

**The Seventh Meeting of the Special Commission on the Practical Operation of the 1980  
 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention –  
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**A. Introductory note (still to be drafted)**

**B. Example agreements & manual to achieve recognition and enforcement (still to be drafted)**

(1. Agreement in a cross-border relocation case; 2. International child abduction – return agreement; 3. International child abduction case – non-return agreement)

& Navigation through how to recognise and enforce these agreements in a foreign State under the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention

**C. Attachment:**

**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**

## OBJECTIVES AND SCOPE OF THE EXPLANATORY NOTE

1. The explanatory note aims to give detailed background information on how an agreement 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,<sup>1</sup> the 1996 Hague Child Protection Convention<sup>2</sup> and the 2007 Hague Child Support Convention.<sup>3</sup> The particularities resulting from the application of certain regional instruments will be added in the footnotes.<sup>4</sup>
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.
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 will thereby consider agreements on child related matters but also touch 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.

## TERMINOLOGY

### Parental responsibility<sup>5</sup>

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”.<sup>6</sup> In other words, “parental 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,

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<sup>1</sup> *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”).

<sup>2</sup> *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”).

<sup>3</sup> *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”).

<sup>4</sup> 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”).

<sup>5</sup> 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”).

<sup>6</sup> See Art. 1(2) of the 1996 Convention.

many legal systems as well as regional and international instruments today refer to the term “parental responsibility”. This is to overcome the terminological focus in this area of law on the parents’ rights and to acknowledge the equal importance of parental duties and children’s rights and welfare.

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”.<sup>7</sup> 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.<sup>8</sup> The explanatory note uses the term “rights of custody” in accordance with the terminology of the 1980 Hague Child Abduction Convention.

### **Family agreement**

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 Comment 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”.<sup>9</sup> Where the explanatory note for reasons of simplification refers to “parental agreements” the terms stand for agreements between “holders of parental responsibility”.

### **Package agreement**

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

## **BACKGROUND**

4. All modern Hague Family Conventions<sup>10</sup> encourage the amicable settlement of cross-border family disputes as do a number of relevant regional instruments.<sup>11</sup> 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 Mediation<sup>12</sup> and Principles for the Establishment of Mediation Structures.<sup>13</sup> Both 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.<sup>14</sup>

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<sup>7</sup> 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 (hereinafter, “Guide to Good Practice on Transfrontier Contact”), at p. xxvi.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Committee on the Rights of the Child, “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)”, para. 59, available at the following address: < [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf) > (last consulted on 13 July 2017).

<sup>10</sup> 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*.

<sup>11</sup> 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.

<sup>12</sup> Guide to Good Practice on Mediation (*op. cit.* note 5).

<sup>13</sup> “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”).

<sup>14</sup> See in particular Chapter 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).

5. 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. 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. 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. Mediation in those cases is regularly taking place in the State 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.<sup>15</sup> 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.
6. Following a Recommendation of the Sixth Meeting of the Special Commission,<sup>16</sup> 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-binding, in this area".<sup>17</sup>
7. The Experts' Group held three meetings, taking place in November 2013, December 2015 and in June 2017.<sup>18</sup> 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:

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<sup>15</sup> 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](http://www.hcch.net) > under "Child Abduction Section" then "Previous Special Commission meetings (1989-2012)" and "Sixth Special Commission meeting") and paras 29-56 of the "Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions (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 (hereinafter, "Guide to Part II of the 2012 SC") (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Previous Special Commission meetings (1989-2012)" and "Sixth Special Commission meeting").

<sup>16</sup> 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](http://www.hcch.net) > under "Child Abduction Section" then "Previous Special Commission meetings (1989-2012)" and "Sixth Special Commission meeting").

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

<sup>18</sup> See for further details on the work undertaken by the Experts' Group the "Report of the Experts' Group meeting on cross-border recognition and enforcement of agreements in family matters involving children (The Hague, 2-4 November 2015)", Prel. Doc. No 5 of January 2016 for the attention of the Council of March 2016 on General Affairs and Policy of the Conference (available on the Hague Conference website at < [www.hcch.net](http://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](http://www.hcch.net) > under "Governance" then "Council on General Affairs and Policy") (hereinafter, "Report of the 2013 Experts' Group Meeting").

