

**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)

* * *

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

(LA HAYE, DU 2 AU 4 NOVEMBRE 2015)

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

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

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

2-4 November 2015



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

(The Hague, 2-4 November 2015)

Introduction

1. The Council on General Affairs and Policy of the Conference (the "Council") in 2012 mandated the establishment of "an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention.^[1] 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".² In accordance with this mandate, the Experts' Group met from 12 to 14 December 2013 under the chairmanship of Ms Katharina Boele-Woelki, at that time Professor at the University of Utrecht.³

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

Report on the discussion at the meeting

3. In the second meeting, the Experts' Group considered further the nature and extent of the legal and practical problems, including jurisdictional issues in connection with the recognition and enforcement of agreements reached in the course of international family disputes involving children. The Experts' Group was greatly helped by the answers to the Questionnaire that was sent out by the Permanent Bureau in advance of the meeting. With a view to facilitating the discussions at the meeting, the Experts' Group received in advance a summary⁷ of the responses to the Questionnaire prepared by the Permanent Bureau and a document compiling all the responses.

¹ *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, hereinafter referred to as "1996 Hague Convention".

² Conclusions and Recommendations adopted by the Council in 2012, para. 7.

³ See "Report on the Experts' Group meeting on cross-border recognition and enforcement of agreements in international child disputes (from 12 to 14 December 2013) and recommendation for further work", Prel. Doc. No 5 of March 2014.

⁴ Conclusions and Recommendations adopted by the Council in 2014, para. 5.

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

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

⁷ The summary is attached to this document as Annex 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. It was also noted that within the context of the European Union ("EU"), Article 12(4) of the Brussels IIa Regulation¹⁰ creates a wider basis for party autonomy in relation to parental responsibility and access issues which could provide an inspiration for a future global instrument. The Experts' Group noted, however, that ideally the new instrument should go further and include maintenance and other financial arrangements within the scope of what can be agreed by the parties and given effect to by a single competent authority. It was also noted that within the EU, Article 3(d) of the EU Maintenance Regulation¹¹ permits the courts dealing with the parental responsibility issues to also deal with the maintenance issues in the same litigation. Article 4 of the EU Maintenance Regulation also permits choice of court in a wide range of cases.

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

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

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

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

¹⁰ 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.

¹¹ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

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

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

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

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

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

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

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

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

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

Recommendations to the Council on General Affairs and Policy

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

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

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

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

THE HAGUE, 4 November 2015

ANNEXES

Experts' Group on Recognition and Enforcement of Agreements in Family Matters Involving Children



MEMBERS OF THE EXPERTS' GROUP ON RECOGNITION AND ENFORCEMENT OF AGREEMENTS IN FAMILY MATTERS INVOLVING CHILDREN

The Experts' Group consists of private international law experts from academia, courts, government authorities and private practice (attorneys and mediators) from various legal systems, acting in their private capacity. Following the invitation by Council in 2014,¹ the Experts' Group was expanded to include more judges and private practitioners.

- Ms Nádia DE ARAÚJO, Government Attorney, Rio de Janeiro, Brazil
- Mr Abed AWAD, Partner, Awad & Khoury LLP, New Jersey, United States of America
- Mr Paul R. BEAUMONT, General Editor of the *Journal of Private International Law*, Professor of European Union and Private International Law, University of Aberdeen School of Law, Aberdeen, United Kingdom (Chair)
- Mr Alexandre BOICHÉ, *Avocat à la Cour, Docteur en droit*, Alexandre Boiché Avocats, Paris, France
- Ms Sabine BRIEGER, Judge of the Family Court, District Court of Pankow-Weißensee (*Richterin am Amtsgericht, Amtsgericht Pankow-Weißensee*), Berlin, Germany (member of the International Hague Network of Judges)
- Ms Dervla BROWNE, Senior Counsel, Family Lawyers Association, Dublin, Ireland
- The Honourable Jan-Marie DOOGUE, Chief District Court Judge, District Court of New Zealand, District Court Judge's Chambers, Wellington, New Zealand (member of the International Hague Network of Judges)
- Mr Masayoshi FURUYA, First Secretary / Legal Advisor, Embassy of Japan, The Hague, Netherlands
- Ms Cristina GONZÁLEZ BEILFUSS, Professor in Private International Law, University of Barcelona, Barcelona, Spain
- Ms Gabriela GONZALEZ COFRE, *Abogado Auxiliar, Oficina Internacional, Corporación de Asistencia Judicial de la Región Metropolitana*, Santiago De Chile, Chile
- Mr Dennis HO, Ho & Ip Solicitors, Hong Kong S.A.R., People's Republic of China
- Mrs Dilia Leticia JORGE MERA, Family Law Lawyer, Santo Domingo, Dominican Republic
- Ms Outi KEMPPAINEN, Legislative Counsellor, Law Drafting Department, Private Law Unit, Ministry of Justice, Finland
- Ms Mary KEYES, Professor, Griffith University Law School, Brisbane, Australia
- Ms Olga KHAZOVA, Senior Research Fellow, Associate Professor, Institute of State and Law, Russian Academy of Sciences, Moscow, Russia

¹ Conclusions and Recommendations adopted by the Council in 2014, para. 5.

