

Questionnaire

Cross-border recognition and enforcement of agreements in family matters involving children

A. Introduction

This Questionnaire concerns the legal effects of agreements in the area of international family law involving children, *e.g.*, agreements in disputes regarding child custody, child support, relocation with a child, rights to visit and to have contact with a child. For the purposes of this Questionnaire, the term “agreement” covers written, not oral agreements. Furthermore, due to the diversity of legal systems, the term “agreement” should be understood broadly, including, among others, private agreements between parents or other family members (reached, *e.g.*, through mediation), (out-of-court) settlements, “parental agreements” (as provided for in some jurisdictions) as well as agreements that have been authenticated by, or concluded, registered or filed with a competent authority. The Questionnaire also covers the recognition and enforcement of judgments and other court decisions insofar as an agreement is incorporated in a judgment or turned into a court decision (*e.g.*, in a court order).

Agreements between parents or other family members in family disputes involving children have gained more importance and have become more frequent. This development is, in part, attributable to the enhanced promotion of alternative dispute resolution mechanisms (such as mediation, conciliation, and negotiation) to achieve agreed solutions in these cases.¹ In addition, party autonomy in the area of family law has gained more importance and States increasingly enable parents and other family members to conclude agreements that regulate child-related matters, in particular custody and contact issues.

Due to today’s increasing “internationalisation” of the family, agreements are negotiated more and more in cross-border situations (*e.g.*, one of the parents plans to relocate to his / her country of origin with the child and contact between the child and the other parent will be carried out abroad or would require the child to travel)² which may require the recognition and enforcement of the agreement in a State (hereinafter referred to as “requested State”) other than the State in which it was concluded (hereinafter referred to as “State of origin”).³

The Council on General Affairs and Policy of the Hague Conference on Private International Law established an Experts’ Group to look into the question on whether, and if yes, under which circumstances, an agreement in the area of family law involving children can be recognised

¹ Amicable agreements are often tailor-made and provide comprehensive solutions which are likely to be respected by the parties. They contribute to better communication and co-operation between parents which is for the benefit of their child. For more information, see Prel. Doc. No 5 of March 2014, “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” (see the Hague Conference website < www.hcch.net > under “Work in Progress” then “General Affairs”).

² It is possible that the cross-border context is considered in the negotiation from the beginning. Or, the agreement is negotiated in a (purely) national context but, due to a change of circumstances, needs to be reviewed in a cross-border situation.

³ For example, if one parent moves with the child to another State and refuses to grant the other parent contact with the child although contact arrangements were included in an agreement the parents concluded before the relocation.

and enforced in a State other than the State of origin.⁴ At its meeting in December 2013,⁵ the Experts' Group concluded, among other things, that since national laws and regulations relevant to the conclusion, recognition and enforcement of agreements in family matters vary, the cross-border recognition and enforcement of agreements may pose legal and practical challenges for judges, private practitioners, parents or other family members involved. The Experts' Group noted that the increase in mobility of families required that agreements be "portable" to States other than the State of origin; if this were not the case, compliance with the agreement's terms would be difficult or even impossible to enforce.

An agreement that solves a cross-border family dispute involving a child might fall within the scope of one or more of the following Hague Conventions:⁶

- the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("1980 Convention"),
- the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("1996 Convention"), and
- the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* ("2007 Convention").

The subject matter(s) of such an agreement may in particular overlap with the subject matters of the 1996 Convention (covering, *i.a.*, matters of parental responsibility and rights of custody) and the 2007 Convention (covering child maintenance). The question arises to what extent the two Conventions, since they include express provisions on recognition and enforcement, can assist in the cross-border recognition and enforcement of these agreements.⁷

Further questions arise concerning agreements in the area of family law that contain a variety of issues in order to address the family situation in a comprehensive and detailed way ("package agreements").⁸ Some of these matters might not be related solely to the child (*e.g.*, in a divorce settlement, parents may negotiate matters related to the matrimonial property aside from matters relating to child custody) and the scope of the agreement might therefore go beyond the scope of the 1996 and 2007 Conventions.

There is also an increasing attempt to solve international child abduction cases in an amicable way (*e.g.*, through mediation) leading to agreements in cases in which the 1980 Convention is applicable. In this context, the question arises whether the 1980 Convention limits the terms in an amicable agreement in a Hague return case. If there were limits and the agreement went beyond the permitted scope, it might be impossible to recognise or enforce the agreement in the requested State.