- (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.”<sup>19</sup>
8. 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”.<sup>20</sup>
  9. 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.”<sup>21</sup>
  10. 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 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.”<sup>22</sup>
  11. 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.”<sup>23</sup>

## STRUCTURE

12. 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.
13. “Chapter II. Subject matters addressed in agreements” lists the different substantive matters regularly addressed in agreements drawn up to settle family disputes concerning

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<sup>19</sup> *Ibid.*

<sup>20</sup> 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](http://www.hcch.net) > under “Governance” then “Council on General Affairs and Policy”.

<sup>21</sup> See “Conclusions and Recommendations for the attention of the Council on General Affairs and Policy of March 2018”, Meeting of the Experts’ Group on cross-border recognition and enforcement of agreements in family matters involving children (The Hague, 14-16 June 2017), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Family agreements involving children” .

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

children. The Chapter also discusses which subject matters fall within the scope of which Hague Convention.

14. In "Chapter III. The 1980, 1996, 2007 Hague Convention – 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.
15. "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.
16. Finally, "Chapter V" provides a checklist as well as recommendations for the preparation of agreements in cross-border family disputes involving children.

## I. PRELIMINARY CONSIDERATIONS

17. How to best 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

18. 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*

19. In a purely domestic context, the first question to pose is: with regard to which subject matters does the domestic law<sup>24</sup> grant the parties party autonomy and what are the limits to party autonomy.
20. 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.
21. 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.<sup>25</sup> 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."<sup>26</sup> 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

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<sup>24</sup> For the sake of this subchapter, 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.

<sup>25</sup> See also the Report of the 2015 Experts' Group Meeting (*op. cit.* note 18), at para. 5, for the assessment made by the Experts' Group.

<sup>26</sup> *Ibid.*



Rights treaties.<sup>27</sup> 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.<sup>28</sup>

22. The fundamental principle that the best interests of the child shall be a primary consideration in all proceedings concerning children (Art. 3 of the CRC) 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 CRC) is given particular importance in the resolution of cross-border family disputes.
23. 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 heard.
24. 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 Hague Child Abduction Convention, which address under points 19.5 and 19.6 the rendering enforceable of mediated agreements, can be a helpful source of information.<sup>29</sup> Furthermore, Central Authorities under the 1980 and 1996 Conventions as well as the so-called “Central Contact Points” created in the context of the Principles for the Establishment of Mediation Structures<sup>30</sup> could be of assistance (see also below under “Further steps”).

**b) Distinguishing legal validity and enforceability**

25. Another matter that, in particular, lay-persons in terms of legal knowledge may not be aware of, is the differentiation between 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.
26. 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

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<sup>27</sup> 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 CRC”) 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 CRC. 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**.

<sup>28</sup> See also, *supra*, under “Terminology” and then “Parental responsibility”.

<sup>29</sup> The Country Profiles are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Conventions” then “1980 Hague Child Abduction Convention” and “Country Profiles”.

<sup>30</sup> See Part A of the Principles for the Establishment of Mediation Structures (*op. cit.* note 13). So far, the following nine States have established a Central Contact Point: Australia, France, Germany, Hungary, Netherlands, Pakistan, Russia, Slovak Republic and the United States of America, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Cross-border family mediation” and “Central Contact Points for international family mediation”.

might become necessary. This requires the agreement's enforceability, which, as said, might have to be obtained through additional (procedural) steps.<sup>31</sup>

27. 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.
28. 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.<sup>32</sup> National law greatly varies with regard to the available options.
29. 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. Mediated 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.<sup>33</sup>
30. 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 Hague Child Abduction Convention.<sup>34</sup>
31. 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).

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

32. 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.<sup>35</sup>

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<sup>31</sup> 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 35-36.

<sup>32</sup> Obviously in international cases, subject matter jurisdiction presupposes international jurisdiction.

<sup>33</sup> 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 Nuria Gonzalez-Martin, BJV, Instituto de Investigaciones Juridicas-UNAM, 2017, pp. 129 *et seq.*, at p. 133.

<sup>34</sup> See, *supra*, note 29.

