Article 19(1) of the 2007 Convention. Doing so in the State of habitual residence of the child, *i.e.*, not the State of habitual residence of the debtor, could be based on the grounds of jurisdiction contained in Article 20(b), (d).

152. Obviously, cross-border contact agreements that deal with matters falling within the scope of the 1996 Convention only, can easily travel cross-border with the help of this Convention among all Contracting States.

3. International child abduction (return and non-return agreement)

153. In the situation of international child abduction, the factual situation differs from that of an envisaged cross-border relocation in many ways. First of all, the dispute is likely to be more conflictual and an amicable solution often difficult to obtain. Furthermore, the time pressure in these cases is much greater. Return proceedings under the 1980 Convention are expeditious proceedings; decisions are to be rendered within a few weeks' time only. Any process to bring about an amicable resolution of the disputes has to comply with the tight timeframe.¹²⁴ A possible criminal prosecution in the State of abduction complicates the resolution of the dispute.¹²⁵

154. In international child abduction cases particular rules of international jurisdiction in matters of parental responsibility apply in accordance with the 1996 Convention. In addition, the 1980 Convention contains a negative rule of jurisdiction for custody proceedings. The Conventions are premised on the notion that the most appropriate forum to determine the long-term merits of custody is usually the State of the habitual residence of the child. The child's removal to or retention in another State by one parent in breach of the other parent's custody rights should not bring about a change of jurisdiction. The 1980 Convention provides that as long as Hague return proceedings are ongoing, the courts in the State to which the child was taken cannot decide on the merits of custody, see Article 16 of the 1980 Convention. The 1996 Convention, reinforcing the 1980 Convention, provides that the international jurisdiction for matters falling within the scope of the 1996 Convention remains with the authorities of the State where the child, immediately before the abduction, habitually resided until the conditions for a shift of international jurisdiction are met. For a change of international jurisdiction in accordance with Article 7, the child must have "acquired a habitual residence in another State" and "a) each person, institution or other body having rights of custody has acquiesced in the

¹²⁴ See for the particular challenges for mediation in international child abduction cases Chap. 2 of the Guide to Good Practice on Mediation (*op. cit.* note 5).

¹²⁵ See, *supra*, at paras 87-89.

removal or retention;" or "b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment".

155. The particularities of the factual and legal situation in international child abduction cases may complicate the matter of rendering agreements settling the family dispute legally binding and enforceable in all States concerned.

a) *Return agreement*

Example case: Hague return proceedings are ongoing in State A. Following specialised¹²⁶ mediation, the parents have worked out a detailed agreement in accordance with which the child and mother (taking parent) are to return to the State from which the child was taken (State B). The child will from now on live with the mother as primary carer in State B, the father will have regular contact with the child in accordance with a detailed contact arrangement and the child will continue to see the maternal family in State A during summer holidays. The 1980 and 1996 Conventions are in force between State A and State B.

156. The court seised with the Hague return proceedings can conclude the return proceedings by consent but the court does not have international jurisdiction to render a decision on the merits of custody and contact. This international jurisdiction remains with the authorities in State B, in accordance with Article 7 of the 1996 Convention, supported by Article 16 of the 1980 Convention.

157. Article 11 of the 1996 Convention, which, in cases of urgency, grants jurisdiction for measures of protection to the authorities of any Contracting State in whose territory the child is present cannot assist in rendering the agreement fully binding in State A in our example case. Article 11 may play a role in the context of return proceedings when it comes to ensuring the safe return of the child with certain measures of protection.¹²⁷ This may include appointing the mother as provisional sole primary carer of the child, and giving provisional force to a contact arrangement with the father. However, the measures taken in accordance with Article 11 are, by their nature, "temporary measures" and "lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 [of the 1996 Convention] have taken the measures required by the situation".¹²⁸ Hence, a court with jurisdiction under Article 11 of the 1996 Convention cannot in a binding way implement long-term arrangements for custody and contact. The provisional order is only effective until the competent authority in State B takes over. It is for the competent authority in State B to decide whether or not to give binding effect to the parties' agreement concerning custody and contact. Besides, the use of Article 11 presupposes a situation of "urgency"¹²⁹ making the measures of protection necessary.