The objective of this Questionnaire is to gather information on these questions and in particular on the role that Hague Family Law Conventions play in the cross-border recognition and enforcement of agreements in international family disputes involving children. It further aims at gaining some insight into the practical and legal problems that, especially, judges and practitioners face when dealing with this matter.

⁴ The mandate of the Experts' Group is to carry out "exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention. Such work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area." The Experts' Group was asked to assess all types of agreements, and not only those reached through mediation. See Conclusions and Recommendations adopted by the Council of 2012 (17-20 April 2012), para. 7, available at the path indicated in note 1.

⁵ For the report of the meeting, the conclusions and recommendations agreed upon by the Experts, and a background document, see Prel. Doc. No 5 (*op. cit.* note 1).

⁶ All three Conventions encourage amicable solutions for matters covered by their scope. For more information on these and other Hague Conventions, see < www.hcch.net > under "Conventions".

⁷ See Chapter IV (Art. 23-28) of the 1996 Convention and Chapter V (Arts 19 to 31) of the 2007 on recognition and enforcement. Art. 30 of the 2007 Convention deals with the recognition and enforcement of "maintenance arrangements" as defined in Art. 3 e) of this Convention.

⁸ The Experts' Group discussed in particular these "package agreements", see the report of the Experts' Group meeting included in Prel. Doc. No 5 (*op. cit.* note 1).

In addition, the Permanent Bureau seeks the views of judges, practitioners, Government officials and other experts on the impact that a new international instrument might have on the practical use and “portability” of these agreements across borders.⁹ The Experts’ Group concluded in this regard that a binding instrument could provide a “one-stop shop” to accommodate, in particular, the “package” of issues that parents may include in an agreement and that a non-binding “navigation tool” could assist those concerned in securing cross-border recognition and enforcement of “package agreements” within the existing legal framework.¹⁰

You are kindly invited to complete the Questionnaire (in either English or French) at your earliest convenience, but in any event by no later than **Friday, 18 September 2015**, in order to allow the Permanent Bureau sufficient time to compile the responses and prepare for the November Experts’ Group meeting.

We would appreciate if you could provide, where possible, case law or case studies that you think might help illustrate ways in which agreements in international family disputes involving children are being recognised and enforced abroad, as well as a copy of, or a web-link to, any legislation mentioned in your responses (preferably in English or French). If, in your work, you have dealt with or you know of a case where an agreement between parents was concluded in the context of international child abduction, we would appreciate if you could briefly describe the case(s) (obviously within the limits of confidentiality).

Please e-mail the Questionnaire as well as copies of legislation, case law and case studies you may want to add to < secretariat@hcch.net >, to the attention of Kerstin Bartsch, Senior Legal Officer, with the subject line: “Questionnaire - Recognition and enforcement of agreements”.

All information provided in this Questionnaire will be treated confidentially and will only be used for the purpose described. A report summarising the results of this consultation in general terms may be made available on the Hague Conference website.

B. Questionnaire

I. General information

Your name:

Your title:

Your e-mail address:

Your profession (e.g., judge, lawyer, barrister, solicitor, mediator, Government official, academic expert)

Name of State (or territorial unit, where applicable) in which you are based (hereinafter referred to as “your State”):

Instructions:

For the purposes of answering the questions in Sections II and III, if the 1980, 1996 and / or 2007 Conventions are in force in your State / jurisdiction, you may assume that it / they also apply in the other jurisdiction referred to in the case illustration. If they are not in force, please indicate in your response the applicable legal framework.

For the purposes of answering the questions in Sections IV and V, please answer the questions irrespective of whether the 1996 and 2007 Conventions are in force in your jurisdiction.

⁹ See para. 5 of the Conclusions and Recommendations adopted by the Council of 2014 (8-10 April 2014), available at the path indicated in note 1.

¹⁰ See the Report of the Experts’ Group meeting in paras 62 and the Conclusions and Recommendation in para. 12, contained in Prel. Doc. No 5 (*op. cit.* note 1).

II. Cross-border recognition and enforcement of an agreement concluded in the context of international child abduction

The objective of this section is to assess the role of the 1980 and 1996 Conventions as well as other international instruments or bilateral agreements in the cross-border recognition and enforcement of agreements in international child abduction cases. We furthermore seek input on the legal and practical challenges that judges, practitioners and parents may face when seeking recognition and enforcement of an agreement in an international child abduction case.