<sup>35</sup> 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

33. 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.<sup>36</sup>
34. 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. Two “methods” of rendering the agreement enforceable should be distinguished for the sake of our considerations: (A) the rendering enforceable of the agreement as such<sup>37</sup>, and (B) the rendering enforceable of the content of the agreement embodied in a decision or court settlement or similar measure.
35. 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”<sup>38</sup> in a State bound by the instrument and that the agreement is enforceable in the State of origin.<sup>39</sup> 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.<sup>40</sup> 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.
36. 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.<sup>41</sup> Recalling that in our 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 had an international element). As a further condition, the rendering of the decision enforceable abroad will most likely presuppose that the content of the decision is not considered contrary to the public policy of the foreign State.
37. 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

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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 country.

<sup>36</sup> See also, *infra*, para. 42 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.

<sup>37</sup> See Art. 46 of the Brussels IIa Regulation for the enforceability of agreements, *op. cit.* note 4.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* For the question on how to render the agreement enforceable in the State of origin, see *supra*, paras 28 *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.

<sup>40</sup> 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.

<sup>41</sup> 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”.

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.

38. 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 Hague Conventions.

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

39. 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?
40. 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"<sup>42</sup> 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 35 and 36). These conditions may have an impact on the content<sup>43</sup> 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.
41. Obviously, the legal situation is simplified considerably, where international or regional instruments creating uniform rules on private international law, such as the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention, are in force between the relevant States.<sup>44</sup>
42. In some cases it may happen, that a 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 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

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<sup>42</sup> 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 Chapter V.2.a).

<sup>43</sup> For example, the agreement should be able to pass the "public policy" test of the foreign State.

<sup>44</sup> See for up to date information on which States are Contracting States to these Conventions the Hague Conference website at < [www.hcch.net](http://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](http://www.hcch.net) > under "Instruments" then "Status chart".

other State. It should not be left unmentioned that in some cases using the 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.

43. 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

44. In this Chapter, subject matters<sup>45</sup> 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.<sup>46</sup>
45. 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*

46. An agreement settling a cross-border family conflict involving children typically regulates matters of exercise of parental responsibility.<sup>47</sup> 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 country 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 skype.

*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. ...*

47. All the above matters fall within the scope of the 1996 Hague Child Protection 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

<sup>45</sup> This Chapter focuses on substantive law subject matters only; no reference is made to choice of court or choice of law agreements.

<sup>46</sup> 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 3 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**.

<sup>47</sup> For the term “parental responsibility” used in this explanatory note see, *supra*, “Terminology” and then “Parental responsibility”.

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**

48. 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).*

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

**2. Maintenance**

50. 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.<sup>48</sup>

*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. 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.*

51. Matters of child and spousal / ex-spousal maintenance fall within the scope of the 2007 Hague Child Support 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 Hague Convention (or, respectively, other applicable private international law instrument, such as the EU Maintenance Regulation).

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

52. 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.
53. 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*

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<sup>48</sup> 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”.

*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 the half the actual ticket price of the previous year...*

54. At first glance, it may not be obvious whether travel-costs for cross-border visits could fall within the scope of the 2007 Hague Child Support Convention or within the scope of the 1996 Hague Child Protection 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.<sup>49</sup> 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 the 1996 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 CRC.<sup>50</sup>
55. In order to help travel-costs for cross-border visits to qualify as a part of “the exercise of parental responsibility”<sup>51</sup> 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).
56. 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 can be recommendable.
57. It might furthermore be conceivable to consider travel costs as a part of maintenance payment depending on the individual circumstances of the case and the law applicable.<sup>52</sup> 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 the applicable law, the decision could benefit from the recognition and enforcement mechanism of the 2007 Hague Child Support Convention.
58. 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 at the same time.

#### **4. Costs of education**

59. 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.

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<sup>49</sup> See also the Report of the 2015 Experts’ Group Meeting (*op. cit.* note 18), at para. 14 referring to the broad scope of the 1996 Convention.

<sup>50</sup> *op. cit.* note 27.

<sup>51</sup> 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.

<sup>52</sup> 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.

*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. ...*

60. While the 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, it is not evident, whether a decision or other measures determining the parents' contribution for schooling or other education costs, equally falls within the scope of the 1996 Convention. Given the broad scope of the Convention it seems however not excluded.<sup>53</sup>

61. Besides, education cost could as child related expenses fall under "maintenance" and as such within the scope of the 2007 Hague Child Support Convention.