- The Honorable Judith L. KREEGER, Circuit Judge, Eleventh Judicial Circuit of Florida, Miami, United States of America (member of the International Hague Network of Judges)
- The Honourable Justice Baratang MOCUMIE, Free State High Court, Bloemfontein, South Africa (member of the International Hague Network of Judges)
- The Honourable Mrs Annette C. OLLAND, Senior Judge, District Court of The Hague, The Hague, Netherlands (member of the International Hague Network of Judges)
- Ms Nieve RUBAJA, Professor in Private International Family Law and Researcher, *Universidad de Buenos Aires, Facultad de Derecho*, Buenos Aires, Argentina
- Mr Peretz SEGAL (retired), former Head of Legal Counsel Department, Ministry of Justice, Jerusalem, Israel
- Mr Robert G. SPECTOR, Glenn R. Watson Chair & Centennial Professor of Law Emeritus, University of Oklahoma College of Law, Norman, United States of America
- Mr Pál SZIRÁNYI, Legal Officer, JUST.A.1 Civil Justice Policy, Directorate General Justice and Consumers, European Commission, Brussels, Belgium
- Ms Bea VERSCHRAEGEN, Professor, *Universität Wien, Institut für Rechtsvergleichung*, Vienna, Austria
- Ms Catherine WESTENBERG, Attorney at Law and Mediator, MBA, Basel, Switzerland

Experts' Group on Recognition and Enforcement of Agreements in Family Matters Involving Children

2-4 November 2015



Summary of responses received to the Questionnaire of July 2015 relating to cross-border recognition and enforcement of agreements in family matters involving children

A. INTRODUCTION

1. This is a brief summary of the responses received to the Questionnaire relating to cross-border recognition and enforcement of agreements in family matters involving children.¹ The Questionnaire was circulated in July 2015 to the National and Contact Organs of the Members, Central Authorities, members of the International Hague Network of Judges, private practitioners (*e.g.*, lawyers, mediators) and other experts (*e.g.*, from academia).

2. The structure of this document follows the structure of the Questionnaire.

B. OVERVIEW

I. Statistics

3. The Permanent Bureau received a total of 89 responses to the Questionnaire. 41 responses were provided by government officials, including from Central Authorities, 25 by judges, 20 by private practitioners, 2 by academic experts and 1 by a Regional Economic Integration Organisation (European Union).

4. Responses were received from 50 States, 1 Regional Economic Integration Organisation (European Union), and 1 non-governmental organisation (ISS).

5. Of the 50 States from which responses were received, the 1980 Convention² is in force in 48 States;³ the 1996 Convention⁴ is in force in 32 States;⁵ and the 2007 Convention⁶ is in force in 26 States.

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

6. The objective of this section of the Questionnaire was to assess the role of the 1980 and 1996 Conventions, as well as other international instruments or bilateral agreements concerning cross-border recognition and enforcement of agreements in international child abduction cases.

7. The section included two case illustrations concerning international child abduction.

¹ The Questionnaire is available on the Hague Conference website at < <https://assets.hcch.net/docs/e10412aa-e638-444c-a697-7883f78bb2c0.pdf> >.

² *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

³ This number includes the People's Republic of China where the 1980 Convention is in force in the Special Administrative Regions of Hong Kong and Macao.

⁴ *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.*

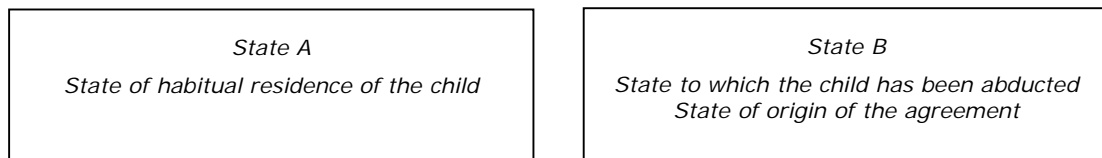
⁵ Italy ratified the 1996 Convention on 30 September 2015, and the Convention will enter into force in January 2016. It is, therefore, counted as a Contracting State to the 1996 Convention.