158. Should the court seised with the Hague return proceedings in State A nonetheless include the full terms of the agreement in its decision, the authorities in other Contracting States to the 1996 Convention would be under no obligation to recognise the decision with regard to custody and contact, see the ground for non-recognition Article 23(2)(a) of the 1996 Convention.

159. The ideal "starting point" legal system to render the agreement on custody and contact legally binding and enforceable with the help of the 1996 Convention is State B (*i.e.*, the State of habitual residence of the child immediately before the wrongful removal or retention). However, as discussed at the Sixth Meeting of the Special Commission, the court "dealing with the custody issues in State B [...]" is not under a Convention obligation to deal with the case

¹²⁶ As recommended by the Guide to Good Practice on Mediation (*op. cit.* note 5) mediation in international child abduction cases should be conducted by experienced family mediators having received specific training for international family mediation and, more specifically, mediation in international child abduction cases, see para. 98 of the Guide. For more information on the requirements for specialised mediation in international child abduction cases see the Guide to Good Practice on Mediation (*op. cit.* note 5) at Chaps 3 and 6.

¹²⁷ See for details Chap. 6 of the Practical Handbook on the 1996 Convention (*op. cit.* note 63).

¹²⁸ See Art. 11(2) of the 1996 Convention.

¹²⁹ Concerning the restrictive interpretation of the term "urgency" see Chap. 6 of the Practical Handbook on the 1996 Convention (*op. cit.* note 63).

expeditiously (in contrast to the court seised with the return proceedings in State A). Even though courts in many States tend to deal with custody matters in a speedy way, the processes in State B may be too lengthy to keep the return proceedings under the 1980 Convention in State A pending".¹³⁰ Furthermore, certain additional practical impediments may make it difficult to obtain the measure of child protection in State B while the abduction situation is not solved. The authorities in State B may request the presence of both parties in court and may wish to interview¹³¹ the child.

160. To assist the parties in this complex situation and to make best use of the interplay of the 1996 and 1980 Conventions, the use of direct judicial communications is highly recommended.¹³² The International Hague Network of Judges¹³³ has around 132 members from 84 legal systems (status December 2018) who assist in establishing direct judicial communications. As explained by the Hague Conference Brochure on Direct Judicial Communications, "[t]here are two main communication functions exercised by members of the Network. The first communication function is of a general nature (*i.e.*, not case specific). It includes the sharing of general information from the International Hague Network or the Permanent Bureau with his or her colleagues in the jurisdiction and assisting with the reverse flow of information. [...] The second communication function consists of direct judicial communications with regard to specific cases, the objective of such communications being to address any lack of information that the competent judge has about the situation and legal implications in the State of the habitual residence of the child. In this context, members of the Network may be involved in facilitating arrangements for the prompt and safe return of the child, including the establishment of urgent and / or provisional measures of protection and the provision of information about custody or access issues or possible measures for addressing domestic violence or abuse allegations. These communications will often result in considerable time savings and better use of available resources, all in the best interests of the child."¹³⁴ Where the parties in a cross-border child abduction case have concluded an agreement on return, direct judicial communications can assist in securing that the agreement is rendered legally binding in the State of return in a speedy way.

161. For matters of maintenance falling within the scope of the 2007 Convention in force between State A and State B, the abduction situation does not bring about a situation of blockage of jurisdiction. Given the authorities of State A have, in accordance with their rules,¹³⁵ international jurisdiction on matters of maintenance, they could for example render a decision reproducing the terms of the agreement on maintenance. The decision would be recognisable and enforceable in State B provided the grounds of jurisdiction used in State A constitute a basis for recognition and enforcement in accordance with Article 20 of the 2007 Convention. Should the laws of State A offer the possibility to establish a "maintenance arrangement" in the sense of Article 3(e) of the 2007 Convention, Article 30 of the Convention could be used to give the agreed terms on maintenance legal effect in State B. This option is independent of considerations of international jurisdiction.

¹³⁰ Guide to Part II of the 2012 SC (*op. cit.* note 20), at para. 48.