## 5. Property of the child

62. 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.)*

63. The 1996 Hague Child Protection Convention applies to measures of protection that deal with the "administration, conservation or disposal of the child's property".<sup>54</sup> 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".<sup>55</sup> 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".<sup>56</sup>

64. It should be noted that with a view to effectively protecting the best interests of the child, the law of some States provide for certain control mechanisms when it comes to a disposal by parents over 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 property is taken by a competent authority in a Contracting State, this measure will be automatically recognised in all other Contracting States.<sup>57</sup>

## 6. Separation of property in the context of divorce

65. 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

<sup>53</sup> See also, *supra*, note 18. At least in cases, where the education costs are necessary costs 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. In this context, it shall be underlined that the CRC obliges States "to respect the right of the child to preserve his or her identity, including nationality, name and family relations" and notes that the education of a child shall be directed towards: "The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own", see Arts 8 and 29 of the CRC.

<sup>54</sup> See Art. 3(g) of the 1996 Convention.

<sup>55</sup> 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.

<sup>56</sup> 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").

<sup>57</sup> 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 56).



issues. As concerns agreements on the separation of property there is no Hague Convention offering a mechanism for cross-border recognition and enforcement.<sup>58</sup> 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**

66. 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**

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

68. 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.

69. 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 country 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.

70. 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 terms "return" or "non-return" in parental agreements is likely to stipulate in which country 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...*

71. All parts of the agreement relating to return or non-return implying a long-term decision of the parents 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 Hague Child Protection Convention.

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

72. 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 agreement may therefore address questions, such as who will bear the travel expenses for the return, for both the child and the taking parent, and where will the child and taking parent reside immediately upon arrival.

*Example: The father agrees to purchase the train ticket for daughter S. .... Upon arrival, S. and her mother will reside in the old family apartment until the end of June 2017. ...*

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<sup>58</sup> See, *supra*, note 46.

73. All these matters relate to the safe return of the child to the country from which he or she was unlawfully taken. A decision or other measure embodying these matters qualifies as measure of child protection under the 1996 Hague Child Protection Convention.

**c) Criminal charges**

74. A very problematic issue in international child abduction cases is that of criminal charges brought against the abducting parent in the country from which the child was abducted. 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 refrain the abducting parent from returning to that country and from traveling to that country in the future for child-parent contact. Depending on the circumstances of the case, criminal charges in the country of abduction can, if the child is to be returned to that country, lead to a complete interruption of direct contact between the taking parent and the child. This result is in contradiction to what the 1980 Convention intends to achieve and the problems in connection with criminal charges have repeatedly been discussed at Meetings of the Special Commission to review the operation of the 1980 Convention.<sup>59</sup>
75. 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 accordance with 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 of 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. ...*

76. 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.<sup>60</sup>

**8. Other matters**

77. 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.
78. A group of agreements which should not be left unmentioned are parental agreements concerning disabled children having reached the age of majority. Here 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 HAGUE CONVENTIONS – WHAT THEY OFFER**

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

<sup>59</sup> 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.

<sup>60</sup> See Permanent Bureau of the Hague Conference, *op. cit.* note 5, at Chapter 2.8, paras 85 *et seq.*

79. 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.

**a) The 1980 Hague Child Abduction Convention**

80. 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.

81. 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]”.<sup>61</sup> 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.”<sup>62</sup>

82. 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.

83. At the same time, the Convention is equipped to respect a parental agreement on the moving of a child to another State. Proof can be found in the general understanding that the “left-behind parent” can consent to or acquiesce in the moving of his/her child to another State (Art. 13(1)(a)), which illustrates the Convention’s capacity to accept parental agreement to relocation.

84. It should be highlighted that the option of “acquiescence” to a removal or retention, is the open door to allowing for an amicable settlement of the cross-border family dispute envisaging a solution other than the 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”.<sup>63</sup> 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”.<sup>64</sup> As the Guide emphasises “mediation does not face the same jurisdictional restrictions as judicial proceedings”.<sup>65</sup> 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.). What should be retained here, is that the 1980 Convention is ready to accept agreed solutions also 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).