⁶ *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.*

8. In Case illustration No 1, the parents mediate in the State to which the child has been abducted (State B, the State in which the agreement is concluded, hereinafter referred to as the "State of origin") and reach the agreement that the mother and child will return to the State of habitual residence (State A) under certain conditions which concern custody of and contact with the child, as well as the matrimonial home.⁷

9. In Case illustration No 2, the parents reach, in the State to which the child has been abducted (State B, State of origin), the agreement that mother and child will *not* return to the State of habitual residence (State A). Terms of the agreement concern custody of and contact with the child, including a visitation schedule and payment for travel arrangements.⁸

Case Illustrations No 1 and 2:



Case illustration No 1 (mutually agreed return):

10. In relation to Case illustration No 1, the respondents were divided as to whether the agreement is enforceable in the State of origin (State B), which is not the State of habitual residence of the child,⁹ with a slightly higher number of responses answering the question in the affirmative than in the negative; a small number of responses stated that the agreement would only be enforceable in part.¹⁰

11. Those responses that reported the unenforceability of the agreement in the State of origin explained that the court in that State (which is not the State of habitual residence) would lack jurisdiction to rule on these matters. Most of those respondents based their view on Article 16 of the 1980 Convention or Article 7 of the 1996 Convention.

12. Most of the respondents who mentioned that the agreement would only be enforceable in part noted, similarly, that only the term relating to the return is enforceable since the court in the State of origin lacked jurisdiction to rule on matters other than the child's return.¹¹

13. With regard to conditions for the enforceability¹² in the State of origin, most respondents stated that it is necessary to incorporate the agreement in a judgment, turn it into a court order, or have it approved otherwise by a court in that State (State B).¹³ Some respondents stated that the agreement has to be turned into a court order or be otherwise formalised in the State of habitual residence (State A) so that enforcement can be sought in the State of origin.¹⁴

⁷ The parents agree that the mother would return to State A with the child on the following conditions: (1) the parents have joint custody; (2) the child will live with the mother in the former matrimonial home, from which the father will move out; (3) the child will stay with the father every second weekend.

⁸ The parents agree that the mother will not return to State A with the child on the following conditions: (1) the parents have joint custody; (2) the child will spend the summer holidays with the father in State A and the father will pay for the child's travel; (3) father and child will have contact via phone or skype every weekend and the father can visit the child on weekends or weekdays when he is in State B.

⁹ Question 1 under Case illustration No 1 (mutually agreed return) of the Questionnaire.

¹⁰ 40 responses confirmed enforceability in State B; 31 responses denied enforceability (two responses were classified under the two aforementioned options as the enforceability depended on the applicable legal basis); 11 responses stated that the agreement would be enforceable in part; 9 responses were classified as "unclear / not mentioned".

¹¹ See Art. 16 of the 1980 Convention and Art. 7 of the 1996 Convention. A few respondents mentioned in their responses to the Questionnaire (including in other sections of the Questionnaire) that despite the applicability of these provisions, courts in Hague return proceedings accept agreements concerning child custody, contact and visitation.

¹² A few respondents mentioned in their answers in Sections II and III that more than one option was available in their State, including the option of making a court order (directly) in the State where recognition and enforcement of the agreement is sought *and* the option of recognition and enforcement of a foreign court order.

¹³ A few respondents mentioned the possibility to authenticate, notarise, file or register the agreement with a competent authority in the State of origin (State B).

¹⁴ It seems that these respondents considered that the court in the State of habitual residence had jurisdiction (see *supra* note 11) but it was not clear from the responses whether that court would turn the whole agreement

14. The responses differed regarding the legal basis for enforceability, depending on whether the 1980 Convention, the 1996 Convention or the Brussels IIa Regulation¹⁵ was in force in the respondent's State. While approximately half of the responses referred to applicable domestic law, the other half mentioned that the 1980 and 1996 Conventions (and the Brussels IIa Regulation) provide the legal basis for enforcement.

15. In the latter context, some responses indicated that where the agreement is enforceable in the State of origin, Article 16 of the 1980 Convention or Article 7 of the 1996 Convention did not pose an obstacle. On the other hand, a few responses stated Article 11 of the 1996 Convention as a legal basis, suggesting that this agreement could only be enforced in State B if regarded as an urgent measure of protection.

16. Regarding the ability to recognise and enforce the agreement in the State of habitual residence (State A),¹⁶ the majority of the respondents gave an affirmative answer.¹⁷ The responses differed as to the conditions according to which an agreement can be recognised and enforced: approximately half of the responses stated that the agreement would need to be turned into a court order, be approved otherwise by a court, or authenticated in the State of habitual residence (State A). In this context, a few respondents mentioned that the court order in State A would mirror the terms of an order that had previously been made in State B incorporating the terms of the agreement. The other half of the responses noted that the agreement would need to be turned into a court order in State B and recognition and enforcement of this order be sought in State A.

17. Responses were diverse as to whether the court in State A would review the content of the agreement and / or the international jurisdiction of the court in State B, where applicable. The responses were broadly balanced for both options (court order in State A, or recognition and enforcement of a court order of State B by a court in State A), with approximately half of them reporting that the court would review the content while the other half reported that it would not review the content; some stated that the court in State A would only review the international jurisdiction of the court in State B but not the content of the agreement. Despite the diversity of responses, it transpires, however, that the majority of respondents referring to the 1996 Convention noted that the international jurisdiction of the court in the State of origin, but not the content of the agreement, would be reviewed.

