

# Practitioners' Tool

## Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children

**Practitioners' Tool:**

**Cross-Border Recognition  
and Enforcement of  
Agreements Reached in  
the Course of Family Matters  
Involving Children**

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## Foreword

It is my great pleasure to present the *Practitioners' Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children*.

The Council on General Affairs and Policy (CGAP), the HCCH governing body, established the Experts' Group overseeing this project at its 2012 meeting. The discussions surrounding its formation were characterised by three important issues:

- first, the increased mobility of families and children across borders;
- secondly, the increased settlement of family matters and disputes through agreements between the parties; and
- thirdly, the practical and legal challenges concerning the recognition and enforcement of voluntary agreements across borders. Although the existing HCCH 1980 Child Abduction, HCCH 1996 Child Protection, and HCCH 2007 Child Support Conventions promote amicable settlements, the first two of these Conventions do not provide comprehensive and easily practicable solutions for making these settlements enforceable across borders and the third Convention only covers the maintenance elements of such voluntary agreements.

Since that time, the Experts' Group responsible for the Tool has taken up study of countless facets and situations concerning the cross-border recognition and enforcement of family agreements involving children. It has been no small task to navigate all the contours and overlaps of these three instruments. Great care was taken to assess all possible scenarios and perspectives in cross-border family situations, taking into account legal doctrine, special features of national and regional systems, and the experience of direct practitioners. At its 2022 meeting, CGAP approved the Tool for publication.

This work, first towards a new binding instrument, and then towards a non-binding tool, was carried out with precision, patience and thoughtful compromise from all contributors. The list of those who deserve acknowledgement and thanks for their work over the years is, as a consequence, quite long.

I thank the esteemed members of the Experts' Group—some who have long served on this project, and others who were recently designated. In the first phase of the project, Professor Katharina Boele-Woelki of Utrecht University chaired the Experts' Group, with the support of colleagues at the Permanent Bureau (PB), First Secretary Louise Ellen Teitz and Legal Officer Kerstin Bartsch. I am grateful for their contributions. I also express my deepest gratitude to the most recent Chair of the Experts' Group and long-time friend of the HCCH, Professor Paul Beaumont of the University of Stirling, who shepherded the project in its second phase, with the support of my PB colleagues, First Secretary Philippe Lortie and the Representative for Latin America and the Caribbean Ignacio Goicoechea. Special acknowledgement is due as well to Juliane Hirsch who, in her capacity as consultant, first gave tangible form to the work of the Experts' Group in the 2019 draft. I wish to express my special thanks to Deputy Secretary General Gérardine Goh Escolar who, in close cooperation with the Chair and members of the Experts' Group, and ably assisted by Legal Officers Frédéric Breger, Raquel Salinas Peixoto and Harry Cheng, effectively finalised this Practitioners' Tool. My sincere thanks also go to the many staff members and interns of the PB who have been involved in the project over the years.

The Tool will be a valuable addition to the library of HCCH publications, and I am convinced that this important work will enhance the ability of practitioners to navigate important connections between the HCCH family law and child protection instruments, bringing greater certainty and stability to family arrangements across the globe.

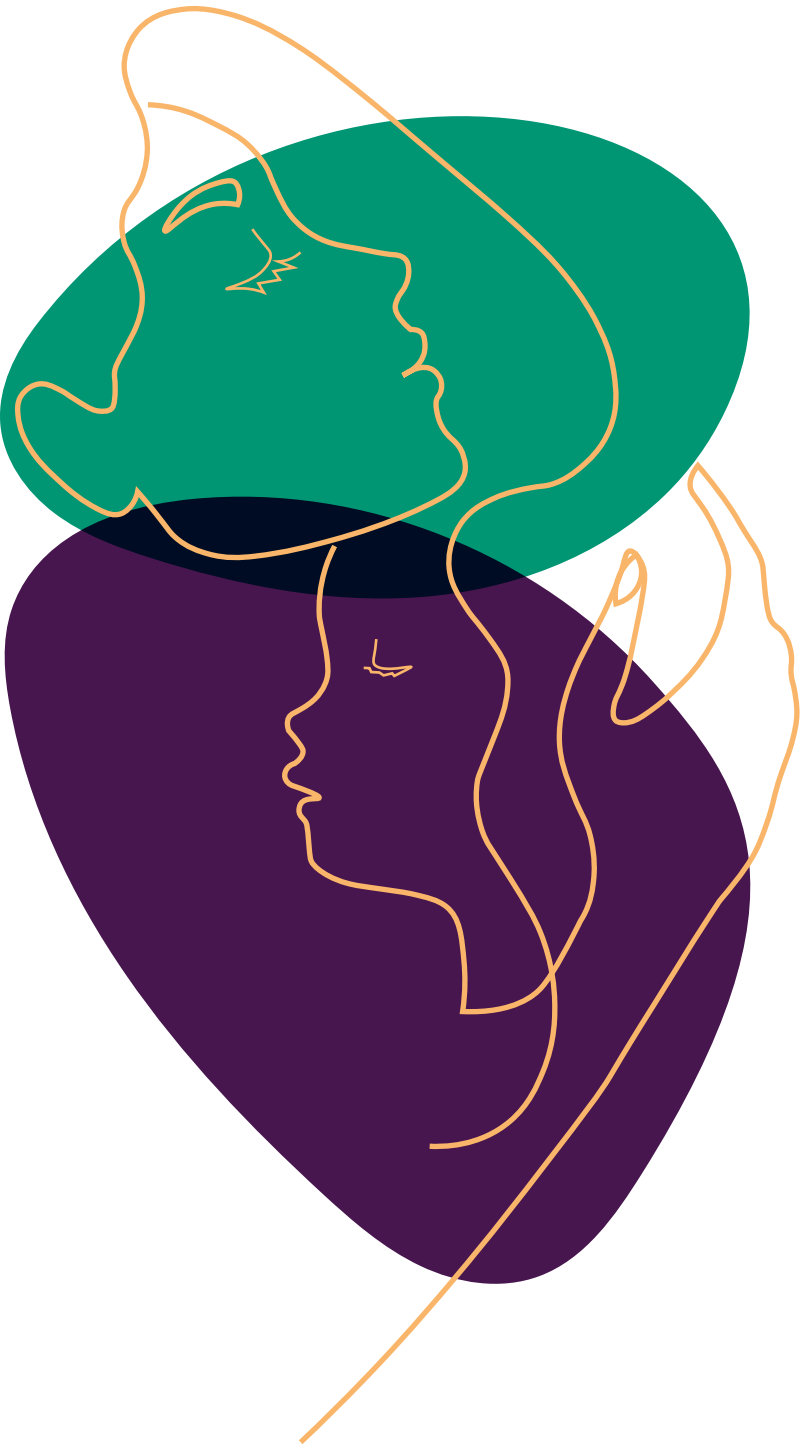
Christophe Bernasconi | *Secretary General*



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## Introduction





1. The Practitioners' Tool aims to explain how agreements made in the area of family law involving children ("family agreements") can be made enforceable in one State and then recognised and enforced in other States through the operation of mechanisms under HCCH Conventions. It is described as a Practitioners' Tool because it is written for those legal and other professionals (e.g., mediators) who are helping families with children navigate cross-border issues by reaching a formal agreement. The HCCH Conventions discussed in this document are:
  - the Child Abduction Convention,<sup>1</sup>
  - the Child Protection Convention,<sup>2</sup> and
  - the Child Support Convention.<sup>3</sup>
2. As these HCCH Conventions each contain features designed to address certain aspects of cross-border family matters involving children, the Practitioners' Tool identifies and discusses challenges that may arise in securing the enforceability of family agreements in cross-border situations where multiple HCCH Conventions may apply. Family agreements can have a very important role in deterring parental child abduction and facilitating the continuation of a meaningful relationship for a child with both of their parents when the parents are living in different States.<sup>4</sup> Mutually agreed solutions have also been used to resolve cases of parental child abduction, often in a more holistic way than is possible by a judicial decision on return of the child to their habitual residence before their wrongful removal or retention, or a decision on non-return.<sup>5</sup> Thus, mutually agreed solutions may help consolidate and resolve family matters that cannot be fully addressed by one Convention. Various dispute resolution techniques may be available to legal advisers pursuing such solutions, including mediation.<sup>6</sup> Whichever technique is chosen, the content of this Practitioners' Tool may be read to assist in understanding principles common to these Conventions and to help apply them to typical cross-border situations that may be suitable for resolution by a family agreement.
3. **The legal information provided in this Practitioners' Tool does not constitute or replace legal or professional advice. Readers contemplating drafting a family agreement with cross-border elements are strongly encouraged to seek legal advice regarding their particular circumstances.**
4. **The information in this Practitioners' Tool applies only where the States concerned are Contracting Parties to one or more of the HCCH Conventions named above and the Convention is in force between them. Which Convention is relevant to the**

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<sup>1</sup> *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, "Child Abduction Convention").