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<sup>61</sup> See Art. 3 of the 1980 Convention and Art. 7(2) of the 1996 Convention with the same wording.

<sup>62</sup> 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.

<sup>63</sup> See Chapter 5 “Scope of mediation in international child abduction cases” of the Guide to Good Practice on Mediation (*op. cit.* note 5), at para. 186.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, para. 187.

85. Finally, Article 7(c) of the 1980 Convention contains a strong statement towards the encouragement of 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 mediation<sup>66</sup> where available and / or facilitate the 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**

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

87. 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.

88. 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 country. 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 country not including the modalities of an agreed exercise of parental responsibility.

89. 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”.<sup>67</sup> In the light of this, considering a parental agreement on the exercise of parental responsibility a “measure of protection” might seem 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.<sup>68</sup> However, a “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.

90. As concerns agreements on international jurisdiction the 1996 Hague Child Protection Convention provides very limited party autonomy. The Convention centralises, with very

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<sup>66</sup> See on the matter of specialist family mediation in international child abduction cases the Guide to Good Practice on Mediation (*op. cit.* note 5).

<sup>67</sup> See P. Lagarde, *op. cit.* note 55, at para. 18.

<sup>68</sup> 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.

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. As Article 10(1)(b) clarifies the choice of jurisdiction by the parents must be in the "best interests of the child".<sup>69</sup> 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.

91. 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".<sup>70</sup>

### **c) The 2007 Hague Child Support Convention**

92. Among the modern Hague Family Conventions, the 2007 Hague Convention is the one that goes furthest with regard to expressly promoting and supporting agreements concerning the matters covered by the Convention.
93. 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.
94. 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.<sup>71</sup>
95. Independent 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.<sup>72</sup>

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<sup>69</sup> 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.

<sup>70</sup> See Art. 31(b) of the 1996 Convention.

<sup>71</sup> Out of the currently (status April 2017) 34 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](http://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.

<sup>72</sup> 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

96. When comparing agreements referred to by Article 19(1) of the 2007 Convention and those that can be recognised and enforced in accordance with Article 30 in form of “maintenance arrangements” one has to state that in practice there maybe be a minor overlap.<sup>73</sup>
97. 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”.
98. 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”.<sup>74</sup> This kind of agreement is expressly not envisaged for maintenance obligations in respect of children.<sup>75</sup>
99. When talking about the promotion of party autonomy through the 2007 Hague Child Protection Convention, it should not be forgotten, that the applicable law instrument created together with that Convention, namely the 2007 Hague Protocol<sup>76</sup> introduces, as a novelty,<sup>77</sup> the possibility of a choice of law for maintenance matters (even though almost completely excluded for child maintenance).<sup>78</sup> This is yet another 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 or other measure or respectively as “maintenance arrangement” “travel” cross-border with the assistance of the 1996 and 2007 Conventions?**

100. Among the three Hague Conventions in the focus of the explanatory note, only the 1996 Hague Child Protection and the 2007 Hague Child Support Convention set up recognition and enforcement mechanisms.

**a) The 1996 Hague Child Protection Convention**

101. An agreement on any matters falling within the scope of the 1996 Hague Child Protection 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

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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”).

<sup>73</sup> Art. 19(1) is the narrower provision: only a settlement or agreement 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 (*Ibid.*) for further details.

<sup>74</sup> See Arts 18(2)(a) and 20(1)(e) of the 2007 Convention.

<sup>75</sup> 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.

<sup>76</sup> *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter, the “2007 Hague Protocol”).

<sup>77</sup> See A. Bonomi, “Explanatory Report on the 2007 Hague Maintenance Obligations Protocol”, The Hague, 2013, at paras 109 and 110.

<sup>78</sup> 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.

“measures” was already used in the predecessor Convention.<sup>79</sup> 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.

102. Once a “measure of child protection” in the sense of the 1996 Hague Child Protection Convention has been obtained, this measure is recognised by operation of law in any other Contracting State to the Convention.<sup>80</sup>
103. 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.
104. 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”<sup>81</sup>, it should generally be the Contracting State of habitual residence of the child where the measure of child protection should be obtained.<sup>82</sup> 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”.<sup>83</sup> The particularities of international child abduction cases are further explored below, see Chapter IV, 2. c).
105. 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”.<sup>84</sup> 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”. For the explanatory note, 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).
106. 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).

<sup>79</sup> 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.

<sup>80</sup> See Art. 23(1) of the 1996 Convention.

<sup>81</sup> See P. Lagarde, *op. cit.* note 55, at para. 37. See also Art. 5 of the 1996 Convention.

<sup>82</sup> See paras 13.49-13.50 of the Practical Handbook on the 1996 Convention (*op. cit.* note 56).

<sup>83</sup> See Art. 25 of the 1996 Convention.

<sup>84</sup> See P. Lagarde, *op. cit.* note 55, at para. 123.

107. 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.

**b) The 2007 Hague Child Support Convention**

108. If an agreement on maintenance matters falling within the scope of the 2007 Hague Child Support 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)<sup>85</sup>, since Contracting States cannot make a reservation with regard to these grounds of jurisdiction.

109. 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 capable of passing the "public policy" of the foreign State in which recognition and enforceability will be sought. See also below under Chapter V, 2. d).

110. 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.

**IV. APPROACHING TYPICAL CROSS-BORDER FAMILY CONFLICT SITUATIONS**

111. 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**

112. 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").

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<sup>85</sup> 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; [...].



113. 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.<sup>86</sup>
114. All subject matters falling within the scope of the 1996 Hague Child Protection 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 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 registered with or 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.
115. As concerns matters falling within the scope of the 2007 Hague Child Support Convention, two avenues can be followed to use the Convention’s recognition and enforcement mechanism.
116. 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 the 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.
117. Secondly, the agreement could be rendered enforceable abroad as a maintenance arrangement, 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.<sup>87</sup> 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.
118. 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 agreements. 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.

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<sup>86</sup> See for the subject matters typically contained in agreements made in international family disputes concerning children above Chapter II.

<sup>87</sup> *Ibid.*, Art. 30(8).

119. After analysing the mechanisms offered by the 1996 and 2007 Conventions the following conclusions can be drawn for an agreement on cross-border relocation.
120. 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".<sup>88</sup>
121. 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.
122. As concerns matters in the agreement falling within the scope of the 2007 Hague Child Support 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 country of the habitual residence of the respondent<sup>89</sup> (*i.e.* here the debtor, who is the respondent for the purpose of the recognition and enforcement procedure under Chapter V of the Convention), having the respondent<sup>90</sup> submit to the jurisdiction, or seizing the court in the country of habitual residence of the child given the respondent<sup>91</sup> has lived with the child in that State or has resided in that State and provided support for the child there.
123. 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.
124. 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.
125. 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

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<sup>88</sup> See for the term "package agreement" the "Terminology" above.

<sup>89</sup> 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 Chapter 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 country of jurisdiction.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

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.

126. Obviously, where the agreement includes matters<sup>92</sup> not falling within the scope of the 1996 and 2007 Conventions or where these Conventions are not in force<sup>93</sup> between the relevant States, the task of rendering the agreement legally binding and enforceable in all States concerned is more challenging.

127. 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 competent under both 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.<sup>94</sup>

## 2. Agreements in cross-border contact cases

128. The category of cases considered in this sub-chapter are those where one holder of parental responsibility lives in a country other than the country 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.

129. 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*.

130. 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 both, the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention are in force between all States concerned by the dispute, the following advice 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).

131. 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.

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<sup>92</sup> 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 Chapter 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 39 *et seq.*

<sup>93</sup> 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.

<sup>94</sup> It could be helpful if States were to consider the development of good practices with a view to achieving the described “best case scenario”.

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

132. In the situation of international child abduction, the factual situation differs from that of an envisaged cross-border relocation in many regards. 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 higher. Return proceedings under the 1980 Hague Child Abduction 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.<sup>95</sup> A possible criminal prosecution in the State of abduction complicates the resolution of the dispute.<sup>96</sup>

133. In international child abduction cases particular rules of international jurisdiction in matters of parental responsibility apply in accordance with the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. 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 Hague Child Abduction 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. 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 noted in Article 7 of the 1996 Convention 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 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".