18. Regarding the question of recognition and enforceability in State A, some respondents mentioned that the agreement would only partially be recognised and enforced, with the majority of those noting that all terms, except for the attribution of the matrimonial home, would be recognised and enforced.

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

19. In relation to Case illustration No 2, most responses affirmed that the agreement is enforceable in the State of origin (State B).¹⁸

20. A great majority of those respondents mentioned that, in order to be enforceable, the agreement would need to be incorporated in a judgment, turned into a court order, or be approved otherwise by a court, or be authenticated in State B. These respondents referred to

into a court order or only the part relating to child custody, contact and visitation, without the term relating to the child's return since the court in State B would have jurisdiction over this matter in a Hague return case.

¹⁵ 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.

¹⁶ Question 2 under Case illustration No 1 (mutually agreed return) of the Questionnaire.

¹⁷ 68 responses confirmed that the agreement can be recognised and enforced in the State of habitual residence of the child; 9 responses stated that the agreement would be recognised and enforced in part (one response was classified under the two aforementioned options as the enforceability depended on the applicable legal basis); 3 responses reported that it could not be recognised and enforced; 10 responses were classified as "unclear / not mentioned".

¹⁸ Question 1 under Case illustration No 2 (mutually agreed non-return) of the Questionnaire. 65 responses confirmed that the agreement is enforceable in the State of origin of the agreement (State B); 5 responses stated that the agreement was enforceable in part; 6 responses stated that it was not enforceable; 13 responses were classified as "unclear / no response".

¹⁸ See Art. 13(1)(b) of the 1980 Convention and Art. 7(a) of the 1996 Convention.

their domestic law and / or mentioned, among others, Article 5 of the 1996 Convention (and / or Art. 8 of the Brussels IIa Regulation) as the legal basis for enforcement. Many respondents were of the view that State B, the State to which the child had been abducted, has become the State of habitual residence of the child and jurisdiction would now lie with the court in that State.

21. It should be noted, however, that explanations on when and why the habitual residence of the child has changed were different and vague. Some respondents stated that habitual residence changed with the parent's agreement that the child should stay in the "new" State, while others saw the agreement as a withdrawal of the return application or as a consent to the wrongful removal.¹⁹ Other respondents envisaged a transfer of jurisdiction referring to Articles 8 and 9 of the 1996 Convention. Yet others were vague and merely confirmed that the agreement would be enforceable "as of the moment" the child acquires habitual residence in State B, thus leaving it unclear as to *when* the habitual residence of the child changes.

22. Only a few respondents reported that the agreement would first need to be incorporated in a judgment, turned into a court order, or be authenticated in State A, and recognition and enforcement of this court order be sought in the State of origin of the agreement, State B.

23. A few responses stated that the agreement could be enforceable in part, with the majority of those stating that the agreement term on joint custody could not be enforced due to their domestic law.

24. With regard to whether the agreement can be recognised and enforced in the State of the habitual residence of the child (State A),²⁰ the majority responded in the affirmative.²¹ More than half of those responses stated the requirement that the agreement has to be incorporated in a judgment, turned into a court order, or be approved otherwise by a court in State B, before being recognised and enforced in State A. The remainder stated that to be enforceable, the agreement would need to be incorporated in a judgment, be turned into a court order, or be approved otherwise by a court in State A.

25. Similar to Case illustration No 1, responses were diverse as to whether the court in State A would review the content of the agreement and / or the international jurisdiction of the court in State B, where applicable.

26. From the responses to this section of the Questionnaire, the following conclusions can be drawn:

- In almost all surveyed States, an agreement concluded in a case of international child abduction needs to be incorporated in a judgment, turned into a court order, or be approved otherwise by a court in order to be recognised and enforceable in both the State of origin and the State in which recognition and enforcement of a foreign agreement is sought. Depending on the facts of the case and the applicable law, it is necessary to have either one court order for which enforcement is sought abroad, or two court orders – one in the State of origin and one in the foreign State.²² Some respondents referred to Article 46 of the Brussels IIa Regulation,²³ granting authentic instruments and agreements the same status as judgments if they are enforceable in the State of their origin.
- Concerning an agreement concluded in the State where the child is present (not the State of habitual residence), stating that the child will return to the State of habitual residence, and also including terms on custody and contact, there seems to be no unity as to whether

¹⁹ See Art. 13(1)(b) of the 1980 Convention and Art. 7(a) of the 1996 Convention.

²⁰ Question 2 under Case illustration No 2 (mutually agreed non-return) of the Questionnaire.