Case illustration No 1 (mutually agreed return):

Beth and Alex, a married couple, have been living for several years in State A where their child Cara was born. In July 2014, Beth travels with Cara to her home country, State B, for what she states is a holiday; Alex stays in State A. Once arrived in State B, Beth informs Alex that she and Cara will not return to State A. Alex requests that Cara returns to State A where she has been living all her life. Beth wants to divorce him and stay with Cara in State B. Beth and Alex mediate in State B and agree that Beth will return to State A with Cara on the condition that (1) the parents have joint custody; (2) Cara will live with Beth in the former matrimonial home from which Alex will move out; (3) Cara will stay with Alex every second weekend.

Questions:

1. Your State is the State of origin (State B, *i.e.*, the State where mediation took place and which is not the State of habitual residence of the child): Based on the law applicable in your jurisdiction, is such an agreement enforceable in your State? If yes, under which conditions (*e.g.*, does the agreement need to be incorporated in a judgment or turned into a court order, authenticated, or concluded, registered or filed with a competent authority)? On which ground (legal basis) would the competent authority base its jurisdiction? If, in your response, the 1980 Convention is applicable, please consider Article 16 of this Convention. Furthermore, if, in your response, the 1996 Convention is applicable, please consider Article 7 of this Convention.
2. Your State is the requested State (State A, the State of habitual residence of the child): Could such an agreement be recognised and enforced in your State? If yes, which steps would need to be taken in your State and / or in the State of origin (*e.g.*, does the agreement need to be incorporated in a judgment or turned into a court order, be authenticated by, or concluded, registered or filed with a competent authority; would it be possible to issue a mirror order in your State)? In particular, would a court in your jurisdiction review the agreement's content and examine the jurisdiction of the State of origin before recognising and enforcing the agreement?

Case illustration No 2 (mutually agreed non-return):

Same as case illustration No 1 above, but Beth and Alex agree that Beth will *not* return to State A with Cara on the condition that (1) the parents have joint custody; (2) Cara will spend the summer holidays with Alex in State A and Alex will pay for Cara's travel; (3) Alex and Cara will have contact via phone or skype every weekend and Alex can visit Cara on weekends or weekdays when he is in State B. After a few months, Alex does not comply with the agreement's terms; Beth seeks enforcement of the agreement in State A.

Questions:

1. Your State is the State of origin (State B, *i.e.*, the State where mediation took place and which is not the State of habitual residence of the child): Based on the law applicable in your jurisdiction, is such an agreement enforceable in your State? If yes, under which conditions (*e.g.*, does the agreement need to be incorporated in a judgment or turned into a court order, be authenticated by, or concluded, registered or filed with a competent

authority)? On which ground (legal basis) would the competent authority base its jurisdiction?

2. Your State is the requested State (State A, the State of habitual residence of the child): Could such an agreement be recognised and enforced in your State? If yes, which steps would need to be taken in your State and / or in the State of origin (*e.g.*, does the agreement need to be incorporated in a judgment or turned into a court order, be authenticated by, or concluded, registered or filed with a competent authority; would it be possible to issue a mirror order in your State)? In particular, would a court in your jurisdiction review the agreement's content and examine the jurisdiction of the State of origin before recognising and enforcing the agreement?

III. Cross-border recognition and enforcement of an agreement concluded in the context of international relocation

The objective of this section is to assess the role of the 1980, 1996 and 2007 Conventions in the cross-border recognition and enforcement of agreements in international family disputes involving children, other than international child abduction cases. We furthermore seek input on the legal and practical challenges that parents may face when reaching an agreement in such international family disputes, *e.g.*, on custody, child support and contact. As an example of an international family dispute involving children (other than international child abduction), this section focuses on an international relocation case.

Case illustration No 3 (relocation agreement):

Beth and Alex live in State A and decide to divorce. Beth wants to relocate with their child Cara to her home country, State B. Alex, whose home country is State A, would agree to this under a few conditions. Before the relocation, in State A, they conclude an agreement detailing the conditions for relocation to State B. The agreement contains the following terms (1) both parents have joint custody; (2) Alex who will continue living in State A will have the right to contact Cara by phone / skype as often as he wishes; (3) Alex has the right to visit Cara every second month for one weekend; (4) Alex and Cara can spend a minimum of three weeks together during the summer holidays; (5) if Cara visits Alex in State A, Beth and Alex will jointly organise the travel, either one of them will accompany the child and Alex will pay for the travel costs; (6) Alex will not pay any spousal support; (7) Alex will pay child support. After the relocation, Beth does not comply with the agreement's terms; Alex seeks enforcement of the agreement in State B.