134. 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. The parents having followed specialised mediation 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.*

135. The court seized 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.

136. 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

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<sup>95</sup> See for the particular challenges for mediation in international child abduction cases Chapter 2 of the Guide to Good Practice on Mediation (*op. cit.* note 5).

<sup>96</sup> See, *supra*, at paras 73-75.

it comes to ensure the safe return of the child with certain measures of protection.<sup>97</sup> 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 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”.<sup>98</sup> 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”<sup>99</sup> making the measures of protection necessary.

137. Should the court seized 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.

138. 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 expeditiously (in contrast to the court seized 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”.<sup>100</sup> 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 interview<sup>101</sup> the child.

139. 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.<sup>102</sup> The International Hague Network of Judges<sup>103</sup> has around 124 members from 81 legal systems (status May 2017) 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

<sup>97</sup> See for details Chapter 6 of the Practical Handbook on the 1996 Convention (*op. cit.* note 56).

<sup>98</sup> See Art. 11(2) of the 1996 Convention.

<sup>99</sup> See concerning the restrictive interpretation of the term “urgency”, Chapter 6 of the Practical Handbook on the 1996 Convention, (*op. cit.* note 56).

<sup>100</sup> Guide to Part II of the 2012 SC, *op. cit.* note 15, at para. 48.

<sup>101</sup> Of course, depending on the circumstances, a video hearing of the child might be possible replacing the child’s presence in State B.

<sup>102</sup> See for further details: Permanent Bureau of the Hague Conference on Private International Law, *Direct Judicial Communications*, The Hague, 2013 and (to be added new Prel.Doc. on the matter).

<sup>103</sup> See for details the list of members of the International Network of Judges available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction”.

child.”<sup>104</sup> 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.

140. For matters of maintenance falling within the scope of the 2007 Hague Child Support Convention as 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,<sup>105</sup> 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 bases for recognition and enforcement in accordance with Article 20 of the 2007 Convention is given. 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.

**b) Non-return agreement**

*Example: Hague return proceedings are ongoing in State A. 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 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 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.*

141. Rendering the above non-return agreement fully binding and enforceable for both States concerned will almost certainly require an involvement of the authorities in State B, at least if the parties want to give immediate force to the entire agreement at the moment the Hague return proceedings are concluded.
142. The authorities of State A do not have international jurisdiction on the merits of custody and contact while the Hague return proceedings are ongoing, Article 16 of the 1980 Convention and Article 7 of the 1996 Convention.
143. Once the return proceedings come to an end as a result of the parents' agreement that the child is to remain in State A, the blockage of jurisdiction in Article 16 of the 1980 Convention ceases to exist. This however, does not lead to an automatic shift of jurisdiction on matters of custody and contact from State A to State B. 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.
144. Should the conditions of Article 7 for a shift of jurisdiction not immediately be given, as discussed at the Sixth Meeting of the Special Commission, “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”.<sup>106</sup> 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. Again, the potential advantages of the use of direct judicial communications, to assist in speeding up the process should be noted.<sup>107</sup>
145. Against this background, and to benefit most from the interplay between the 1996 and 1980 Conventions the same steps as suggested above in paragraph 137, *i.e.*

<sup>104</sup> See Permanent Bureau of the Hague Conference, *op. cit.* note 102, p. 7.

<sup>105</sup> In EU States these would be the jurisdiction rules contained in the EU Maintenance Regulation.

<sup>106</sup> Guide to Part II of the 2012 SC, *op. cit.* note 15, at para. 47.

<sup>107</sup> See, *supra*, para. 138.

taking the agreement to the competent authorities of State B to transform it into a “measure of protection” there should be considered.

146. 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”.<sup>108</sup> 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”.<sup>109</sup>

For agreements on matters of maintenance, see above paragraph 139.

## **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 Hague Conventions in force between the States concerned?<sup>110</sup>
- 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?

147. 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

<sup>108</sup> Guide to Part II of the 2012 SC, *op. cit.* note 15, at para. 49.

<sup>109</sup> *Ibid.*

<sup>110</sup> See for up to date information on which States are Contracting States to these Conventions the Hague Conference website at < [www.hcch.net](http://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](http://www.hcch.net) > under “Instruments” then “Status chart”.