²¹ 64 responses confirmed that the agreement is enforceable in the State of habitual residence of the child (State A); 3 responses stated that the agreement was enforceable in part; 4 responses stated that it was not enforceable; 18 responses were classified as "unclear / no response".

²² The "foreign State" or "requested State" refers to the State in which recognition and enforcement of the agreement is sought, and which is not the State of origin.

²³ Art. 46 of the Brussels IIa Regulation states that "[d]ocuments which have been formally drawn up or registered as authentic instruments and are enforceable in one European Union (EU) Member State and also agreements between the parties that are enforceable in the EU Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments".

such an agreement can be recognised in the State of origin. The role that Article 16 of the 1980 and Article 7 of the 1996 Convention play seems to be unclear. This is also indicated by the small number of responses which stated that only the terms related to the return would be enforceable. Some responses even mentioned that, although it is understood that the above-mentioned articles prevent the recognition of the agreement in the State of origin, such agreements are nevertheless concluded in accordance with the will of the parents and are sanctioned by the judge sitting in the return proceedings. It seems that there is a desire to give effect to the will of the parents who have agreed on a set of conditions linked to the return of the child.

- The situation seems to be clearer in cases where the parents agree that the child will *not* return. Here, it is assumed that the State of origin of the agreement has become the State of habitual residence of the child. Thus, the courts in that State have jurisdiction to enforce the terms of the agreement. However, from the responses received, it is, *i.a.*, not clear at which point in time the habitual residence of the child changes (*e.g.*, whether it changes at the moment the parents agree on the non-return of the child, or after the child has resided for a certain length of time in the “new” State).

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

27. The objective of this section was 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.

28. Case illustration No 3 describes a situation of international family relocation. The parents conclude an agreement in the State of habitual residence of the child (State A) detailing the terms under which the mother can relocate with the child to State B. The terms include matters of custody, contact and visitation, organisation of the child’s travel and payment of travel costs, spousal and child maintenance. After the relocation, the father seeks enforcement of the agreement in State B (which is not the State of origin but the State of habitual residence of the child after relocation).

Case illustration No 3:



29. The respondents were first asked to elaborate on whether the agreement could be recognised and enforced in State B, which has become the State of habitual residence of the child after the relocation.²⁴

30. According to the majority of respondents, the agreement can be recognised and enforced in State B.²⁵

31. From those respondents, most stated as a condition that the agreement be incorporated in a judgment, turned into a court order, approved otherwise by a court, or authenticated by a competent authority in State A, before recognition and enforcement is sought in State B. The respondents referred to their respective domestic law, the 1996 and 2007 Conventions (and / or the Brussels IIa Regulation and the Maintenance Regulation²⁶) and other international instruments as providing for the legal basis for the recognition and enforcement of the court order (or of an authentic instrument under the Brussels IIa Regulation) made in State A. Half of these respondents stated that the court in State B would not review the content of the court

²⁴ Question 1 under Case illustration No 3 (relocation agreement) of the Questionnaire.

²⁵ 68 responses confirmed that the agreement is enforceable in the State B; 3 responses stated that the agreement was enforceable in part; 3 responses stated that it was not enforceable; 15 responses were classified as “unclear / no response”.

²⁶ 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.

order from State A, some of which mentioned that the court would, however, review the international jurisdiction (of the court in State A).²⁷ A few responses, however, noted that courts in State B would review the content of the agreement and / or international jurisdiction.

32. Some respondents stated that the agreement would be enforceable if it was incorporated in a judgment, turned into a court order or approved by, or registered with, a court in State B, including the possibility that the order in State B mirrors the terms of an order made in State A. In this scenario, the majority of responses suggested that the court in State B would review the content of the agreement.

33. Respondents were then asked whether the fact that this relocation agreement includes a range of matters, ranging from child custody to spousal support, impacts on its cross-border recognition and enforcement.²⁸

34. A preponderant part of the responses noted that the inclusion of a range of matters in a relocation agreement has, in fact, an impact on its recognition and enforcement.²⁹ These responses mentioned that different terms of the agreement may need to be raised in different proceedings and that different courts may be competent. They also stated that there may be different enforcement conditions for different terms. In addition, some respondents noted that some terms may not be recognised, so that the agreement could only be enforced in part; others said that due to this circumstance, there was a risk that the whole agreement would not be recognised.

35. Of those respondents who were of the view that a range of matters in a relocation agreement would *not* have an impact on the cross-border recognition and enforcement of the agreement, only very few provided a reason, *i.a.*, that the court which would incorporate the agreement in an order would, in any event, review the (entire) agreement.

36. From the responses received in this section, the following conclusions can be drawn:

- In the majority of instances, an agreement concluded in the “old” State of habitual residence of the child can be recognised and enforced in the “new” State of habitual residence, provided that it is incorporated in a judgment, turned into a court order, or be approved otherwise by a court in the “old” State of habitual residence. In some jurisdictions, it is necessary to turn the agreement into a court order in the “new” State of habitual residence; this order could mirror the terms of an order which had been made in the “old” State of habitual residence. Consequently, as mentioned in relation to section 2, it is necessary to have either one court order, for which enforcement is sought abroad, or one court order in the State in which enforcement is sought, or even *two* court orders – one in the State of origin and one in the foreign State.
- It is perceived that the inclusion of a range of matters in a relocation agreement impacts on the recognition and enforcement of agreements abroad.
- It also appears that the three Hague Family Law Conventions do not ensure that recognition and enforcement of the court order giving effect to the agreement can be sought in one single court in the State addressed.

IV. Cross-border recognition and enforcement of an agreement the content of which goes beyond the scope of the 1996 and 2007 Conventions

37. Since parents do not negotiate along “convention lines”, this section sought information on the cross-border recognition and enforcement of agreements, the content of which goes beyond the scope of the 1996 and 2007 Conventions (*e.g.*, an agreement including matters on matrimonial property issues, post-divorce financial provisions falling outside the scope of spousal support, or matters related to inheritance).

²⁷ In particular those respondents who referred to the 1996 Convention as providing a legal basis for recognition and enforcement mentioned that the court in State B would not review the agreement, but only examine whether the court in State A had international jurisdiction, see Art. 27 of the 1996 Convention.

²⁸ Question 2 under Case illustration No 3 (relocation agreement) of the Questionnaire.

²⁹ 49 responses were classified as confirming that there was an impact; 15 responses stated that there was no impact; 9 respondents provided general answers which could not be classified under the first two options; 16 respondents did not answer this question or provided an unclear response.

38. Respondents were first asked whether they had 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.³⁰ A quarter of the respondents answered in the affirmative, including approximately one third of the responses provided by judges and private practitioners (those that deal with these agreements in practice). The remainder either responded that they had no experience with the inclusion of such matters or did not submit a response at all.³¹

39. The majority of affirmative responses indicated that matters outside the scope of the two Conventions concerned the distribution of property and patrimonial matters (including inheritance). A few responses raised matters related to parentage, adoption or civil and criminal proceedings.

40. Further, the Questionnaire sought to elicit how frequently such matters were included in these agreements.³² Of those who responded,³³ two thirds indicated that they had had at least some experience with the inclusion of matters outside the scope of the 1996 and 2007 Conventions in agreements. Half of those respondents stated that these matters were included *frequently* or *sometimes*, the other half had *rarely* dealt with these matters.

41. Moreover, respondents were encouraged to explain whether the requirements for the enforceability and, where applicable, recognition of an agreement that includes matters falling outside the scope of the 1996 and 2007 Conventions were different from those described above.³⁴ Slightly less than half of the responses indicated that the requirements were different.³⁵ They noted, for example, a possible lack of a legal basis for recognition and enforcement for terms falling outside the scope of the existing legal instruments, different conditions for their enforceability, the existence of specific connecting factors for different terms of the agreement, and possible restrictions of party autonomy in the area of family law. It was also mentioned that the terms of the agreement would need to be considered by different courts.

42. Finally, the respondents were asked whether the fact that an agreement includes matters that are outside the scope of the 1996 and 2007 Conventions impacts on its recognition and enforcement, *e.g.*, whether there is a risk that only parts of the agreement will be recognised and enforced.³⁶ More than half of the respondents answered in the affirmative, while about a fifth indicated that there was no impact.³⁷

43. Those respondents that confirmed an impact mentioned, among others, that some agreement terms would not be recognised and enforced at all; that different enforcement conditions would apply for each term; that some terms would need to be recognised and enforced in separate court proceedings or by different courts; or that the entire agreement would not be recognised and enforced since a partial recognition of the agreement was not possible.

³⁰ Question 1 under Section IV of the Questionnaire.

³¹ 22 respondents answered this question in the affirmative (confirming that they have dealt with agreements containing terms falling outside the scope of the 1996 and 2007 Conventions); 45 respondents in the negative; 22 respondents did not give an answer or noted that this question was not applicable in their case.

³² Question 2 under Section IV of the Questionnaire.

³³ In total, 42 respondents stated that they had had some experience with the inclusion of such matters in agreements: 7 responses indicated "frequently", 13 responses indicated "sometimes" and 22 responses indicated "rarely". The remainder of the responses indicated that they had had no experience with the inclusion of such matters or did not submit a response.

³⁴ Question 3 under Section IV of the Questionnaire.

³⁵ 40 responses were classified as confirming a difference in the requirements for enforceability (and, where applicable, recognition) and 19 responses indicated that the requirements were *not* different, but most of them did not provide further elaboration (two responses were classified under both aforementioned options since they mentioned that the requirements would not be different from the perspective of the State of origin but would be different from the perspective of the requested State); 32 respondents did not answer the question or their answers were classified as "unclear".

³⁶ Question 4 under Section IV of the Questionnaire.

³⁷ 54 respondents confirmed an impact, 14 answered in the negative and 21 did not proffer an answer to this question or their answer was classified as "unclear".

44. From the responses to this section of the Questionnaire, the following conclusions can be drawn:

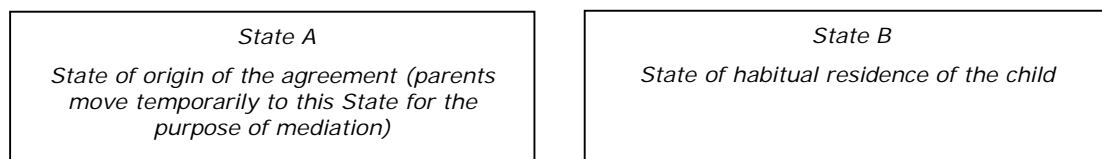
- In practice, agreements may include a range of matters which may fall outside the scope of the 1996 and 2007 Conventions. In such a situation, it is probable that there are different requirements for the enforceability (and recognition, if applicable) of the different terms of the agreement, *e.g.*, because of the application of different legal bases, or where different courts are competent.
- Where there is no legal basis for the recognition and enforcement of certain terms, or where the court does not have jurisdiction in respect of certain issues, there is a real risk that either particular terms of the agreement or the *entire* agreement cannot be recognised and enforced.

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

45. This section of the Questionnaire focused on the role of “party autonomy” in relation to agreements reached in international family disputes involving children.

46. Case illustration No 4 describes a case where the parents and child move from State A to State B. After a year of living in State B, the parents decide to separate and go back to State A temporarily to mediate on child custody and contact issues. The mediation agreement is concluded in State A within three weeks. State B remains the State of habitual residence of the child and both parents will continue living in State B.

Case illustration No 4:



47. The respondents were asked whether the agreement would be enforceable and, where appropriate, recognisable in the two relevant States. Input was also sought on whether party autonomy would allow the parties to choose a forum other than the State of habitual residence of the child to reach an agreement.³⁸

48. With regard to the recognition and enforceability of the agreement in State A (which is the State of origin but not the State of habitual residence), the responses were broadly balanced, with approximately half of them reporting that the agreement was capable of being recognised and enforced in this State, while the other half reported that it was not, predominantly referring to the fact that the court lacked jurisdiction.³⁹

49. The great majority of respondents confirmed recognition and enforceability of the agreement in State B, the State of habitual residence.⁴⁰

50. In both circumstances, the agreement would need to be incorporated in a judgment, turned into an order or be approved otherwise by a court.

51. With respect to the parties' autonomy to choose a forum other than the habitual residence of the child to reach an agreement, approximately half of the respondents who answered that question noted that parties have such autonomy;⁴¹ the other half noted that they have not. The

³⁸ Question 1 under Case illustration No 4 of the Questionnaire.

³⁹ 24 responses indicated that the agreement could be recognised and enforced in State A; 22 responses indicated that the agreement could not be enforced in State A (two responses were classified under the two aforementioned options as the enforceability depended on the applicable legal basis); 34 responses were classified as “unclear / not mentioned”.

⁴⁰ 46 respondents answered in the affirmative; 3 respondents answered in the negative; 29 responses were classified as “unclear / not mentioned”.

⁴¹ However, of those responses, a few noted that the agreement would only be regarded as a private contract and may therefore need to be recognised by a court in order to be enforceable (in the State of origin or in the

reasons provided varied greatly. Therefore, it is not possible to distil a preponderant view for or against the existence of party autonomy. However, what might be drawn from the responses is an acknowledgement that party autonomy is currently restricted in the applicable private international law instruments, including the 1996 and 2007 Conventions. Further, some respondents suggested that consideration should be given to reflect upon the need for more party autonomy that would allow parents, *i.a.*, to settle their dispute or, in the absence of a dispute, to organise their family affairs, in a forum of their choice. In this context, it was, *i.a.*, noted that more party autonomy in international family law matters may have positive effects, including with respect to the best interests of the child.

52. The respondents were also asked whether they would answer differently if the agreement had been reached by parents who were based in different States and mediation was done from a distance, *e.g.*, by using online dispute resolution services.⁴² The great majority of the responses indicated that there would be no difference.

53. From the responses to this section of the Questionnaire, the following conclusions can be drawn:

- There is a division of opinion as to whether an agreement that has been concluded in a State which is not the State of habitual residence of the child, but was chosen by the parents, can be recognised and enforced in the State in which it was concluded, mainly because it was not clear whether the court in that State had jurisdiction. The situation seems to be clearer when recognition and enforcement is sought in the State of habitual residence.
- There is also divided opinion as to whether parents have the autonomy to choose a forum to reach an agreement.