<sup>2</sup> *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, "Child Protection Convention").

<sup>3</sup> *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, "Child Support Convention").

<sup>4</sup> Art. 10(2) of the *United Nations Convention of 20 November 1989 on the Rights of the Child* (hereinafter, "UNCRC") says: "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents".

<sup>5</sup> See HCCH, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part V – Mediation*, The Hague, 2012 (hereinafter, "Guide to Good Practice on Mediation"); S. Vigers, *Mediating International Child Abduction Cases: The Hague Convention*, Hart, 2011.

<sup>6</sup> See the Guide to Good Practice on Mediation (*op. cit.* note 5).

**particular situation depends on the subject matter of the family agreement.** The status information on the HCCH website shows whether the relevant States concerned are Contracting Parties to the Child Abduction, Child Protection, and / or Child Support Conventions. For the Child Abduction Convention, a Contracting Party's accession to (as opposed to ratification of) the Convention needs to be accepted by a Contracting Party to the Convention for it to enter into force as between these Contracting Parties. For the Child Protection Convention, where a Contracting Party accedes to the Convention (as opposed to ratifying it), the accession will have effect only as regards the relations between the acceding Party and those Contracting Parties that have not raised an objection within the timeframe set by the Convention (see Art. 58 of the Child Protection Convention). The same is true for the Child Support Convention (see Art. 58 of the Child Support Convention). For the Child Support Convention, Contracting Parties can make reservations and declarations, which can affect the scope of the Convention.<sup>7</sup>

5. The Practitioners' Tool does not cover situations where none of these three Conventions apply, for example, where the subject matter of the agreement (or part thereof) does not fall within the scope of any of these Conventions,<sup>8</sup> or where the States concerned are not Contracting Parties to the relevant Convention. Note also that the means by which family agreements can be (rendered) legally binding and enforceable in any given legal system depend on considerations of substantive family law and domestic procedural law of the States concerned.<sup>9</sup> These considerations fall outside the scope of this Practitioners' Tool. This Practitioners' Tool does not address issues relating to general private international law.
6. **The main audience of the Practitioners' Tool is legal or professional advisers who deal with cross-border family law situations.**
7. The Practitioners' Tool is divided into six Sections. Section I introduces the concepts and terminology used in the Practitioners' Tool. Section II discusses the three HCCH Conventions that this Practitioners' Tool refers to: the Child Abduction Convention, Child Protection Convention, and Child Support Convention, and elaborates upon these Conventions in the context of family agreements. Section III considers some specific issues that may arise in the context of family agreements. Section IV surveys the application of these Conventions in typical cross-border situations that may involve family agreements. Section V provides the general questions to consider in

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<sup>7</sup> See para. 53 and accompanying footnote.

<sup>8</sup> Criminal law issues, for example, fall outside the scope of the Child Abduction, Child Protection and Child Support Conventions. For further information on the matter of criminal prosecution when trying to reach a family agreement, see the Guide to Good Practice on Mediation (*op. cit.* note 5), Chapter 2.8, paras 85 *et seq.*, and the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI – Article 13(1)(b)*, The Hague, 2019 (hereinafter, "Guide to Good Practice on Art. 13(1)(b)"), Chapter II.2.e.i, para. 67.

<sup>9</sup> Certain regional instruments may also apply. For example, in the European Union (EU), the following Regulations are of relevance, since these Regulations would apply between the Member States of the EU to recognition and enforcement in intra-EU matters: **Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000** (hereinafter, "the Brussels IIa Regulation"); **Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (hereinafter, "the EU Maintenance Regulation"); and **Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of judgments in matrimonial matters and the matter of parental responsibility, and on international child abduction** (hereinafter, "the Brussels IIb Regulation"). The Brussels IIb Regulation adopted on 25 June 2019 applies in place of the Brussels IIa Regulation as from 1 August 2022 to all EU Member States except Denmark.

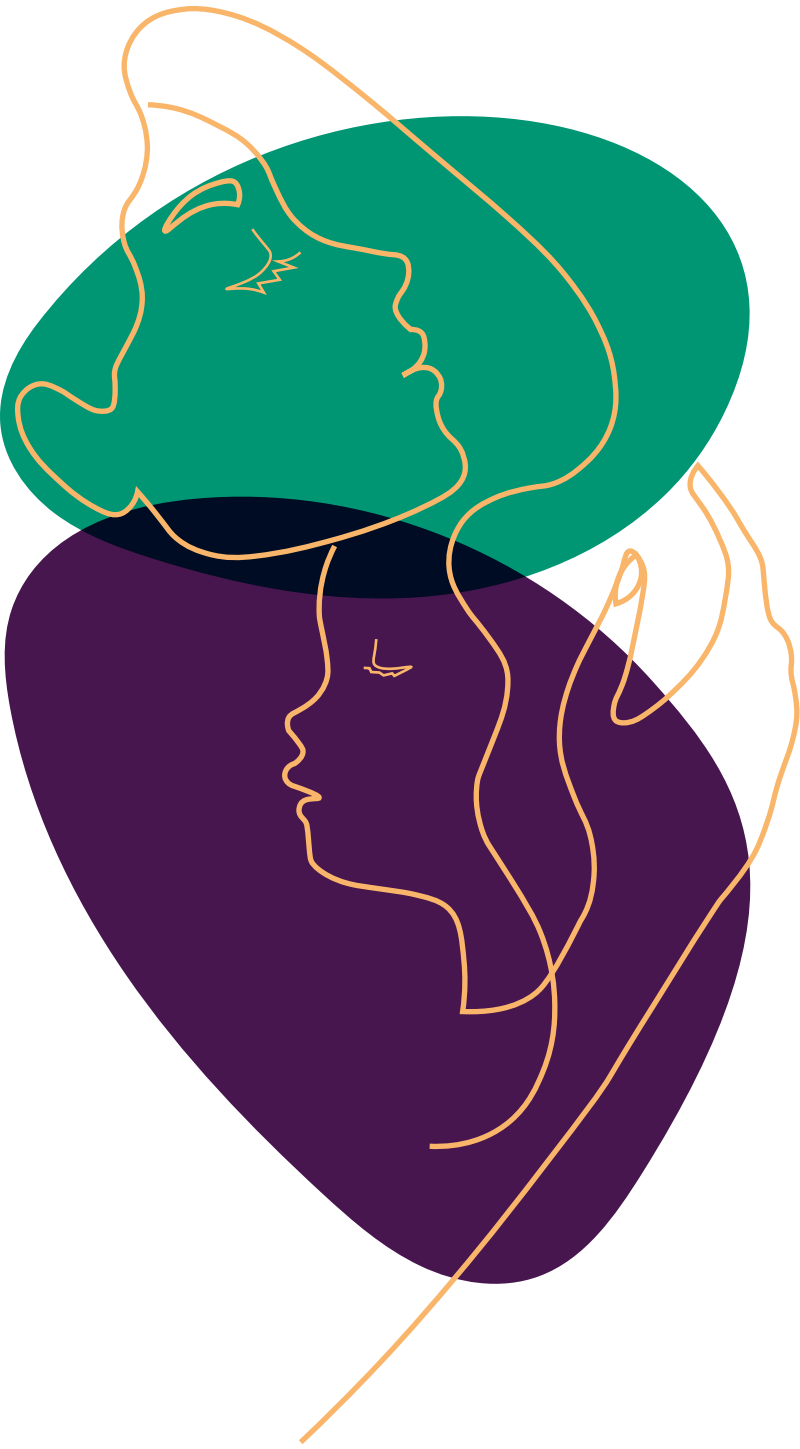
the context of how family agreements can be recognised and enforced in a foreign Contracting Party under the Child Support and Child Protection Conventions listed above. Section VI presents useful resources.

8. The HCCH would like to thank the many experts whose knowledge and experience have contributed to this document and, in particular, the members of the Experts' Group on Family Agreements, chaired by Professor Paul Beaumont (University of Stirling, Scotland, United Kingdom), and composed of judges, government officials (e.g., Central Authority personnel), academic / cross-disciplinary experts and private practitioners from various jurisdictions, for their work on the development of the Practitioners' Tool.<sup>10</sup>

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<sup>10</sup> The following experts were, throughout or at different stages, involved in the drafting of this Tool: Judges: Judge Sabine Brieger (Germany), Judge Jan-Marie Doogue (New Zealand), Judge Judith Kreeger (United States of America), Judge Baratang Constance Mocomie (South Africa), Judge Jacquelyn Moran (New Zealand), Judge Annette C. Olland (Netherlands); Government officials: Ms Miriam Baron (Israel), Ms Yael Blondheim (Israel), Mr Carlos Bruno Ferreira da Silva (Brazil), Ms Lalisa Froeder Dittrich (Brazil), Mr Masayoshi Furuya (Japan), Ms Fabiana Arazini Garcia Kanadoglu (Brazil), Ms María Gabriela González Cofré (Chile), Ms Yukiko Harimoto (Japan), Mr Yosuke Ito (Japan), Ms Outi Kemppainen (Finland), Mr Eral Knight (UK), Mr Sadaharu Kodama (Japan), Ms Haldi Koit (EU) (alternate), Mr Luiz Otávio Ortigão de Sampaio (Brazil), Ms Marie Riendeau (Canada), Ms Joëlle Schickel-Küng (Switzerland), Ms Andrea Schulz (EU), Ms Angèle Sears-Debono (EU), Mr Peretz Segal (Israel), Ms Joanna Serdyska (EU), Ms Gunhild Sletmoen (Norway), Mr Pál Sziranyi (EU), Ms Javiera Verdugo Toro (Chile), Ms Lisa Vogel (United States of America), Ms Wong leong Leng (China Macau SAR); Academic/cross-disciplinary experts and private practitioners: Ms Elizabeth Aguilin-Pangalangan (Philippines), Ms Nádia de Araujo (Brazil), Mr Abed Awad (United States of America), Mr Paul R. Beaumont, Chair of the Experts' Group, Ms Katharina Boele-Woelki (Netherlands), Mr Alexandre Boiché (France), Ms Dervla Browne (Ireland), Ms Cristina González Beilfuss (Spain), Ms Nuria González Martin (Mexico), Ms Juliane Hirsch (Consultant), Mr Dennis Ho (Hong Kong SAR), Ms Dilia Leticia Jorge Mera (Dominican Republic), Ms Mary Keyes (Australia), Ms Olga Khazova (Russian Federation), Mr Alexander Leuftink (Netherlands), Ms Nieve Rubaja (Argentina), Mr Robert Spector (United States of America), Ms Wendy A. van der Stroom-Willemsen (Netherlands), Ms Bea Verschraegen (Austria), Ms Catherine Westenberg (Switzerland). The background and overview of the findings of the Experts' Group can be found in Info. Doc. No 2 for CGAP 2020, "Overview of the findings of the Experts' Group on cross-border recognition and enforcement of agreements in family matters involving children in relation to the development of a normative instrument", available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Governance" then "Council on General Affairs and Policy" and "Archive (2000-2021)".





## Terminology



9. Throughout this Practitioners' Tool, it is important to remember that each jurisdiction may use different terminology to describe the same concept or may apply different and unique definitions to familiar and common terms. Additionally, some terms found in the HCCH Conventions may have complete definitions within the Convention;<sup>11</sup> or a non-exhaustive autonomous definition;<sup>12</sup> or while undefined in the Convention, require to be given an autonomous interpretation;<sup>13</sup> or may refer to the law of a State to determine (part of) the meaning of the term.<sup>14</sup> Thus, the rights and duties that are associated with each term should be carefully examined and terminology used in family agreements should be carefully formulated. Some examples of common terms, and illustrations of their evolving nature, are provided below.

### Family agreement

10. The term "family agreement" is used in this Practitioners' Tool to refer to an agreement in the area of family law involving children that involves subject matter that falls within the scope of the Child Abduction, Child Protection and / or Child Support Conventions, and includes an agreement between holders of "parental responsibility" (see, *infra*, para. 11).

### Parental responsibility

11. Article 1(2) of the Child Protection Convention defines the term "parental responsibility" as including "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child".<sup>15</sup> In other words, "parental responsibility" includes all legal rights and duties that a parent, a guardian or other legal representatives have in respect of a child with a view to raising the child and ensuring the child's development. The term "parental responsibility" can refer to parental rights and duties as a whole, often encompassing rights of custody (see, *infra*, para. 13) and "rights of contact" (see, *infra*, para. 12). In

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<sup>11</sup> See, e.g., the definition of "maintenance arrangement" in Art. 3(e) of the Child Support Convention.

<sup>12</sup> See, e.g., the partial definition of "rights of custody" in Art. 5(a) of the Child Abduction Convention and Art. 3(b) of the Child Protection Convention. See the significance of giving a uniform interpretation to "the right to determine the child's place of residence" by the US Supreme Court in *Abbott v. Abbott*, 560 U.S. 1 (2010).

<sup>13</sup> See, e.g., the meaning of "habitual residence" in each of the three HCCH Child Conventions and the significance of giving it a uniform interpretation under the Child Abduction Convention noted by the Canadian and US Supreme Courts in *Office of the Children's Lawyer v. Balev*, [2018] 1 S. C. R. 398 and *Monasky v. Taglieri* 589 U.S. (2020).

<sup>14</sup> See, e.g., under Art. 3 of the Child Abduction Convention and Art. 7(2) of the Child Protection Convention where the law of the State of the habitual residence of the child immediately before the wrongful removal or retention of the child determines whether it is possible for a family agreement on rights of custody to have legal effect in child abduction cases. The reference is not to the "internal" law of that State and therefore it can include a *renvoi* to take account of the conflict of laws rules of that State which may lead to the application of the internal law of another State; see the Explanatory Report on the Child Abduction Convention, para. 70, which suggests that *renvoi* should only be used where it makes the Convention operative rather than inoperative. E. Pérez-Vera, "Explanatory Report on the 1980 Child Abduction Convention", in HCCH, *Actes et documents de la Quatorzième session* (1980), Tome III, *Child Abduction*, The Hague, Imprimerie Nationale, 1982, pp. 426-473; available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Publications", then "Explanatory Reports" (hereinafter, "Explanatory Report on the Child Abduction Convention"). See further on this issue P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford University Press, 1999, pp. 46-48 and R. Schuz, *The Hague Child Abduction Convention*, Hart, 2013, pp. 169-170.

<sup>15</sup> See Art. 1(2) of the Child Protection Convention.



addition to this definition, the Child Protection Convention also contains specific articles that govern mechanisms of attribution and extinction of parental responsibility.

### Rights of contact

12. In line with the modern concept of "parental responsibility",<sup>16</sup> the Practitioners' Tool uses the term "rights of contact" instead of the term "rights of access". The term "contact" is used in a broad sense to include the various ways in which a non-custodial parent (and, sometimes, another relative or established friend of the child) maintains personal relations with the child, whether by periodic face-to-face visitation or contact, by distance communication or by other means.<sup>17</sup>

### Rights of custody

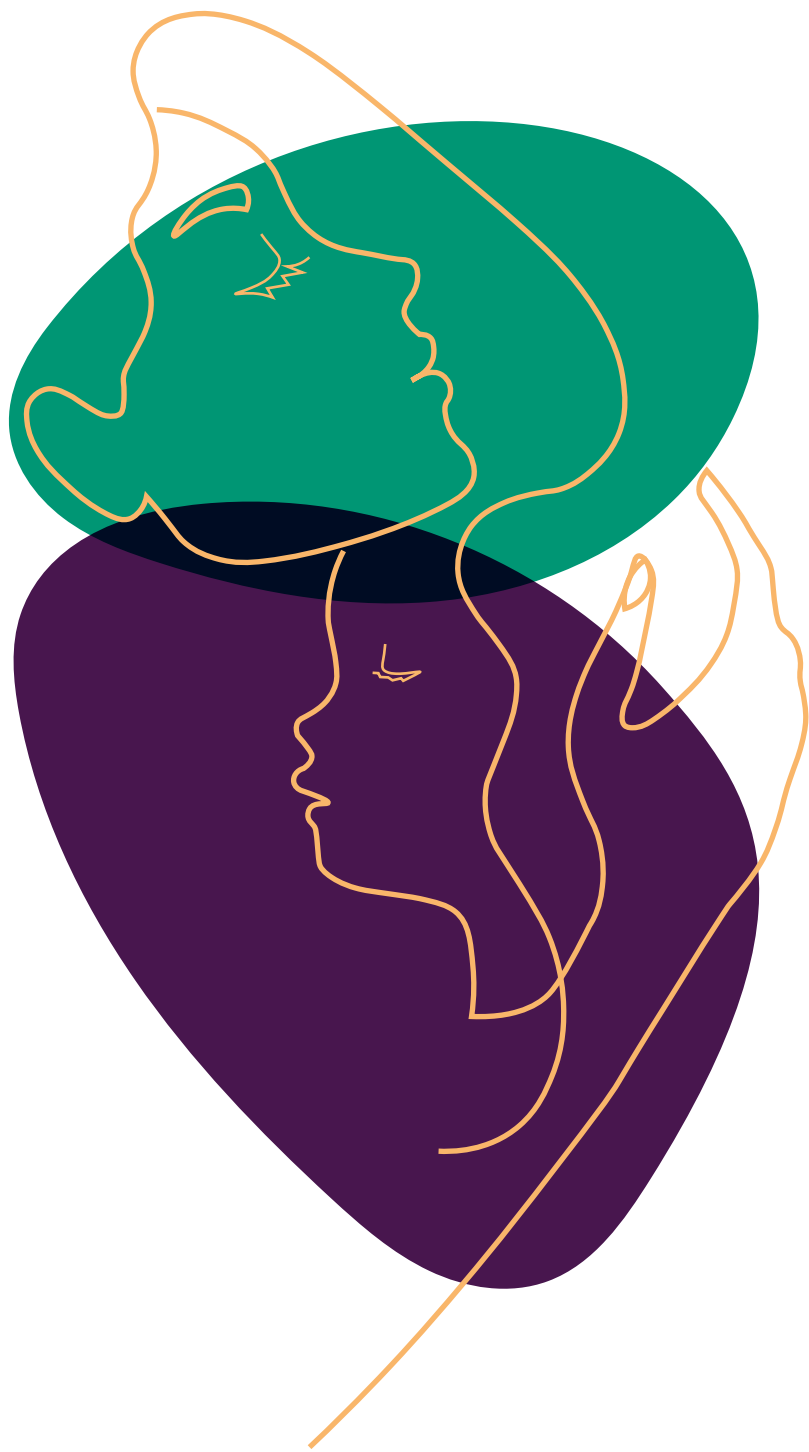
13. The concept of "rights of custody" as used in this Practitioners' Tool is in line with the partial definition of that term provided under Article 5(a) of the Child Abduction Convention and Article 3(b) of the Child Protection Convention. It includes "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".<sup>18</sup> "Rights of custody" is used in this Practitioners' Tool when referring to the specific language of these Convention provisions or to the various proceedings or mechanisms that they govern.

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<sup>16</sup> This is in line with the terminology used by the General Principles and Guide to Good Practice on Transfrontier – Contact concerning Children. See HCCH, *Transfrontier Contact concerning Children – General Principles and Guide to Good Practice*, Bristol, Family Law (Jordan Publishing Limited), 2008, at p. xxvi (hereinafter, "Guide to Good Practice on Transfrontier Contact").

<sup>17</sup> *Ibid.*

<sup>18</sup> See the Guide to Good Practice on Art. 13(1)(b) (*op. cit.* note 8), Glossary, p. 11.



The Child  
Abduction,  
Child Protection,  
and Child  
Support  
Conventions in  
the Context of  
Family  
Agreements

## The Child Abduction, Child Protection, and Child Support Conventions in the Context of Family Agreements

- A The Child Abduction Convention
- B The Child Protection Convention
- C The Child Support Convention

14. Subject to the applicable substantive law and depending on the circumstances of the individual case, certain subject matter may fall within the scope of, and benefit from the recognition and enforcement mechanisms of the Child Protection and / or Child Support Convention (e.g., payments from one parent to the other to facilitate contact with a child or to provide specialist language teaching for a child in the mother tongue of the non-resident parent may fall within the scope of the Child Protection or Child Support Convention).<sup>19</sup> Situations involving international child abduction and rights of access (contact) fall within the scope of the Child Abduction Convention.
15. The choice of the Contracting Party in which the parties will first render their family agreement enforceable is crucial. This has a great impact on whether the agreement can be given the widest possible effect in other Contracting Parties in accordance with the HCCH Conventions within the scope of this Practitioners' Tool.
16. How an agreement concerning a number of different international family law matters can be (rendered) binding and enforceable in two or more States is a complex question. Many of the issues that may arise, such as those relating to general private international law rules, substantive family law, or domestic procedural law, fall outside of the scope of this Practitioners' Tool. This section will briefly provide an overview of the three HCCH Conventions to identify the provisions in each Convention that are relevant to family agreements. It will address the Child Abduction Convention first, as many cases that are resolved by the conclusion of family agreements involve situations of international child abduction and, as of the date of issue of this Practitioners' Tool, the Child Abduction Convention has the highest number of Contracting Parties of the three Conventions being discussed in this Tool.

## A. The Child Abduction Convention

17. The Child Abduction Convention aims to protect children internationally from the harmful effects of their wrongful removal or retention by providing a system of cooperation between Contracting Parties and a rapid procedure for the return of the child to their State of habitual residence. The Convention is based on the principle that, save in the circumstances provided by Articles 12, 13 and 20 of the Convention, the return of a wrongfully removed or retained child to the Contracting Party of their habitual residence is in their interests.<sup>20</sup>
18. This section provides a brief overview of the Child Abduction Convention as it relates to family agreements. Information on the Child Abduction Convention can be found in its Explanatory Report<sup>21</sup> and the Guides to Good Practice on the Convention.<sup>22</sup>

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<sup>19</sup> See para. 55, *infra*, for additional considerations regarding language used to characterise "maintenance" in the agreement.

<sup>20</sup> Preamble, Child Abduction Convention.

<sup>21</sup> Explanatory Report on the Child Abduction Convention (*op. cit.* note 14).

<sup>22</sup> The HCCH has published seven Guides to Good Practice on the Child Abduction Convention:

- Guide to Good Practice *under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I – Central Authority Practice*, Bristol, Family Law (Jordan Publishing), 2003 (hereinafter, "Guide to Good Practice on Central Authority Practice").

## 1. Return Proceedings

19. Return proceedings under the Child Abduction Convention aim to return the child to the State of their habitual residence prior to the wrongful removal or retention. Any decision taken in relation to the return application, regardless of whether the decision is to return or not to return the child, is not a decision on the merits of custody.<sup>23</sup> The appropriate court with jurisdiction under the Child Protection Convention will decide on issues of parental responsibility.<sup>24</sup> It is possible that the return of the child is followed by a lawful relocation to the State that had ordered the return.
20. An amicable solution in relation to an international child abduction situation may address only the immediate abduction situation or it may, at the same time, address other issues that underpin the family dispute, such as parental responsibility or custody, contact, finances or relocation. It is therefore important that the family agreement stipulates exactly what the parties have in mind when addressing the return and non-return of the child to their State of habitual residence immediately prior to the wrongful removal or retention.
21. The family agreement, whether it provides for the return of the child to their State of habitual residence immediately prior to the removal or retention, or for the relocation of the child in the new State, can bring an end to the dispute between the parties under the Child Abduction Convention. This will allow the court hearing the return application to dispose of the proceedings after taking notice of the parties' agreement. In doing so, under the first scenario, the court may order the return of the child to the State of habitual residence. Under the second scenario, the court may either reject the application based on the left-behind parent's acquiescence in the removal or retention (Art. 13(1)(a)) or allow the left-behind parent to withdraw their application for return (see, *infra*, Section II.A.2).
22. Regardless of the decision on whether to return the child to their State of habitual residence immediately prior to the wrongful removal or retention, parts of the family agreement relating to a long-term decision of the parents as to where the child will live, with whom the child will live, and any arrangements relating to the exercise of parental responsibility, such as care and contact, fall within the scope of the Child Protection Convention (see, *infra*, Section II.B.1.a).

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- Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II – Implementing Measures, Bristol, Family Law (Jordan Publishing), 2003 (hereinafter, "Guide to Good Practice on Implementing Measures").
  - Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part III – Preventive Measures, Bristol, Family Law (Jordan Publishing), 2005 (hereinafter, "Guide to Good Practice on Preventive Measures").
  - Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part IV – Enforcement, Bristol, Family Law (Jordan Publishing), 2010 (hereinafter, "Guide to Good Practice on Enforcement").
  - Part V – Mediation (*op. cit.* note 5).
  - Part VI – Art. 13(1)(b) (*op. cit.* note 8).
  - Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).

<sup>23</sup> Art. 19 of the Child Abduction Convention; see also Art. 16 of the Child Abduction Convention, which provides that "the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

<sup>24</sup> See Art. 3(a) and (b) of the Child Protection Convention.

## 2. Consent to or Acquiescence in the Removal or Retention in the Context of Family Agreements

23. The Child Abduction Convention provides for exceptions under Articles 12, 13 and 20 in which the judicial or administrative authority seised with the return application has discretion not to order the return of the child. Article 13(1)(a) applies if the person or institution having care of the person of the child had consented to or subsequently acquiesced in the removal or retention. In such cases, the authority is not bound to order the return of the child.<sup>25</sup>
24. The possibility of "acquiescence" in a case falling under the Child Abduction Convention may therefore prevent a return order being made, and an amicable settlement of the dispute may be based on an agreement not to return the child to the State from which they were taken. However, if the family agreement deals with matters of parental responsibility, including rights of custody and contact, it may be advisable for a measure of protection incorporating the agreement to be sought and obtained in the State of the child's habitual residence (unless there are ongoing divorce, separation or annulment proceedings where such matters could be resolved).

## 3. Practical Arrangements

25. In some States, courts ordering the prompt return of the child under the Child Abduction Convention may provide for practical arrangements to facilitate the implementation of the return of the child to the State of habitual residence.<sup>26</sup> Similarly, return agreements may include provisions that relate to the preparation and details of the return itself, such as the date of return, the mode of transport and the party that is to pay for the travel involved in the return. In addition to being enforced as part of a return order, these provisions would also qualify as a measure of protection under the Child Protection Convention (see, *infra*, Section II.B.2, paras 33, 38, and 42-46).
26. The agreement may also include provisions relating to the return that are to be implemented in the State of return before a decision on the merits of custody is in place or the family agreement is rendered enforceable in that State. Examples of such provisions include specifications as to who will pick up the child from the port of disembarkation should the child travel alone, the arrangements for the child's immediate accommodation upon return or stipulations as to whom the child may have contact with immediately upon return. These matters relate to the exercise of parental responsibility and fall within the scope of the Child Protection Convention (see, *infra*, Section II.B).

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<sup>25</sup> The applicant, usually the left-behind parent, may choose to withdraw the application for return. Practitioners should be sure a parent understands the consequences of "acquiescence" on legal positions they may wish to take in the future.

<sup>26</sup> See, e.g., the Guide to Good Practice on Art. 13(1)(b) (*op. cit.* note 8), para. 49.

#### 4. Issues Relating to the Parent Returning with the Child

27. The family agreement may contain provisions on the child's return where the parent chooses to return with the child. Such provisions can come within the scope of the Child Abduction Convention where, in the absence of such protective measures, the court would have found a grave risk of harm to the child as provided for by Article 13(1)(b) of the Convention.<sup>27</sup> More generally, it should be recognised that the situations involving past or continuing domestic abuse raise additional considerations for the safety of both the child and the abused parent.<sup>28</sup> The availability of such protective measures will depend on the applicable law. In some jurisdictions, where domestic violence is involved, the relevant law may not permit the parties to settle the situation through an agreement.<sup>29</sup>
28. Examples of other issues relating to the parent returning with the child that may arise in the context of family agreements are where criminal charges may be brought against a parent, and where the taking parent may face immigration or visa obstacles in returning with the child.
29. In many States, international child abduction is a criminal offence. This is intended to deter potential wrongful cross-border removal or retention. Criminal charges against the taking parent in a child abduction case can make concluding a family agreement difficult. Criminal charges against either parent for other matters can also have this effect. In many States, the initiation or discontinuation of prosecution is solely left to the discretion of the authorities concerned, or prosecution may be obligatory under the law of the State concerned. Where prosecution is not solely left to the authorities, a parent could undertake not to initiate any criminal charges or to take all steps possible to bring about the withdrawal of criminal charges, where this is relevant under applicable rules.
30. There may be obstacles to a taking parent's return involving immigration issues, *e.g.*, where a taking parent may not be able to enter or remain in the State of habitual residence due to the expiration of the relevant visa or the lack of residence rights. The resolution of such issues might be facilitated by the left-behind parent undertaking to assist the taking parent to obtain appropriate permissions, where this is relevant under applicable immigration rules.
31. The Child Protection Convention also adds to the efficacy of any protective measures ordered by the judicial or administrative authority in a case of urgency when returning a child to their State of habitual residence.<sup>30</sup> These protective measures lapse as soon as the authorities of the child's State of habitual residence have taken the measures required by the situation.<sup>31</sup>

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<sup>27</sup> *Ibid.*, Chapter II.2.a and e.

<sup>28</sup> Practitioners may refer to the Guide to Good Practice on Mediation (*op. cit.* note 5), regarding risks involving the unequal power dynamics between the parents in situations that involve domestic violence.

<sup>29</sup> See the Guide to Good Practice on Art. 13(1)(b) (*op. cit.* note 8), Chapter II.2.a.

<sup>30</sup> Art. 11(1) of the Child Protection Convention.

<sup>31</sup> Art. 11(2) of the Child Protection Convention.

## B. The Child Protection Convention

32. The Child Protection Convention enables competent authorities to protect children and cooperate in a variety of cross-border situations. It applies to a wide range of civil measures for the protection of a child and a child's property, ranging from orders concerning parental responsibility and contact, to public measures of protection and care, as well as to matters of representation in relation to the protection of children's property.<sup>32</sup>
33. Family agreements are not enforceable per se under the Child Protection Convention.<sup>33</sup> Any such agreement would need to be incorporated into a decision taken by a judicial or administrative authority of the competent Contracting Party, usually that of the child's State of habitual residence. Such authority will generally apply its domestic law, and so the family agreement must have enforceable content as understood in that jurisdiction. Once the family agreement is incorporated into a decision, it becomes a measure of protection that must be recognised by operation of law (i.e., automatically recognised) in all other Contracting Parties, subject to the Convention's provisions for the refusal of recognition. Where requested by an interested party, the measure of protection may also be declared enforceable or registered for the purpose of enforcement in the relevant jurisdiction. The actual enforcement will then take place in accordance with the domestic law of the jurisdiction in which enforcement is sought to the extent provided by such law.<sup>34</sup>

### 1. Family Agreements on Rights of Custody, Parental Responsibility, International Jurisdiction and the Property of the Child

34. The framework for recognition and enforcement under the Child Protection Convention applies in the same way regardless of the circumstances that led to the family agreement and to the taking of a measure of protection incorporating its terms. The framework supports various kinds of agreements on substantive law matters, including agreements that (a) establish rights of custody, and contact and relate to parental responsibility, and (b) relate to the property of the child.
35. In relation to family agreements on international jurisdiction, the Child Protection Convention allows for very limited party autonomy. With very few exceptions, the Convention centralises jurisdiction in the authorities of the State of the child's habitual residence (Art. 5). The parents of a child may agree that the court of the State dealing with their divorce, legal separation or annulment exercise jurisdiction on measures of child protection in the place of the authorities of the State of habitual residence if the following conditions are met: if the domestic law applicable in that jurisdiction so

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<sup>32</sup> Information on the Child Protection Convention can be found in its Explanatory Report, see P. Lagarde, "Explanatory Report on the 1996 Child Protection Convention", in HCCH, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605; available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Publications", then "Explanatory Reports" (hereinafter, "Explanatory Report on the Child Protection Convention"), and the Practical Handbook on the Convention, see HCCH, *Practical Handbook on the 1996 Hague Child Protection Convention*, The Hague, 2014, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Publications", then "Practical Handbooks" (hereinafter, "Practical Handbook on the Child Protection Convention").