¹³¹ Of course, depending on the circumstances, a video hearing of the child might be possible replacing the child's presence in State B.

¹³² See for further details: Permanent Bureau of the Hague Conference on Private International Law, Brochure on Direct Judicial Communications, The Hague, 2013, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" and "Draft document to inform lawyers and judges about direct judicial communications, in specific cases, within the context of the International Hague Network of Judges", Preliminary Document for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention – October 2017, available on the website of the Hague Conference < www.hcch.net > under "Conventions", then "1980 Hague Child Abduction Convention", then "Special Commission meetings".

¹³³ See for details the list of members of the International Network of Judges available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section".

¹³⁴ See Permanent Bureau of the Hague Conference (*op. cit.* note 132), p. 7.

¹³⁵ In EU States these would be the jurisdiction rules contained in the EU Maintenance Regulation (*op. cit.* note 4).

b) *Non-return agreement*

Example: Hague return proceedings are ongoing in State A after a wrongful removal from State B. The parents having followed specialised mediation have worked out a detailed agreement in accordance with which the child and mother (taking parent) are not to return to State B. The child will from now on live with the mother as primary carer in State A, the father will have regular contact with the child in accordance with a detailed contact arrangement and the child will regularly travel to State B. The 1980 and 1996 Conventions are in force between State A and State B.

162. As in the case of the return-agreement, the court seized with the Hague return proceedings can conclude the return proceedings by consent but cannot in the absence of international jurisdiction on the merits of custody and contact render a decision on these matters. In the situation of a wrongful removal or retention, the international jurisdiction generally remains with the authorities in State B in accordance with Article 7 of the 1996 Convention, supported by Article 16 of the 1980 Convention.

163. As long as the authorities of State B still hold international jurisdiction on matters of custody and contact, the parental agreement on these matters will have to be rendered into a child protection measure in State B in order to become binding and enforceable in both State B and State A. Problems may arise where the process in State B will not be speedy enough to keep the Hague return proceedings in State A pending until the “measure of child protection” in State B is obtained. As stated above an additional “practical impediment to pursuing the suggested option of going back to State B may be that the court in State B, seized to turn the parental agreement on custody and contact issues into a court order, may request the presence of both parties in court and may wish to interview the child”.¹³⁶ As noted in the Special Commission discussions, “due to the interdependence of the terms of the agreement, it is not a satisfactory solution to terminate the return proceedings in accordance with the agreement without rendering the remainder of the agreement on the long-term custody issues legally binding and enforceable”.¹³⁷

164. A more appropriate solution can be offered to parents who conclude a non-return agreement when a shift of international jurisdiction on matters of custody and contact under the 1996 Convention has occurred.

165. If the court seized with the Hague return proceedings finds that the child’s habitual residence has changed to State A and that the conditions for a shift of international jurisdiction in accordance with Article 7(1)(a) of the 1996 Convention are met **and** if the court has internal jurisdiction to approve the agreement between the parties the court can render the agreement enforceable simultaneously with ending the return proceedings.

166. Of course, the fact that the 1996 Convention is in force between the two relevant States and that a shift of international jurisdiction on the merits of custody has occurred under this Convention does not alter Article 16 of the 1980 Convention. However, Article 16 of the 1980 Convention only prevents the court from “*deciding on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention*”.

167. Furthermore, it can be argued that in the light of a literal, systematic and teleological interpretation of Article 16 of the 1980 Convention this provision should not be an obstacle to the Hague court’s giving effect to the agreement simultaneously with ending the Hague return proceedings. As set out by the 1980 Explanatory Report, Article 16 is meant to “promote the realization of the Convention’s objects regarding the return of the child”¹³⁸ The Article aims to avoid the misuse of custody proceedings by the taking parent in the State to which the child was taken bringing about conflicting custody decisions and circumventing the Convention’s return mechanism. Where 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. Hence Article 16 of the 1980 HC should not prevent

¹³⁶ Guide to Part II of the 2012 SC (*op. cit.* note 20), at para. 49.

¹³⁷ *Ibid.*

¹³⁸ See the Explanatory Report on the 1980 Convention (*op. cit.* note 72), at para 121.

the court from approving the agreement. Support for this argument can be found in the 1980 Explanatory Report which in setting forth the objective of Article 16 notes that "it is perfectly logical to provide that this obligation [prohibition against deciding upon the merits of custody rights] will cease as soon as it is established that the conditions for a child's return have not been met [...] because the parties have come to an amicable arrangement [...] ".¹³⁹

168. To dispel any doubts with regard to the "lawfulness" of the court's approval of a long-term custody agreement in view of Article 16 of the 1980 Convention, the court seized with Hague return proceedings could (if the national procedural law allows) end the Hague return proceedings by implementing the agreement on non-return and immediately reopen the proceedings to approve the remainder of the agreement.

169. As concerns the shift of international jurisdiction on matters of custody and contact from State B to State A under the 1996 Convention, it must be highlighted that this does not automatically occur as soon as parents agree on the non-return of the child in the course of Hague return proceedings. Only if the cumulative conditions of Article 7 of the 1996 Convention are met, can the jurisdiction shift. This presupposes that the habitual residence of the child has changed to State A (see for parental agreements indicating a shift of habitual residence further under Chapter III.3 and Chapter V.2.c).

170. Furthermore, it is required that "each person, institution or other body having rights of custody has acquiesced in the removal or retention", Article 7(a) of the 1996 Convention. Apart from the parents there may be other individuals or authorities that are considered to have rights of custody in accordance with the law of State B (for example, the court seized with custody proceedings in State B when the removal occurred); these persons / bodies must give their approval or at least be deemed to have acquiesced in the removal or retention now that the parents have reached an agreement.

171. In the example, the child is present in State A and the parents (being the only holders of parental responsibility) have agreed that the child will remain in State A on a long-term basis. **In this case the conditions in Article 7 of the 1996 Convention for a shift of jurisdiction from State B to State A are met. The reasons are that the father has acquiesced in the child remaining in State A, has accepted that the child is no longer habitually resident in State B and that the child's habitual residence has changed to State A. The last proposition is based upon the agreement of both parental responsibility holders about the child's long-term residence and the fact of the child's presence in State A since the wrongful removal.**

172. Where the conditions of Article 7 for a shift of jurisdiction are not immediately given, as discussed at the Sixth Meeting of the Special Commission, it is suggested that "a transfer of jurisdiction from State B to State A in accordance with Article 8 or, more usually, Article 9 of the 1996 Convention could be sought to render the agreement binding in State A by court order".¹⁴⁰ However, the court in State B deciding on the transfer of jurisdiction is not under an obligation to deal with the matter expeditiously. Besides, in view of the necessary exchange that is to take place between the authorities in State A and State B to arrange for the transfer and knowing that not all authorities use responsive means of communication such as email, the process of transfer of jurisdiction can in itself be time-consuming. It is therefore questionable whether the transfer of jurisdiction on custody matters could be achieved quickly enough to allow the court seized with Hague return proceedings to render the agreement on custody binding within the timeline it has to end the Hague proceedings. Again, the potential advantages of the use of direct judicial communications, to assist in speeding up the process should be noted;¹⁴¹ however, it should be mentioned that there is very limited experience with transfers of jurisdiction in this context in practice so far.

173. For agreements on matters of maintenance, see above paragraph 161.

¹³⁹ *Ibid.*

¹⁴⁰ Guide to Part II of the 2012 SC (*op. cit.* note 20), at para. 47.

¹⁴¹ See, *supra*, para. 160.

V. CHECKLIST FOR RENDERING AN AGREEMENT LEGALLY BINDING AND ENFORCEABLE IN THE STATES CONCERNED & RECOMMENDATIONS FOR THE PREPARATION OF AGREEMENTS

1. Checklist

- What are the subject matters that are (to be) covered by the agreement?
- With which States does the conflict have a connection and with which States will the agreement, once implemented, have a link?
- With regard to which subject matter must the agreement be legally binding and enforceable in which State(s)?
- Which private international law instruments with importance for the subject matters covered by the agreement are in place between the States concerned? And, in particular, are the 1980, 1996 and / or 2007 Conventions in force between the States concerned? ¹⁴²
- In which legal system should the agreement first be rendered legally binding and enforceable with a view to giving it cross-border effect and enforceability in (as many of) the legal system(s) concerned (as feasible) with the help of the above identified instruments of private international law?
- Are civil legal proceedings concerning (some) matters covered by the agreement currently ongoing in one or more States? What does the agreement envisage for these proceedings? Do the ongoing proceedings affect the choice of the legal system, in which the agreement shall first be rendered legally binding and enforceable?