VI. Other questions

54. This section of the Questionnaire sought to gather general information on the usefulness and interplay between the 1980, 1996 and 2007 Conventions.

55. Respondents in whose jurisdictions the 1996 and 2007 Conventions are in force were asked to describe, with respect to the above-mentioned case illustrations, any legal and / or practical challenges in the application of these Conventions, in particular their interplay with each other.⁴³

56. The predominant view is that there are legal and practical challenges.⁴⁴

57. Legal challenges concerned, among others:

- the recognition and enforcement of agreements (or court orders incorporating such an agreement) in a State other than the State of origin;⁴⁵
- the enforceability of agreements, the content of which goes beyond the scope of either or both the 1996 and 2007 Conventions (“package agreements”);
- the relationship between the Hague Family Law Conventions, other international instruments and domestic law.

58. Practical challenges concerned, among others:

foreign State). Similarly, a few other respondents noted that it matters less where the agreement was concluded since recognition and enforcement of the agreement terms depends on whether a court has jurisdiction to incorporate the term of this agreement into a court order.

⁴² Question 2 under Case illustration No 4 of the Questionnaire.

⁴³ Question 1 under Section VI of the Questionnaire.

⁴⁴ Only a very small number of respondents mentioned that there were no challenges. From those that responded to this question, 42 stated that there are legal and practical challenges (often stating more than one challenge) and 4 respondents stated that there were none.

⁴⁵ In this context, respondents noted that challenges may arise due to different requirements for enforceability and the need to have court approval (sometimes from courts in both States involved) before the agreement can be enforced. It was also mentioned that over the course of the required formal process, the advantages that an amicable agreement offers (*i.a.*, celerity) may be lost.

- costs (*e.g.*, in relation to proceedings, translation of documents);
- time (in particular the duration of court proceedings, which may have to be initiated in more than one State);
- administrative requirements (*e.g.*, legalisation of documents);
- legal representation (*e.g.*, some respondents considered it vital for parties to have legal representation due to the complexity of the applicable legal instruments and their interplay, and saw this as a disadvantage for self-representing litigants).

59. Moreover, respondents in whose jurisdictions the 1996 and 2007 Conventions are not in force were asked to provide any comments as to the potential usefulness of the Conventions *de lege ferenda*.⁴⁶ Those that responded commented positively on the usefulness of the Conventions.⁴⁷

60. Finally, the Questionnaire sought opinions on whether a new international instrument (binding or non-binding) would 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.⁴⁸

61. Two thirds of those that answered this question saw merit in pursuing the development of an international instrument in this area (most of them without specifying whether it should be a binding or non-binding instrument).⁴⁹ They noted, among others, that a new instrument could:

- unify criteria for different aspects of the agreement and facilitate the recognition and enforcement of agreements;
- ensure the enforceability of, in particular, “package agreements”;
- resolve issues of jurisdiction, including by allowing a choice of forum for the dispute settlement;
- clarify the role of Article 16 of the 1980 Convention and Article 7 of the 1996 Convention, in particular when parents mediate in international child abduction cases and agree on the return of the child under certain conditions.

62. It was noted that this new instrument could increase legal certainty and ensure that amicable solutions are practical and effective, thus furthering the attractiveness of such agreements.

63. Some responses indicated that a new international instrument would not help overcome legal and practical challenges. A few of those opined that the existing instruments are sufficient.

64. From the responses to this section of the Questionnaire, the following conclusions can be drawn:

- In jurisdictions where the 1996 and 2007 Conventions are in force, there remain concerns as to the “portability” of the agreement, *i.e.*, enforceability in a State other than the State of origin. There is also a lack of certainty with respect to the enforceability of “package agreements”.
- There is a perceived risk that the agreement may not be enforceable and this may undercut efforts to promote amicable dispute settlement.

⁴⁶ Question 2 under Section VI of the Questionnaire.

⁴⁷ 17 respondents answered this question and elaborated on the usefulness of the 1996 and 2007 Conventions. The remainder did not answer this question.

⁴⁸ Question 3 under Section VI of the Questionnaire.

⁴⁹ 44 respondents stated that a new international instrument would help overcome legal and practical challenges and often provided several reasons for their views; 15 respondents answered this question in the negative; 29 respondents did not answer the question or raised general points which could not be clearly classified.

- A predominant view is that proceedings are costly and lengthy, since, in most cases, the agreement would have to be incorporated in a judgment, turned into a court order, or be approved otherwise by one or more courts in order for it to be enforceable.
- Further, concerns were raised as to the complexity of the different applicable international instruments and their interplay with each other and domestic law.
- Many responses perceived a new instrument (binding / not binding) to be potentially helpful. Such an instrument would provide for efficient enforcement of agreements (including “package agreements”) and increase legal certainty for parents who seek to organise their family affairs or settle their dispute on an amicable basis.