Questions:

1. Your State is the requested State (State B which is now – after the relocation - the State of habitual residence of the child): Could such an agreement be recognised and enforced in your State? If yes, which steps would need to be taken in your State and / or in the State of origin (*e.g.*, does the agreement need to be incorporated in a judgment or turned into a court order, be authenticated by, or concluded, registered or filed with a competent authority; would it be possible to issue a mirror order in your State)? In particular, would a court in your jurisdiction review the agreement's content and examine the jurisdiction of the State of origin before recognising and enforcing the agreement?
2. In your view, does the fact that this relocation agreement includes a series of matters, ranging from child custody to spousal support, impact on its cross-border recognition and enforcement? (*E.g.*, is there a risk that only parts of the agreement will be recognised and enforceable?)

IV. Cross-border recognition and enforcement of an agreement whose contents go beyond the scopes of the 1996 and 2007 Conventions

Parents do not negotiate along “convention lines”. Therefore, we seek information on the cross-border recognition and enforcement of agreements whose contents go beyond the scopes of the 1996¹¹ and 2007¹² Conventions (e.g., an agreement on matrimonial property issues or post divorce financial provisions falling outside the scope of spousal support or matters related to inheritance).¹³

Questions:

1. In your work, have you dealt with agreements in the area of international family law involving children that contain terms related to matters that are outside the scope of the 1996 and 2007 Conventions? If yes, please briefly describe these matters.
2. From your experience, how frequent are matters that are outside the scope of the 1996 and 2007 Conventions included in agreements in the area of international family law involving children? (Please indicate: frequent, sometimes, rarely, or never.)
3. If matters that are outside the scope of the 1996 and 2007 Conventions are included in a family agreement involving children (e.g., those you listed above), are the requirements for the enforceability and, where applicable, recognition of this agreement different from those you described above? Please answer this question from the perspective of (1) your State being the State of origin of the agreement and (2) your State being the requested State.
4. Does the fact that an agreement includes matters that are outside the scope of the 1996 and 2007 Conventions impact on its recognition and enforcement (e.g., is there a risk that only parts of the agreement will be recognised and enforceable, or that the whole agreement would not be recognised and enforced)?

V. The role of “party autonomy” in the cross-border recognition and enforcement of agreements

Case illustration No 4:

Beth and Alex, together with their child Cara live for 10 years in State A. They decide to move to State B for work. After one year living in State B, Beth and Alex decide to separate. They would like to mediate child custody and contact issues. Since they do not speak the language of State B fluently and cannot find a mediator who is able to mediate their case in their native language, they decide to travel back to State A temporarily and take part in mediation in this State within three weeks. The mediation agreement is concluded in State A. State B remains the State of habitual residence of the child and Beth and Alex will continue living in State B.

¹¹ Measures directed to the protection of the person or property of the child, see Arts 1 and 3 of the 1996 Convention.

¹² Child support and other forms of family maintenance as well as spousal support under certain conditions, see Art. 2 of the 2007 Convention.

¹³ See the Report of the Experts' Group meeting, para. 46 and the Background Note in para. 64, both contained in Prel. Doc. No 5 (*op. cit.* note 1).

Questions:

1. In your view, would this agreement be enforceable and, where appropriate, recognisable in the two key States (State A, the State of origin of the agreement, and State B, the requested State which is the State of habitual residence of the child)? Please explain (*e.g.*, does party autonomy allow the parties to choose a forum other than the habitual residence of the child to reach an agreement?).
2. If Beth and Alex are based in different States / jurisdictions (States A and B) and mediation is done from a distance (*e.g.*, by using online dispute resolution services), would your answer to 1. be different?

VI. Other questions

1. For respondents in whose jurisdiction the 1996 and 2007 Conventions are in force: In relation to any of the above mentioned case illustrations, please describe any (other) legal and / or practical challenges (*e.g.*, costs, time, administrative requirements such as translation of documents) in the application of these Conventions, in particular their interplay with each other, that you / judges, practitioners and others concerned would / might face when seeking recognition and enforcement of an agreement in a State other than the State in which the agreement was concluded.
2. For respondents in whose State / jurisdiction the 1996 and 2007 Conventions are not in force, do you have any comments as to the potential usefulness of the Conventions *de lege ferenda*?
3. Would a new international instrument (binding or not binding) help overcome legal and practical challenges with a view to facilitating the cross-border recognition and enforcement of agreements in international family disputes involving children? If so, please explain.

Please state below any information you would like to add to the questionnaire, *e.g.*, case law, case studies, web-links to legislation, as well as descriptions of cases you have dealt with: