

Title	Report of the Experts' Group on Cross-Border Recognition and Enforcement of Agreements in Family Matters Involving Children (meetings of 14-15 September and 29-30 November 2021)
Document	Prel. Doc. No 3A of December 2021
Author	Experts' Group on Family Agreements Chair of the Experts' Group on Family Agreements
Agenda Item	Item TBD
Mandate(s)	C&D No 13 of CGAP 2021
Objective	To report on the fifth meeting of the Experts' Group (meetings of 14-15 September and 29-30 November 2021)
Action to be Taken	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
Annexes	Annex I: <i>Aide-mémoire</i> of the fifth meeting (14-15 September 2021) of the Experts' Group on Family Agreements prepared by the Chair Annex II: List of participants of the fifth meeting (14-15 September 2021) of the Experts' Group on Family Agreements Annex III: <i>Aide-mémoire</i> of the fifth meeting (29-30 November 2021) of the Experts' Group on Family Agreements prepared by the Chair Annex IV: List of participants of the fifth meeting (29-30 November 2021) of the Experts' Group on Family Agreements
Related Documents	<ul style="list-style-type: none"> - Prel. Doc. No 5 of March 2014 for CGAP 2014 - Questionnaire on cross-border recognition and enforcement of agreements in family matters involving children (2015) - Prel. Doc. No 5 of January 2016 for CGAP 2016 - C&R of June 2017 Experts' Group meeting for CGAP 2018 - Info. Doc. No 7 of September 2017 for October 2017 SC on the Child Abduction and Child Protection Conventions

CGAP 2022
MARCH 2022
PREL. DOC. NO 3A



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| | <ul style="list-style-type: none">- Prel. Doc. No 4 of February 2018 for CGAP 2018- C&R of June 2018 Experts' Group meeting for CGAP 2019- Prel. Doc. No 4 of January 2019 for CGAP 2019- Info. Doc. No 2 of January 2020 for CGAP 2020- Prel. Doc. No 3B of January 2022 for CGAP 2022 |
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I. Introduction

- 1 In its Conclusion and Decision No 13 of 2021, the Council on General Affairs and Policy (CGAP) “mandated the [Permanent Bureau] to continue the revision of the draft Practical Guide on cross-border recognition and enforcement of agreements reached in the course of family matters involving children with the assistance of the Experts’ Group. The draft Practical Guide will be circulated to HCCH Members for comments, revised accordingly, and submitted to CGAP for approval at its 2022 meeting”. Accordingly, the Permanent Bureau (PB) produced a revised version of the draft Practical Guide, which was based on the comments of HCCH Members on the last draft of the Practical Guide that had been submitted to CGAP in March 2019.¹ This revised version was circulated to the Experts’ Group on Cross-Border Recognition and Enforcement of Agreements in Family Matters Involving Children (EG) for written comment in July 2021.
- 2 The revised version was iterated in line with the EG’s written comments and in consultation with the Chair, and recirculated ahead of the fifth meeting of the EG, which was convened to discuss this most recent revision.
- 3 From 14 to 15 September 2021, the EG met via videoconference. This meeting was attended by 26 experts representing 25 Member States from various regions, and one Regional Economic Integration Organisation, as well as members of the PB. The *Aide-mémoire* of the Chair in Annex I provides a short overview of the main points of discussion at the meeting on 14 and 15 September 2021. The list of EG members who participated in the meeting on those dates is included as Annex II.
- 4 A revision of the draft Practical Guide was produced according to the discussions and recommendations of the fifth meeting. This revision was circulated in November 2021 for further review and written comment by the EG. Among the proposed revisions was the change in the title of the document from “draft Practical Guide” to “draft Practitioners’ Tool”, in order to better reflect its target audience.
- 5 From 29 to 30 November 2021, the EG met via videoconference to discuss remaining drafting matters in the draft Practitioners’ Tool and to finalise it for submission to CGAP. The *Aide-mémoire* of the Chair in Annex III provides a short overview of the main points of discussion at the meeting on 29 and 30 November 2021. The list of EG members who participated in the meeting on those dates is included as Annex IV.

II. Proposal for CGAP

- 6 The Experts’ Group invites CGAP to take note of the *Aide-mémoire* documents prepared by the Chair based on the deliberations during the fifth Experts’ Group meeting.

¹ See “Revised draft Practical Guide: Cross-border recognition and enforcement of agreements reached in the course of family matters involving children”, Prel. Doc. No 4 of January 2019 for the attention of CGAP 2019, available on the HCCH website www.hcch.net under “Governance”, then “Council on General Affairs and Policy” and “Archive (2000-2021)”.

ANNEXES

Annex I

Aide-mémoire of the fifth meeting (14-15 September 2021) of the Experts' Group on the Cross-Border Recognition and Enforcement of Agreements in Family Matters involving Children prepared by the Chair

Introduction

- 1 This *Aide-mémoire* of the Chair provides a short overview of the main points of discussion at the fifth meeting (14-15 September 2021) of the Experts' Group.
- 2 The Experts' Group met to discuss the most recent revision of the draft Practical Guide, prepared by the Permanent Bureau (PB), and based on the comments of HCCH Members on the last draft of the Practical Guide that had been submitted to CGAP in March 2019. This revised version was circulated to the Experts' Group in July 2021.
- 3 The Experts' Group focused on several issues, namely: (1) the title, focus and structure of the Guide, (2) the target audience of the Guide, (3) the use of examples, (4) the issue of mediation and alternative dispute resolution, (5) the concept of habitual residence, (6) hearing the child, (7) the terminology used in the Guide in respect of "access", "custody" and "parental responsibility", (8) cases of urgency and Article 11 of the 1996 Child Protection Convention, (9) specific issues relating to criminal proceedings and domestic violence, and (10) various miscellaneous drafting issues.

Title, focus and structure of the Guide

- 4 An issue that had been raised to the Experts' Group was whether a change in the title of the final document would better clarify the scope and intended audience of the Practical Guide. Some members of the Experts' Group were in support of the proposal to change the title of the document. A revised title will be suggested by the Chair in the next version of the draft Practical Guide.
- 5 The July 2021 revision of the draft Practical Guide presented the 1980 Child Abduction Convention, the 1996 Child Protection Convention, and the 2007 Child Support Convention in chronological order. The Experts' Group discussed the issue of the focus and structure of the Guide, and considered whether the relationships between the three Conventions required consideration of the instruments in a particular order or method of presentation. The Experts' Group considered the following possible approaches:
 - That the chronological ordering be retained: In support of this position, some members noted that the mandate of the Experts' Group arose out of the increasing use of family agreements to resolve matters in the context of the 1980 Child Abduction Convention. In addition, there are significantly more Contracting Parties to the 1980 Child Abduction Convention than there are to the 1996 Child Protection and 2007 Child Support Conventions; or
 - That the Guide be reorganised to place greater focus on the 1996 Convention: In support of this position, some members noted that the Practical Guide concerns the recognition and enforcement of agreements, and it would therefore be more logical to highlight the 1996 and 2007 Conventions, which contain specific provisions for recognition and enforcement not present in the 1980 Child Abduction Convention. Some members moreover noted that the 1980 Child Abduction Convention would still be discussed where an agreement would either directly resolve the abduction or address protection measures for the child. In this regard, the abduction scenario is treated as an exception rather than the rule.

- 6 The Chair proposed the inclusion of a general introductory statement emphasising the importance or benefit of reaching agreements as a method to simplify potential difficulties before they arise. The Experts' Group generally agreed with the utility of this compromise language, as it could help set out the purpose and internal organisation of the Practical Guide, reducing the risk of any misunderstanding arising from discussing the 1980 Child Abduction Convention before the 1996 Child Protection Convention. This language could also clarify how mediation and the amicable settlement of disputes may lead to a solution in cases falling within the 1980 Child Abduction Convention. In addition, the Experts' Group agreed to an express statement in the Guide that not all three of the Conventions may be applicable in every situation. Although the Chair's proposal met with some hesitance on the part of some members of the Experts' Group, these members noted that their acceptance of the proposed approach would depend on the language used in the final text.

Target audience

- 7 The target audience of the Practical Guide was a matter that had been extensively considered when the Experts' Group reviewed the 2019 draft. The Experts' Group agreed that the appropriate target audience would be trained professionals who are working to facilitate family agreements. Consequently, the Experts' Group agreed that the Practical Guide should be reviewed to ensure that it consistently addresses "legal or professional advisers", rather than parties. Moreover, the Experts' Group noted that the text should clearly note that professional and legal advice should be sought in order to understand the law(s) of the States involved in the relevant cross-border family matter.

Use of examples

- 8 Members agreed that if examples are to be kept in the Practical Guide, they should be worded so that they would not be used as legal advice or drafting templates. Each example provided should be clear in its objective and should avoid the use of aspirational terms. Examples that illustrate a factual scenario are less likely to be problematic. Examples which may appear to include drafting language should be carefully revised.

Mediation

- 9 The Chair noted that the Experts' Group had, in previous meetings, extensively discussed the issue of mediation and alternative dispute resolution, and that the Experts' Group had generally found it difficult to speak in great depth on these topics without raising questions outside the scope of the Practical Guide. The Experts' Group agreed that it was appropriate to note the utility of mediation as one possible avenue for arriving at a family agreement. The Experts' Group also agreed that a general statement could be included to direct readers to the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part V: Mediation*.

Habitual residence

- 10 The Experts' Group discussed the potential weight, when courts determine the habitual residence of a child, to be assigned to the intention of the custody holders as expressed in a family agreement. As there appeared to be little or no case law directly addressing the weight of such intention in a family agreement, the question was raised as to whether it would be valuable for the Practical Guide to propose a normative approach. There was a proposal to include language that recently established parental agreements on a child's habitual residence should be a significant or considerable factor in a court's assessment of where the child is habitually resident.
- 11 Some members of the Experts' Group noted that it may be misleading to suggest any normative position. For these members, the goal of the Practical Guide should be to alert professional advisers

to the fact that there are different possible approaches, and to highlight that the determination of habitual residence affects which court has jurisdiction over the matter. The adviser's job is to find the approach taken by the courts in the jurisdictions concerned. Some Experts' Group members noted that, in practice, lawyers would seek to pre-determine the habitual residence of a child within the terms of the agreement. Finally, some members of the Experts' Group also noted that, if the normative position of the Practical Guide conflicted with the established law of certain States, then it would be difficult for those States to endorse it.

- 12 Further to a proposal by the Chair, consensus was achieved in the Expert's Group in relation to a proposal to redraft the text to say that intent is a "relevant" factor in the jurisprudence on habitual residence from apex courts, the agreement can be taken as an expression of intent, and that the jurisprudence of apex courts has not addressed the specific issue of a recent agreement on habitual residence. Some members of the Experts' Group noted that the comment on the lack of jurisprudence on the issue would require careful drafting to reflect the consensus position in the Experts' Group.

Hearing the child

- 13 The Experts' Group discussed how the child's right to be heard should be considered in attempts to conclude a family agreement, in light of the obligation to ensure the best interests of the child. The Experts' Group generally agreed that the Practical Guide should clearly refer to the *UN Convention on the Rights of the Child* as the authority for the principle of ensuring the best interests of the child, and should clarify that the right to be heard includes the right of the child to decline to participate. The Experts' Group discussed whether there is a legal requirement for the parents to hear the views of the child when making an agreement. The Experts' Group concluded that the language of the Practical Guide was sufficient as drafted, but that further editing could lessen the focus on legal requirements while noting that including the child's participation in the process of arriving at an agreement would likely streamline the process of transforming that agreement into a protection measure. On this point, some members noted that the process of transforming a parental agreement into a measure of protection under the 1996 Child Protection Convention may require, in some Contracting States, that the authorities verify that the child was heard.

Terminology of access, custody, parental responsibility

- 14 Some members of the Experts' Group noted that the terminology of the Practical Guide should be reviewed with respect to "rights of access" or "rights of custody", as current terminology may be shifting towards "rights of contact", "parenting time", or other terms not utilised in the Conventions. Other members of the Group noted that it is safer to refer to the terms used in the Child Abduction and Child Protection Conventions. The Guide could distinguish more clearly between the "attribution and extinction of parental responsibility", a topic confined to Article 16 of the 1996 Child Protection Convention, and other exercises of custody, access, or parental responsibility that are deployed as measures of protection under that Convention, as this distinction may help clarify the terms of a family agreement. Some members of the Experts' Group noted that clarification should be added if any non-Convention terms are used because the same terms are not used in every jurisdiction, and even where they are used may not have the same meaning. Some members of the Experts' Group noted that the Guide may also include reference to the drafting history of the *UN Convention on the Rights of the Child*, which favours the use of the term "parental responsibility" rather than "custody", as the latter term frames the child as an object.

Cases of urgency and Article 11 of the 1996 Child Protection Convention

- 15 Some members of the Experts' Group noted that the potential agreement of the parties should be factored into the assessment of whether a situation of "urgency" exists. It was also noted that in

child abduction cases where the jurisdiction has ratified the 1996 Child Protection Convention, judges can regard protective measures in the return order as “urgent” under Article 11 of that Convention to facilitate the prompt and safe return of the child by ensuring recognition of those measures until the authorities of the child’s habitual residence have taken the measures required by the situation. Moreover, some members noted that the Guide should clarify that there may be separate proceedings simultaneously ongoing, for example, in terms of return proceedings under the 1980 Child Abduction Convention, and the implementation of protective measures under the 1996 Child Protection Convention.

Criminal proceedings and domestic violence in child abduction cases

- 16 The Experts’ Group discussed drafting suggestions to clarify the effect of criminal proceedings on the recognition and enforcement of agreements that aim to resolve child abduction cases. Members of the Experts’ Group agreed that potential criminal proceedings could affect the likelihood of reaching an agreement for safe return in cases that fall under the 1980 Child Abduction Convention. Some members of the Experts’ Group suggested that language may be included to note that criminal charges against a taking parent in a child abduction case would likely make it more difficult to attempt to conclude family agreements through an amicable settlement process.
- 17 On the matter of domestic violence, the members of the Experts’ Group agreed to add a short paragraph in the draft Practical Guide noting that the relevant applicable law would determine what safeguards might be in place to protect people who have experienced, or continue to experience, domestic violence, and that this law may also affect a determination of whether a family agreement arrived at against this background was validly concluded. In addition, the safe return of a child in an abduction case may necessitate protective measures for the safe return of the taking parent, since the child’s safety may also be tied to the safety of that parent as a caregiver. While this language would have to be carefully drafted in order to avoid expansion of the protective measures under the 1996 Child Protection Convention, the drafting can be guided by the approved language found in the Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention.

Miscellaneous drafting points

- 18 The Experts’ Group also addressed drafting points that could be resolved with minor adjustments. In particular, the Experts’ Group noted that reference to “advance recognition” must refer to recognition of the measure of protection, and not to recognition of the entire family agreement itself. Within the discussion of travel and education costs, the Experts’ Group agreed that examples and footnotes should be redrafted, or deleted where necessary, to avoid providing template-like language or suggesting legal advice outside the scope of the Guide. The Experts’ Group also agreed that any discussion of property separation should clarify that matters related purely to property separation between spouses do not fall under the scope of the 2007 Child Support Convention.

Next steps

- 19 Based on the discussions and consensus reached at this fifth meeting of the Experts’ Group, the PB will revise the July 2021 version of the draft Practical Guide. Members of the Experts’ Group were also requested to provide any objections to the written comments already circulated to the PB by 5 October 2021. A new revision will be circulated to the Experts’ Group by November 2021, before being circulated to HCCH Members for informal consultation, with the aim of preparing the draft Practical Guide for approval by CGAP at its next meeting in March 2022. If necessary, the Experts’ Group will plan to continue its meeting in November 2021 to discuss outstanding drafting issues.

Annex II

List of participants of the fifth meeting (14-15 September 2021) of the Experts' Group on Cross-Border Recognition and Enforcement of Agreements in Family Matters Involving Children

Function / Country / REIO	Name
Chair	Mr Paul BEAUMONT
Argentina	Ms Nieve RUBAJA
Australia	Ms Mary KEYES
Austria	Ms Bea VERSCHRAEGEN
Brazil	Ms Lalis FROEDER DITTRICH
Canada	Ms Marie RIENDEAU
Chile	Ms Javiera VERDUGO TORO
China (Hong Kong SAR)	Mr Dennis HO
China (Macau SAR)	Ms WONG leong Leng
European Union	Ms Angele SEARS-DEBONO (Ms Haldi KOIT as alternate)
Finland	Ms Outi KEMPPAINEN
France	Mr Alexandre BOICHÉ
Germany	Ms Sabine BRIEGER
Ireland	Ms Dervla BROWNE
Israel	Ms Yael BLONDHEIM
Japan	Mr Masayoshi FURUYA
Mexico	Ms Nuria GONZÁLEZ MARTÍN
Netherlands	Mr Alexander LEUFTINK
Norway	Ms Gunhild SLETMOEN
Philippines	Ms Elizabeth AGUILING-PANGALANGAN
Russian Federation	Ms Olga KHAZOVA
South Africa	Ms Baratang Constance MOCUMIE
Spain	Ms Cristina GONZÁLEZ BEILFUSS
Switzerland	Ms Catherine WESTENBERG
UK	Mr Eral KNIGHT
USA	Ms Lisa VOGEL
Permanent Bureau	Mr Christophe BERNASCONI, Secretary General Mr Philippe LORTIE, First Secretary Ms Gérardine GOH ESCOLAR, First Secretary Mr Harry CHENG, Legal Officer Mr Christopher ANDERSON, Legal Officer Ms Nadia BOUQUET, Intern

	MS Jana ARAJI, Intern MS Laura MOLENAAR, Administrative Officer
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Annex III

***Aide-mémoire* of the fifth meeting (29-30 November 2021) of the Experts' Group on the Cross-Border Recognition and Enforcement of Agreements in Family Matters involving Children prepared by the Chair**

Introduction

- 1 This *Aide-mémoire* of the Chair provides a short overview of the main points of discussion at the fifth meeting (29-30 November 2021) of the Experts' Group.
- 2 In response to the comments of the Experts' Group provided prior to, during and immediately after its meeting of 14 to 15 September 2021, the Permanent Bureau (PB) prepared a new iteration of the draft Practitioners' Tool. This iteration was circulated to the Experts' Group in early November 2021 for further comments. In light of the potential incompatibility of a number of comments regarding the language in certain paragraphs of the draft Practitioners' Tool, the Chair convened the Experts' Group for discussions on 29 and 30 November 2021 that focused specifically on drafting.
- 3 The Experts' Group focused, and achieved consensus in group drafting, on the following issues: (1) return of the taking parent with the child; (2) effect of criminal proceedings; (3) hearing the child; (4) habitual residence; (5) matters of maintenance in return agreements; (6) cases where the court is seised with return proceedings in a case with a non-return agreement; (7) footnotes discussing the issues of *renvoi* and homologation; (8) definition of parental responsibility; (9) return proceedings in child abduction cases; and (10) language directed at courts. In addition, members of the Experts' Group were given an opportunity to highlight any other provisions that they wished to discuss. On each issue, the Experts' Group guided by the Chair reached a consensus approach for the PB to implement.
- 4 After completing the debate and drafting on all issues scheduled for discussion, the Experts' Group engaged in a paragraph-by-paragraph analysis of the document to address all remaining comments that had been submitted by the members. On each paragraph in the document, the Chair and the members reached a consensus position that resolved all remaining questions, concerns, and drafting alternatives.

Next steps

Based on the consensus reached at this meeting of the Experts' Group, the PB will revise the Practitioners' Tool and circulate it to the HCCH Members for informal consultation, with the aim of preparing the Practitioners' Tool for approval by CGAP at its next meeting in March 2022.

Annex IV

List of participants of the fifth meeting (29-30 November 2021) of the Experts' Group on Cross-Border Recognition and Enforcement of Agreements in Family Matters Involving Children

Function / Country / REIO	Name
Chair	Mr Paul BEAUMONT
Argentina	Ms Nieve RUBAJA
Australia	Ms Mary KEYES
Brazil	Ms Lalis Froeder DITTRICH
Canada	Ms Marie RIENDEAU
Chile	Ms Javiera VERDUGO TORO
European Union	Ms Angele SEARS-DEBONO (Ms Haldi KOIT as alternate) Ms Karen ROTH, assisting
France	Mr Alexandre BOICHÉ
Germany	Ms Sabine BRIEGER
Israel	Ms Miriam BARON
Japan	Mr Masayoshi FURUYA
Mexico	Ms Nuria GONZÁLEZ MARTÍN
Philippines	Ms Elizabeth AGUILING-PANGALANGAN
Russian Federation	Ms Olga KHAZOVA
Switzerland	Ms Catherine WESTENBERG
UK	Mr EraI KNIGHT
USA	Ms Lisa VOGEL
Permanent Bureau	Mr Christophe BERNASCONI, Secretary General Mr Philippe LORTIE, First Secretary Ms Gérardine GOH ESCOLAR, First Secretary Mr Harry CHENG, Legal Officer Ms Nadia BOUQUET, Intern Ms Jana ARAJI, Intern Ms Laura MOLENAAR, Administrative Officer