<sup>33</sup> However, parental responsibility can be attributed to a person, or it can be made extinct by an agreement without intervention of a judicial or administrative authority if that is permitted by the law of the State of the child's habitual residence at the time when the agreement takes effect. See Art. 16(2) of the Child Protection Convention.

<sup>34</sup> Art. 28 of the Child Protection Convention.



provides and that court regards this as being in the best interests of the child; if one of the parents habitually resides in the State of that court; if one of the parents has parental responsibility for the child, and if any other holder of parental responsibility agrees to that court's jurisdiction to deal with child protection issues.<sup>35</sup>

**a. Agreements that Establish Rights of Custody, Contact and Relate to Parental Responsibility**

36. In relation to agreements that establish rights of custody, the Child Protection Convention provides frameworks for the resolution of disputes relating to custody and contact that may arise when parents are separated and living in different States. The recognition and enforcement provisions in the Child Protection Convention, therefore, avoid the need to re-litigate custody and contact issues and ensure that decisions taken by the authorities of the State where the child has their habitual residence generally enjoy primacy.
37. An agreement settling a cross-border family conflict involving children typically regulates matters of exercise of parental responsibility.<sup>36</sup> The agreement may also relate to the rights of custody, determine who among the holders of parental responsibility will be the primary carer of the child and in which State the child will live. The agreement may regulate cross-border parent-child contact and contact with other family members, including long-distance contact, such as by telephone and videocall. Parties may want to keep in mind, however, that the authorities having jurisdiction under the Child Protection Convention will apply, except in exceptional circumstances, their own law to matters of parental responsibility and other matters covered by the Convention.<sup>37</sup> As such, party autonomy to address such questions may be limited due to the substantive law of the relevant jurisdiction.
38. The Child Protection Convention requires that "measures of protection" falling within its scope be taken by "an authority" of a Contracting Party.<sup>38</sup> Family agreements on the exercise of parental responsibility, therefore, would require an "authority" to be involved for it to become a "measure of protection" supported by the cross-border recognition and enforcement mechanism of the Convention. Depending on the domestic law(s) of the relevant Contracting Party, directly rendering the family agreement enforceable by an act of a competent authority could, in some cases, suffice to create a "measure of protection" taken by an authority that falls within the scope of the Child Protection Convention. Note, however, that if the intervention of the judicial or administrative authority is a purely passive intervention, without exercising any control over the substance of the matter, this should not be considered as an intervention amounting to a "measure of protection".<sup>39</sup>
39. The family agreement could also address the question of the attribution of parental responsibility. This could be particularly relevant in cases where an unmarried parent

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<sup>35</sup> Art. 10 of the Child Protection Convention. Another way to widen the basis of jurisdiction through party autonomy is to ask the chosen court (if it has one or more of the connections listed in Art. 8(2) of the Child Protection Convention) to request a transfer of jurisdiction to it under Art. 9 of the Child Protection Convention. Greater party autonomy is possible under Art. 10 of the Brussels IIb Regulation in cross-border cases within the EU, based on the child having a "substantial connection" with the chosen State.

<sup>36</sup> See, *supra*, para. 11.

<sup>37</sup> Art. 15 of the Child Protection Convention.

<sup>38</sup> Arts 1(1)(a) and 23(1) of the Child Protection Convention.

<sup>39</sup> Practical Handbook on the Child Protection Convention (*op. cit.* note 32), para. 9.11.

might not by operation of law have parental responsibility. The law of the habitual residence of the child at the time when the agreement takes effect governs the attribution or extinction of parental responsibility. If the law of that State so provides, this can be done "without the intervention of a judicial or administrative authority".<sup>40</sup>

**b. Agreements Relating to the Property of the Child**

40. Agreements in cross-border family disputes involving children may also touch upon matters related to the child's property. The Child Protection Convention applies to measures of protection that deal with the "administration, conservation or disposal of the child's property".<sup>41</sup> This encompasses all the operations concerned with the minor's property, including acquisitions, considered as investments or as assignments disposing of the property transferred in consideration of the acquisition.<sup>42</sup> It is important to note that "the Convention does not encroach on systems of property law and does not cover the substantive law relating to the content of rights over property, such as disputes in relation to ownership / title of property".<sup>43</sup>
41. With a view to effectively protecting the best interests of the child, the domestic law(s) of some States provide for certain control mechanisms when it comes to the disposal by parents of their child's property. The Child Protection Convention does not affect the domestic law. By contrast, once a measure of protection concerning the disposal of the child's property is taken by a competent authority in a Contracting Party to the Convention, this measure will be automatically recognised in all other Parties to the Convention, subject to the possible grounds for refusal of recognition set out in the Convention.

**2. The Cross-Border Recognition and Enforcement Mechanism of the Child Protection Convention**

**a. Recognition by Operation of Law**

42. As discussed above, if embodied in a "measure of protection" taken by an authority of a Contracting Party to the Convention, a family agreement on matters within the Convention's scope can benefit from the recognition and enforcement mechanism of the Convention. Once this "measure of protection" has been obtained, it is recognised by operation of law in any other Contracting Party to the Convention, subject to the Convention's provisions for the refusal of recognition.<sup>44</sup>

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<sup>40</sup> See Art. 16(2) of, and the Explanatory Report on the Child Protection Convention (*op. cit.* note 32), para. 103.

<sup>41</sup> See Art. 3(g) of the Child Protection Convention.

<sup>42</sup> Explanatory Report on the Child Protection Convention (*op. cit.* note 32), para. 25.

<sup>43</sup> See the Practical Handbook on the Child Protection Convention (*op. cit.* note 32), para. 13.72.

<sup>44</sup> See Art. 23 of the Child Protection Convention.

### **b. Grounds of Non-Recognition**

43. Article 23(2) of the Child Protection Convention provides for a number of grounds of non-recognition. Three of these six grounds are of particular relevance in the context of family agreements.
44. The first one is Article 23(2)(a) of the Child Protection Convention, which provides that the recognition of a measure may be refused if it was taken by an authority that had no international jurisdiction under the Convention. The Child Protection Convention, apart from a few exceptions, "centralise[s] jurisdiction in the authorities of the State of the child's habitual residence [to] avoid all competition of authorities having concurrent jurisdiction".<sup>45</sup> Generally, the family agreement would be best transformed into a "measure of protection" by the competent authority in the State of habitual residence of the child.<sup>46</sup>
45. The second ground of non-recognition is Article 23(2)(b) of the Child Protection Convention, which provides that the recognition of the measure of protection may be refused if "the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State". For further discussion of the right of the child to be heard, refer to Section III.A, *infra*.
46. A further relevant ground of non-recognition is Article 23(2)(d) of the Child Protection Convention, which states that the recognition of the measure may be refused "if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child". This exception is to be applied restrictively.<sup>47</sup> When drafting a family agreement that is intended to be turned into a measure of protection, the agreement's content should be weighed to see if it is likely to run up against public policy constraints in the State in which recognition and enforcement are to be achieved.<sup>48</sup>
47. To counter any doubts about possible grounds of non-recognition, once the family agreement has been incorporated into a measure of protection, a decision on the recognition or non-recognition of the measure could immediately be sought in the State(s) concerned in accordance with Article 24 of the Child Protection Convention. Depending on the applicable procedural law, a declaration of enforceability or a registration for the purposes of enforcement would have to be obtained if enforcement of the measure of protection is required in the other Contracting Party.<sup>49</sup>

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<sup>45</sup> See the Explanatory Report on the Child Protection Convention (*op. cit.* note 32), para. 37. See also Art. 5 of the Child Protection Convention.