Once the private international law rules are identified that shall enable the agreement to “travel” cross-border and become enforceable abroad, and once the legal system is identified in which the agreement shall first be rendered legally binding and enforceable, the following questions will have to be answered:

- In the first State, what are the conditions for the agreement to become legally binding and enforceable in that State? What are the substantive law rules in that State applicable to the subject matter(s) covered by the agreement and what limits to party autonomy do they foresee? Which steps are needed to render the agreement binding and enforceable? If there are different ways to render the agreement (or its content) enforceable, which one will allow the agreement to “travel” cross-border most easily in accordance with the applicable private international law rules?
- What are the conditions for the cross-border recognition and enforceability of the agreement imposed by the private international law rules in force in the addressed State? What does this imply for the content of the agreement, the process followed and steps taken in the first legal system?

What conditions does the domestic law of the potential State(s) of enforcement impose concerning the content of the agreement for it to be considered as having an “enforceable content”? For example, are the provisions of a contact arrangement sufficiently precise¹⁴³ to be

¹⁴² See for up-to-date information on which States are Contracting States to these Conventions the Hague Conference website at < www.hcch.net > under “Instruments” then “Conventions”, and then when having chosen the relevant Convention under “Status table”. A complete overview of States having ratified Hague Conventions can furthermore be found on the Hague Conference website at < www.hcch.net > under “Instruments” then “Status chart”.

¹⁴³ For instance, it is important to note that the demands on the **precision of the maintenance claim** for it to be considered “enforceable” under the national enforcement law can differ considerably. In one legal system, the term “the debtor pays 10% of his monthly gross income” may be considered sufficiently precise, whereas in other States the amount must be quantified exactly. Or for example, certain legal systems may require **modalities of contact** be described in a very detailed manner for them to be

enforced by the authorities in the State of enforcement? Further questions may arise, depending on the circumstances and legal situation of the individual case:

- In international child abduction cases, are criminal proceedings ongoing / initiated in one of the States concerned? Does this effect the implementation of the agreement?
- If only part of the agreement can be rendered legally binding and enforceable, what are the consequences? What is envisaged by the parties? What are the risks of implementing the agreement nonetheless (in particular with regard to the child)?

2. Recommendations for the preparation of agreements

174. Objective: The agreement settling a cross-border family dispute involving children shall obtain legal effect in all States concerned by the agreement and ideally be (rendered) enforceable in all related legal systems.¹⁴⁴

175. Answers to the above checklist questions require an analysis of the legal situation in the individual case.

176. In the following, a number of recommendations shall be given for the preparation of the agreement.

a) *“Place” of the agreement and choice of process accompanying the amicable settlement of the dispute*

177. In contrast to decisions which are made by an authority of a certain State, agreements are often not clearly attached to a certain location. Particularly today, where long distance communication is a respected means of exchange also in mediation and similar processes, it can indeed be difficult to determine the “State of origin” of an agreement.

178. In practice, it will often be the circumstances of the individual case that determine where the parties to a cross-border dispute can meet to discuss an agreed solution. Sometimes, health problems, visa issues, or in international abduction cases, criminal charges for child abduction, may prevent a party from travelling to another State.

179. In most cases, the question where the parties will actually meet to discuss the amicable solution will not be of importance for the process of rendering the agreement binding and enforceable in all legal systems concerned by the agreement. As discussed above, the crucial question is to which State the parties will “take” their agreement to first render it enforceable, *i.e.*, which “starting point” legal system is chosen with a view to giving the agreement the widest possible effect in other legal systems in accordance with available private international law rules. However, in some cases agreements accompanied by a specific process such as certified mediation may have a privileged standing in certain States.¹⁴⁵ Should the ideal “starting point” legal system grant such a privilege, it is worth considering using this privileged process to elaborate the terms of the agreement, provided of course that it is a process adequate for the resolution of cross-border family disputes. As has been set forth in the Guide to Good Practice on Mediation, mediation can be a very helpful process assisting in the amicable resolution of cross-border family disputes, however, use should be made of specialist international family mediation.

180. Furthermore, certain requirements imposed by the private international law rules facilitating the recognition and enforceability of the agreement (or its content) abroad may impact the parties’ choice of a place and process to bring about an amicable settlement. For

considered enforceable, such as “The father picks up his daughter at the mother’s house at 12.30 on Saturdays”. When wanting to guarantee the enforceability of the child protection measure in another Contracting State, the requirements national law poses for the “precision” of the measure’s content must be considered.

¹⁴⁴ See the good practice promoted in particular by the Guide to Good Practice on Mediation (*op. cit.* note 5), Chap. 12 and Part C of the Principles for the Establishment of Mediation Structures (*op. cit.* note 13), Part C.

¹⁴⁵ See, *supra*, at para. 36.

example, the proximity to the place of the child's presence can be important should an involvement of the child be indicated.

181. One last remark should be made with regard to rules of private international law that may require an agreement to be "made" in a certain State as condition for the recognition and enforcement abroad. For example, Article 30(1) of the 2007 Convention, states: "A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin." The Convention is silent on the question what is to be understood by an agreement "made" in a Contracting State. It will depend on the law of the relevant Contracting State what falls under this category. It is conceivable that an agreement established outside that State and then taken to that State for formalisation with a view to obtaining enforceability there can count as an agreement "made" in that State.

PLEASE NOTE:

- The legal analysis of applicable rules of private international law will help to identify the ideal "starting point" legal system to first render the agreement legally binding and enforceable with a view to giving the agreement the widest possible effect in other legal systems.
- The discussion of the terms of the agreement does not necessarily have to take place in that "starting point" legal system. However, depending on the law of that legal system and the circumstances of the case, it can be recommendable to make use of certain particular processes offered by this legal system to accompany the amicable settlement of the family dispute.

b) *Reflections on the international instruments assisting in making the agreement or its content "travel" across borders*

182. As explained at several instances above, exploring which private international instruments can assist in the individual case in giving the agreement or its content legal effect and rendering it enforceable in all States concerned is a crucial step. Once a "starting point" legal system has been identified and the conditions for the cross-border recognition and enforcement are known, it is recommendable to include in the terms of the agreement any facts that may facilitate the authorities' assessment that all conditions for cross-border recognition are indeed met. For example, should respecting direct or indirect rules of international jurisdiction be a condition for cross-border recognition and enforcement, any undisputed facts helping to later clarify that the "starting point" legal system where the agreement was included in a decision had the necessary international jurisdiction. See for the particularities of "habitual residence" in this regard, below.

PLEASE NOTE:

- Once the ideal "starting point" legal system has been identified, the conditions for the cross-border recognition and enforcement of the agreement, or respectively, the content of the agreement must be assessed.
- It is recommendable to include in the terms of the agreement any undisputed facts that may facilitate the authorities' later assessment that all conditions for cross-border recognition are, indeed, met.

c) *Reflections on the connecting factor "habitual residence" used in the 1980, 1996 and 2007 Conventions*

183. As set forth in Chapter III.3. "habitual residence" is the main connecting factor for international jurisdiction and applicable law in the modern Hague Family Conventions. Hence, the habitual residence of the child has an influence on which State's authorities can be seised and on what basis these authorities will decide.

184. When parents draft an agreement to settle their cross-border family dispute it is imperative for them to understand the legal consequences of a change of habitual residence of their child. It is furthermore important to understand that courts take different approaches to

determine the habitual residence of children (see for details above Chapter III.3). Despite the fact that the intention and wishes of the holders of parental responsibility constitute an important factor when it comes to establishing a new habitual residence for the child, this might not be the only factor considered by the court when determining whether the child has indeed acquired a new habitual residence in a given State. The “hybrid approach”, which in accordance with the comparative analysis undertaken by the Canadian Supreme Court in *Office of the Children’s Lawyer v. Balev*¹⁴⁶ has gained most support in recent child abduction jurisprudence, “treats circumstances of children and the intentions of the parents as factors”¹⁴⁷ and is thus at least a partially factual approach.

185. Even though in a hybrid approach it is important for courts to pay high importance to the shared wishes (particularly if recently established) of the parents regarding their minor child’s habitual residence, any indication of circumstances (the child’s presence, integration, schooling or alike) that underpin a factual connection of the child to the new place of habitual residence in the agreement can be helpful.¹⁴⁸

186. Hence, in parental agreements which aim to bring about a change of habitual residence or settle a dispute on the current habitual residence of the child there is good reason for the parents to fix besides their wishes concerning the habitual residence of their child also their understanding of the facts in the terms of the agreement.

187. It may be helpful if the agreement equally notes the parents’ habitual residence at the time of the drafting of the agreement.

PLEASE NOTE:

- The concept of habitual residence is not defined in the Hague Conventions and may be interpreted in each State in a slightly different way.
- In an agreement settling a cross-border family dispute involving children it is extremely helpful to fix the understanding of the parties with regard to the habitual residence of their child at the moment of the drafting of the agreement. This is particularly important in disputes involving a change of habitual residence of the child.
- It may be helpful if the agreement equally notes the parents’ habitual residence at the time of the drafting of the agreement.

DRAFTING EXAMPLES

(1) Agreement on cross-border relocation

“It is undisputed between the parents that the current habitual residence of their child is situated in State A, where both parents are habitually resident. The parents both agree, that mother and child will permanently relocate to State B on ..., i.e., both parents are content with a change of habitual residence of the child as a result of the agreement’s implementation in the future.”

(2) Agreement on non-return in a cross-border child abduction situation where the child has settled in the new State

“The father, habitually resident in State A, and the mother, habitually resident in State B, agree that their child will not return to State A but will stay to live in State B as his / her new home State. Considering the fact that the child has lived in State B for more than 8 months and has been attending school since ... and taking into consideration that the

¹⁴⁶ *Op. cit.* note 99.

¹⁴⁷ *Ibid.*, at para. 4.

¹⁴⁸ The fact that the parents’ views and intentions regarding their child’s place of habitual residence contained in an agreement are not binding on the courts in their deliberations is illustrated by the above cited Canadian Supreme Court decision, which underlines that “parents cannot contract out of the court’s duty [...] to make factual determinations of the habitual residence of children at the time of their alleged wrongful retention or removal” (*op. cit.* note 99), at para. 78.

child is well integrated into the social and family environment in State B attending the local sports club and having close links to the maternal family, the parents acknowledge that the child has settled in State B. The parents are content with a change of habitual residence of the child to State B."

d) Reflections on the applicable substantive law(s)

188. Once the "starting point" legal system for rendering the agreement legally binding and enforceable is found, possible restrictions to party autonomy imposed by the law applicable in that legal system should be explored. In international family law cases the law applicable is determined in accordance with the rules of private international law. Should the 2007 Hague Protocol be in force in the State concerned, the law applicable to matters of maintenance would be, as a general rule, the law of the State of habitual residence of the creditor.¹⁴⁹ Should the 1996 Convention be in force in the State concerned, the authorities having jurisdiction under the Convention, will apply, as a general rule, their own law to matters of parental responsibility and other matters covered by the Convention.¹⁵⁰ Depending on the subject matters dealt with by the agreement, different laws might be relevant for different parts of the agreement.

189. Furthermore, the limits imposed by the public policy test of the foreign State in which recognition and enforcement is then sought should be known.

PLEASE NOTE:

- Restrictions imposed by the law applicable to the subject matter in the legal system where the agreement shall first be rendered legally binding and enforceable should be known.
- Limits imposed by the public policy test of the other State(s) in which enforceability is later sought with the help of private international law rules should be known.

e) Reflections on the hearing of the child and consideration of the child's best interests

190. Hearing the voice of the child and considerations of the best interest of the child can play an important role when it comes to rendering an agreement made in the area of family law involving children legally binding and enforceable in all legal systems concerned.

191. The fundamental principle that the best interests of the child shall be a primary consideration in all proceedings concerning children as enshrined by Article 3 of the UNCRC is today deeply rooted in national and international family law.¹⁵¹ The same is true for the right of the child to express his / her views in all matters concerning the child and to have these views taken into consideration in accordance with the age and maturity of the child, Article 12 UNCRC. It must be underlined that the child's right to be heard is a right and not a duty of the child.¹⁵² Thus should the child not wish to express his/her views, the child should not be forced to do so.

192. The involvement of the child might already be proposed in mediation¹⁵³ or a similar process to bring about an amicable resolution of the dispute. Alternatively, the court in the

¹⁴⁹ See Art. 3 of the 2007 Hague Protocol; see Arts 4 *et seq.* for exceptions to this general rule.

¹⁵⁰ See Art. 15 of the 1996 Convention.

¹⁵¹ See also the important work undertaken by the Committee on the Rights of the Child in monitoring the implementation of Art. 3(1): "General comment No 14 (2013)" (*op. cit.* note 9).

¹⁵² See "General Comment No 12 (2009) – The right of the child to be heard", drawn up by the Committee on the Rights of the Child, at para 16 "The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation [...]", available at the following address < <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> > (last consulted on 23 January 2019).

¹⁵³ It should be noted that the Committee on the Rights of the Child stated in its 2009 General Comment regarding the effective implementation of the right of the child to be heard under Art. 12 of the UNCRC that the right "to be heard in any judicial and administrative proceedings affecting the child" also needed to be respected where those proceedings "involve alternative dispute [resolution] mechanisms such as mediation and arbitration", see "General Comment No 12 (2009)" (*op. cit.* note 152).

“starting point” legal system might, when first rendering the agreement binding and enforceable, in the course of the child’s best interests’ assessment give the child an opportunity to express his / her views. Having regard to the cognitive and development needs of children the assistance of psychological experts is desirable in this regard.

193. As noted above, the question of whether a child of sufficient age and maturity was given an opportunity to be heard can be decisive in the context of making the agreement “travel” cross-border with the help of relevant rules of private international law. See, for example, Article 23(2)(b) of the 1996 Convention providing that a measure of child protection may be refused “if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State”.¹⁵⁴

194. In this context, it must be noted, that national standards and practice with regard to hearing the child differ from State to State and that these national differences can sometimes pose additional difficulties in the cross-border recognition of decisions in matters of parental responsibility.¹⁵⁵ The trend in contested cases is correctly for decision makers to ensure that a child’s views are heard directly or indirectly but it is worth remembering Lagarde’s point in the Explanatory Report to the 1996 Convention (quoted at paragraph 118 above), that it may not always be in the best interests of the child for the child to have to give an opinion to a decision maker, particularly where the parents are in agreement as to what to do.

PLEASE NOTE:

- An agreement that is drawn up giving due consideration to the views of the child should best include language to reflect this consideration.
- In rare cases where the parents have for good reasons reached an agreement affecting a child without consulting that child an explanation is recommended to justify this lack of consultation. Parents need to be aware that their reasons might not be found acceptable by the decision maker and that in the end the child might be heard before the agreement can be given the force of law.

f) Reflections concerning agreements that can only partially obtain legal effect in the States concerned

195. In cases where it is expected that rendering all parts of the agreement legally binding and enforceable in all States concerned will be difficult, or where this result may not be obtained at once, the matter should be addressed by the parties. It is recommended to include the parties understanding of the interdependence of certain parts of the agreement in order to know how they wish to deal with the partial validity of the agreement.

¹⁵⁴ Such a provision is also contained in the Brussels IIa Regulation, see Art. 23 b) of the Regulation (*op. cit.* note 4).

¹⁵⁵ The discussions on a recast of the Brussels IIa Regulation in the EU have revealed, that the differences in national law can in practice lead to “discrepancies in the interpretation” of the ground for non-recognition in Art. 23 b) of the Regulation, see European Commission, “Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)”, COM(2016) 411 final, 30.6.2016, available at the following address: < <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF> >, p. 4 (last consulted on 23 January 2019).