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 precise to be enforced by the authorities in the State of enforcement?

148. 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

149. 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.<sup>111</sup>

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

151. 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***

152. 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.

153. 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 country.

154. 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

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<sup>111</sup> See the good practice promoted in particular by the Chapter 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).



standing in certain States.<sup>112</sup> 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.

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

156. 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 Hague Child Support 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***

157. 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 the respect of 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, at that moment in time, indeed, 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.

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<sup>112</sup> See, *supra*, at para. 29.

- 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 Hague Conventions**

158. In international family disputes concerning children the issue of "habitual residence" regularly plays an important role. First of all, the parents' disagreement on where their child should habitually reside in the future could be the very source of the dispute. Conflicts surrounding cross-border relocation or international child abduction are classic examples for this category of cases. As connecting factor for international jurisdiction and applicable law, the habitual residence of the child can have an influence on which country's authorities can be seized and on what basis these authorities will decide.
159. The determination of the "habitual residence" of the child will, as explained above, be an important step when it comes to identifying the "starting point" legal system to render an agreement in an international family dispute concerning children legally binding and enforceable, in particular, for matters falling within the scope of the 1996 Convention.
160. All Hague Family Law Conventions use "habitual residence" as a connecting factor but neither 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 facts of the individual case. The test applied in different States is not necessarily the same.
161. By way of example, guidance developed concerning the interpretation of a child's "habitual residence" by the Court of Justice of the European Union<sup>113</sup> (CJEU) which is the Court tasked to safeguard uniform interpretation of EU law shall give some insight into the factors that can play a role in the determination of habitual residence: 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".<sup>114</sup> "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"<sup>115</sup> 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".<sup>116</sup> 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 age<sup>117</sup> 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.<sup>118</sup>
162. When parents draft an agreement to settle their cross-border family dispute there is good reason to fix their understanding of the facts and their wishes concerning the habitual residence of their child in the terms of the agreement. It may be helpful if the agreement equally notes the parents' habitual residence at the time of the drafting of the agreement.

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<sup>113</sup> 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 Art. 8 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.

<sup>114</sup> Judgment of the 2 April 2009, C-523/07, EU:C:2009:225, para. 44.

<sup>115</sup> *Ibid.*, para. 38.

<sup>116</sup> *Ibid.*, para. 40.

<sup>117</sup> Judgment of the 22 December 2010, *Barbara Mercredi v. Richard Chaffe*, C-497/10 PPU, EU:C:2010:829, para. 53.

<sup>118</sup> *Ibid.*, para. 55.

## 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 is attending school since ... and taking into consideration that the 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)**

163. 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.<sup>119</sup> 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.<sup>120</sup> Depending on the subject matters dealt with by the agreement, different laws might be relevant for different parts of the agreement.

164. 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**

165. 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.

166. 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 CRC is today deeply rooted in national and international family law.<sup>121</sup> The same is true for

<sup>119</sup> See Art. 3 of the 2007 Hague Protocol; see Arts 4 *et seq.* for exceptions to this general rule.

<sup>120</sup> See Art. 15 of the 1996 Convention.

<sup>121</sup> 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).

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 CRC.

167. The involvement of the child might already be proposed in mediation<sup>122</sup> or a similar process to bring about an amicable resolution of the dispute. Alternatively, the court in the “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 invaluable in this regard.

168. 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”.<sup>123</sup>

169. In this context, it must be noted, that national standards and practice with regard to hearing the child differ from country to country and that these national differences can sometimes pose additional difficulties in the cross-border recognition of decisions in matters of parental responsibility.<sup>124</sup> 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 para. 63 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 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**

170. 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 may be recommendable to include the parties understanding of the interdependence of certain

<sup>122</sup> 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 CRC 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 Committee on the Rights of the Child, “General Comment No 12 (2009) – The right of the child to be heard”, CRC/C/GC/12, at paras 32, 51 and 59, available at the following address < <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> > (last consulted on 13 July 2017).

<sup>123</sup> Such a provision is also contained in the Brussels IIa Regulation, see Art. 23 b) of the Regulation.

<sup>124</sup> 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 13 July 2017).

parts of the agreement in order to know how they wish to deal with the partial validity of the agreement.