<sup>46</sup> See the Practical Handbook on the Child Protection Convention (*op. cit.* note 32), paras 13.49-13.50.

<sup>47</sup> *Ibid.*, paras 10.09-10.10.

<sup>48</sup> The matter of hearing the child when drafting the agreement and the weight it is given in the assessment of whether the measure's recognition would be contrary to public policy as a matter of the "best interests of the child" is discussed, *infra*, in Section III.A.

<sup>49</sup> Art. 26 of the Child Protection Convention.

### c. *Travel Costs and Education Costs*

48. In many cross-border family disputes, the issue of travel costs in relation to cross-border parent-child visits may be raised. In cases where one parent envisages relocating with the child to another State, the agreement could address how to finance any future cross-border parent-child contact.
49. Regulating the issue of travel costs in family agreements is delicate since non-compliance with a travel cost payment obligation may lead to an obstruction of cross-border contact between parent and child. Difficulties in implementing the agreement may also arise as the amount of future travel costs is unknown at the time the agreement is concluded. It should be noted that, subject to the applicable substantive law and depending on the circumstances of the individual case, travel costs may fall within the scope of the Child Protection Convention<sup>50</sup> and / or the Child Support Convention.<sup>51</sup>
50. Similarly, parents' education choices for their child are clearly part of the exercise of parental responsibility and thus fall within the scope of the Child Protection Convention. A decision determining the parents' contribution to schooling or other education costs may, subject to the applicable substantive law and depending on the circumstances of the individual case, fall within the scope of the Child Protection Convention<sup>52</sup> and / or the Child Support Convention.<sup>53</sup>

## C. The Child Support Convention

51. Among the modern HCCH Family Law Conventions, the Child Support Convention is the only Convention that expressly allows for the recognition and enforcement of agreements ("maintenance arrangements") concerning the matters covered by the Convention. This section provides a brief overview of the Child Support Convention as it relates to family agreements. Information on the Child Support Convention can be found in its Explanatory Report<sup>54</sup> and its Practical Handbooks.<sup>55</sup>

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<sup>50</sup> Conclusions and Recommendations of the Special Commission of 2017, para. 53: "The Special Commission takes note of the finding of the Experts' Group that, depending on the individual circumstances of the case, the applicable law or the wording of the agreement or decision, the travel expenses associated with the exercise of cross-border access / contact may fall within the scope of the 1996 Convention", available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction Section" then "Special Commission meetings".

<sup>51</sup> See para. 55, *infra*, for additional considerations regarding language used to characterise "maintenance" in the agreement.

<sup>52</sup> At least in cases where the education costs are necessary to guarantee the child's link with both parents' cultures, it is conceivable that a decision embodying an agreement on sharing education costs be considered a measure of protection in the sense of the Child Protection Convention.

<sup>53</sup> See para. 55, *infra*, for additional considerations regarding language used to characterise "maintenance" in the agreement.

<sup>54</sup> A. Borrás & J. Degeling, with the assistance of W. Duncan and P. Lortie, *Explanatory Report on the 2007 Child Support Convention*, The Hague, 2013; available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Publications", then "Explanatory Reports" (hereinafter, "Explanatory Report on the Child Support Convention").

<sup>55</sup> HCCH, *Practical Handbook for Caseworkers under the 2007 Child Support Convention*, The Hague, 2013, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Publications", then "Practical Handbooks" (hereinafter, "Practical Handbook on the Child Support Convention") and P. Lortie, M. Groff, *Practical Handbook for Competent Authorities: the 2007 Hague Child Support Convention, the 2007 Hague Protocol on Applicable Law (Maintenance) and the 2009 European Union Maintenance Regulation*, The Hague, 2013, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Publications", then "Practical Handbooks" (hereinafter, "Practical Handbook for Competent Authorities").

## 1. Scope of Application of the Convention

52. Article 2 of the Child Support Convention provides that the Convention applies generally to child support arising out of a parent-child relationship towards children under the age of 21 years and to spousal support.<sup>56</sup> However, under the Convention, spousal support does not benefit from the Central Authority framework of the Convention unless the application for recognition and enforcement of spousal support is made together with a claim for child support.<sup>57</sup>
53. Contracting Parties can restrict the applicability of the Convention in relation to child support to children under the age of 18 years. Contracting Parties can also extend the application of Central Authority support to all applications for spousal support and / or extend application of the Convention (or parts of it) to other forms of family maintenance. As between any two given Contracting Parties, the Convention applies only in so far as their declarations cover the same maintenance obligations and parts of the Convention.<sup>58</sup>

## 2. Maintenance Arrangements

54. Article 3 of the Convention defines "maintenance arrangement" as an
- "agreement in writing relating to the payment of maintenance which –
- (i) has been formally drawn up or registered as an authentic instrument by a competent authority; or
  - (ii) has been authenticated by, or concluded, registered or filed with a competent authority,
- and may be the subject of review and modification by a competent authority."

Both authentic instruments and private agreements are therefore included.

55. A family agreement is moreover likely to touch upon matters of property separation between the spouses, as well as spousal or ex-spousal maintenance. However, only maintenance falls within the scope of the Child Support Convention. In a family agreement containing provisions relating to property separation or distribution, therefore, it may be helpful to identify what is considered maintenance, as well as the specific amounts intended for child support and for spousal support. A transfer of property intended by the parties as support, and identified as "maintenance" in the agreement, would fall within the scope of the Child Support Convention. In such cases, precise drafting may ensure a clear distinction by giving details as to the purpose for which the agreed provision of payment is intended. It may moreover be helpful if the terms of the agreement spell out that the parties consider a certain

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<sup>56</sup> In the EU, the EU Maintenance Regulation takes precedence over the Child Support Convention in cases between EU Member States.

<sup>57</sup> See the Practical Handbook on the Child Support Convention (*op. cit.* note 55), Chapter 3, Part 1. Note that applicants can use the Central Authority network under the Convention for spousal-only applications only if the relevant Contracting Parties have chosen to provide for this.

<sup>58</sup> All declarations and reservations made by Contracting Parties are displayed on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Support Section" then "Status table".

subject matter<sup>59</sup> as "maintenance" falling within the scope of the Child Support Convention.<sup>60</sup> It will ultimately be for the authority to decide and to duly approve what is considered maintenance.

### 3. Recognition and Enforcement of Maintenance Arrangements

56. Maintenance arrangements may be made in any given Contracting Party to the Convention whose laws provide for such an option. Article 30 of the Child Support Convention provides a mechanism for the recognition and enforcement of maintenance arrangements. Article 30(1) of the Convention requires only that the maintenance arrangement be made in a Contracting Party and that it is enforceable as a decision in the State of origin. The maintenance arrangement can be enforced as a decision in other Contracting Parties. The domestic law(s) of a Contracting Party to the Convention may limit the option of establishing a maintenance arrangement to parties that are connected to that State's jurisdiction. Moreover, where the maintenance arrangement is to be enforceable in another Contracting Party, legal advisers should consider the grounds of non-recognition set out in Article 30(4) of the Child Support Convention when drafting the agreement.
57. Contracting Parties to the Child Support Convention may exclude, by way of reservation, the recognition and enforcement of maintenance arrangements. However, practice shows that the majority of Contracting Parties to the Convention are ready to accept the recognition and enforcement of maintenance arrangements.<sup>61</sup>
58. Article 23 of the Child Support Convention provides that procedures for the recognition and enforcement of maintenance decisions, including maintenance arrangements, shall be governed by the law of the State addressed. Where a Contracting Party makes a declaration in accordance with Article 24(1), the procedure in Article 23 is replaced by the alternative procedure in Article 24.<sup>62</sup>

### 4. Settlements or Agreements Concluded Before or Approved by an Authority

59. Independently of the option to recognise and enforce a maintenance arrangement by virtue of Article 30 of the Child Support Convention, Article 19(1) of the Convention provides that a "settlement or agreement concluded before or approved by [a judicial or administrative] authority" is a "decision" in respect of a maintenance obligation. As such, it can be recognised and enforced under Chapter V of the Convention.<sup>63</sup> However, Article 20(1) provides that the authority involved must base its jurisdiction

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<sup>59</sup> For example, education costs could, as child-related expenses, be considered "maintenance" and come within the scope of the Child Support Convention.

<sup>60</sup> Likewise, parties may also expressly provide in the family agreement that they consider a certain subject matter as "maintenance" under another applicable private international law instrument, such as the EU Maintenance Regulation.

<sup>61</sup> See Child Support Convention reservations made in accordance with Art. 30(8) and declarations made in accordance with Art. 30(7), available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Support Section" then "Status table".

<sup>62</sup> See the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Support Section" then "Status table".

<sup>63</sup> See the Explanatory Report on the Child Support Convention (*op. cit.* note 54), para. 433.

on one of the listed "indirect grounds of jurisdiction". Moreover, Article 20(2) provides that Contracting Parties may make reservations regarding some of these bases of jurisdiction. In the interests of ensuring that the family agreement is effective, legal advisers may want to consider rendering the agreement as a decision in a Contracting Party where the authority has international jurisdiction in accordance with Article 20(1)(a), (b) or (d),<sup>64</sup> since Contracting Parties cannot make a reservation with regard to these grounds of jurisdiction. The judicial or administrative authority giving effect to a settlement or agreement in divorce or legal separation proceedings will have a satisfactory indirect ground of jurisdiction under Article 20(1)(f) of the Child Support Convention, unless its jurisdiction was based solely on the nationality of one of the parties. Such decision may not be recognised and enforced, however, in a Contracting Party that has entered a reservation in relation to Article 20(1)(f).<sup>65</sup>

60. It is therefore of significance whether the provision applicable to the family agreement is Article 19(1) or Article 30 of the Child Support Convention.<sup>66</sup> While broadly the same provisions on recognition and enforcement apply to maintenance arrangements as to decisions, Article 30 modifies these rules, in particular, for the grounds of non-recognition.

## 5. Grounds of Non-Recognition

61. Grounds of non-recognition are provided for in Articles 22 and 30(4). Articles 22(a) and 30(4)(a) provide that the recognition and enforcement can be refused if it "is manifestly incompatible with the public policy" of the State addressed. The content of the family agreement should therefore not be manifestly incompatible with the public policy of the Contracting Party in which recognition and enforcement will be sought. However, as noted under the Child Protection Convention above, this will rarely be the case as the "public policy exception should in any case have only a very limited application".<sup>67</sup>

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<sup>64</sup> In accordance with Art. 20(1), a "decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if –

- (a) the respondent was habitually resident in the State of origin at the time proceedings were instituted;
- (b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;
- (c) [...];
- (d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there; [...]"

<sup>65</sup> See Arts 20(2) and 62.

<sup>66</sup> Art. 19(1) is the narrower provision: only settlements or agreements concluded before or approved by an authority are included, while "maintenance arrangements cover a range of different situations in which a competent authority intervenes in the context of agreements relating to the payment of maintenance". See the Explanatory Report on the Child Support Convention (*op. cit.* note 54), para. 74.

<sup>67</sup> *Ibid.*, para. 479.



**Other Issues  
to Consider in  
the Context of  
Family Agreement**



## Other Issues to Consider in the Context of Family Agreement

- A The Best Interests of the Child and Hearing the Child
- B The Concept of “Habitual Residence”
- C Legal Validity and Enforceability

62. The family agreement may include facts that may facilitate the authorities' assessment that all conditions for cross-border recognition of the measure of protection are indeed met. One example is where respecting direct or indirect rules of international jurisdiction is a condition for cross-border recognition and enforcement of the family agreement. In this case, any undisputed facts that may clarify that the State where the agreement was included in a decision had the necessary international jurisdiction may be expressly included in the family agreement.
63. Additionally, certain overarching issues may arise in the course of drafting a family agreement. This section will briefly touch on such issues, which include:
- the best interests of the child and hearing the child;
  - the concept of "habitual residence"; and
  - legal validity and enforceability.

#### A. The Best Interests of the Child and Hearing the Child

64. Since the adoption of the Child Abduction Convention, the earliest of the three HCCH Conventions discussed in this Practitioners' Tool, there have been changes in international legal frameworks. For example, the adoption of the UNCRC led to international recognition of the foundational principle that the best interests of the child must guide all actions concerning children. The UNCRC also affords the child an opportunity to express views in judicial and administrative proceedings affecting them.<sup>68</sup> Whether and how a child is heard, and how their views are obtained and introduced, vary according to internal procedures and practices of Contracting Parties. Including a mechanism for the participation of children in the conclusion of family agreements may help to streamline the process of making such an agreement enforceable, particularly when transformation of the agreement into a measure of protection requires verification that the child was given an opportunity to be heard.
65. Article 23(2)(b) of the Child Protection Convention provides that in certain cases, a measure of protection may be refused at the recognition and enforcement<sup>69</sup> stage "if [it] was taken, except in a case of urgency, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State".<sup>70</sup> However, the child's non-participation in a family agreement made by all the persons having parental responsibility for that child may not necessarily be "in violation of fundamental principles of procedure" in many Contracting Parties. A child may be heard through a variety of means apart from their direct participation in the proceedings for a measure of protection incorporating the family agreement, and the right to be heard includes the right to decline to participate

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<sup>68</sup> See, e.g., Art. 12 of the UNCRC.

<sup>69</sup> Art. 26(3) of the Child Protection Convention. "The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2".

<sup>70</sup> Such a provision is also contained in Art. 23(b) of the Brussels IIa Regulation. The provision is changed in Art. 39(2) of the Brussels IIb Regulation.

as “it is not always in the interest of the child to have to give an opinion, in particular if the two parents are in agreement on the measure to be taken”.<sup>71</sup>

## B. The Concept of “Habitual Residence”

66. All three HCCH Conventions within the scope of this Practitioners' Tool use “habitual residence” as a connecting factor but none of the Conventions defines this concept.<sup>72</sup>
67. Practitioners may wish to note in the family agreement that it reflects an “amicable solution” that the relevant HCCH Conventions all promote.<sup>73</sup> The intent of persons holding “rights of custody” is a “relevant” factor, to be considered among other factors in a “totality of the circumstances” in the jurisprudence on the interpretation of habitual residence from the most senior courts in Contracting Parties to the HCCH Conventions.<sup>74</sup> The weight to be given to an agreement on habitual residence will depend on the overall circumstances of the case.
68. Therefore, when drafting a family agreement, it may be helpful to indicate where the parents consider the child is, or is to be, habitually resident along with recording other relevant facts connecting the child to the place where they regard the child as being, or about to become, habitually resident, subject to the decision of the court with jurisdiction. The agreement may also record the exact date on which the parties intend the habitual residence of the child to change or has changed, if there will be or has been such a change, subject to the decision of the court with jurisdiction. Practitioners may find some useful guidance on how habitual residence will be interpreted by the competent authorities in the State where the parties have agreed their child is to be habitually resident, and in any State where they need the contents of the agreement to be enforced, by consulting the International Child Abduction Database (INCADAT).<sup>75</sup>

## C. Legal Validity and Enforceability

69. It is important to distinguish legal validity and enforceability. An agreement will only have practical effect if it is legally valid. An agreement (or parts of it) might have immediate legal validity, but for enforceability a further step may be required. Enforceability becomes necessary when one of the parties to the agreement does not comply with its terms. The enforceability of the agreement is also required to give it legal effect abroad.

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<sup>71</sup> See the Explanatory Report on the Child Protection Convention (*op. cit.* note 32), para. 123. The Report points out that this ground for refusal is “directly inspired by Art. 12, paragraph 2, of the *United Nations Convention on the Rights of the Child*”; see also, *supra*, para. 45.

<sup>72</sup> For the Child Abduction Convention, see the Explanatory Report (*op. cit.* note 14), para. 66; for the Child Protection Convention, see the Explanatory Report (*op. cit.* note 32), para. 40, and the Practical Handbook (*op. cit.* note 32), para. 13.83; for the Child Support Convention, see the Explanatory Report (*op. cit.* note 54), para. 444, and the Practical Handbook (*op. cit.* note 55), para. 101. See also, *supra*, note 13.

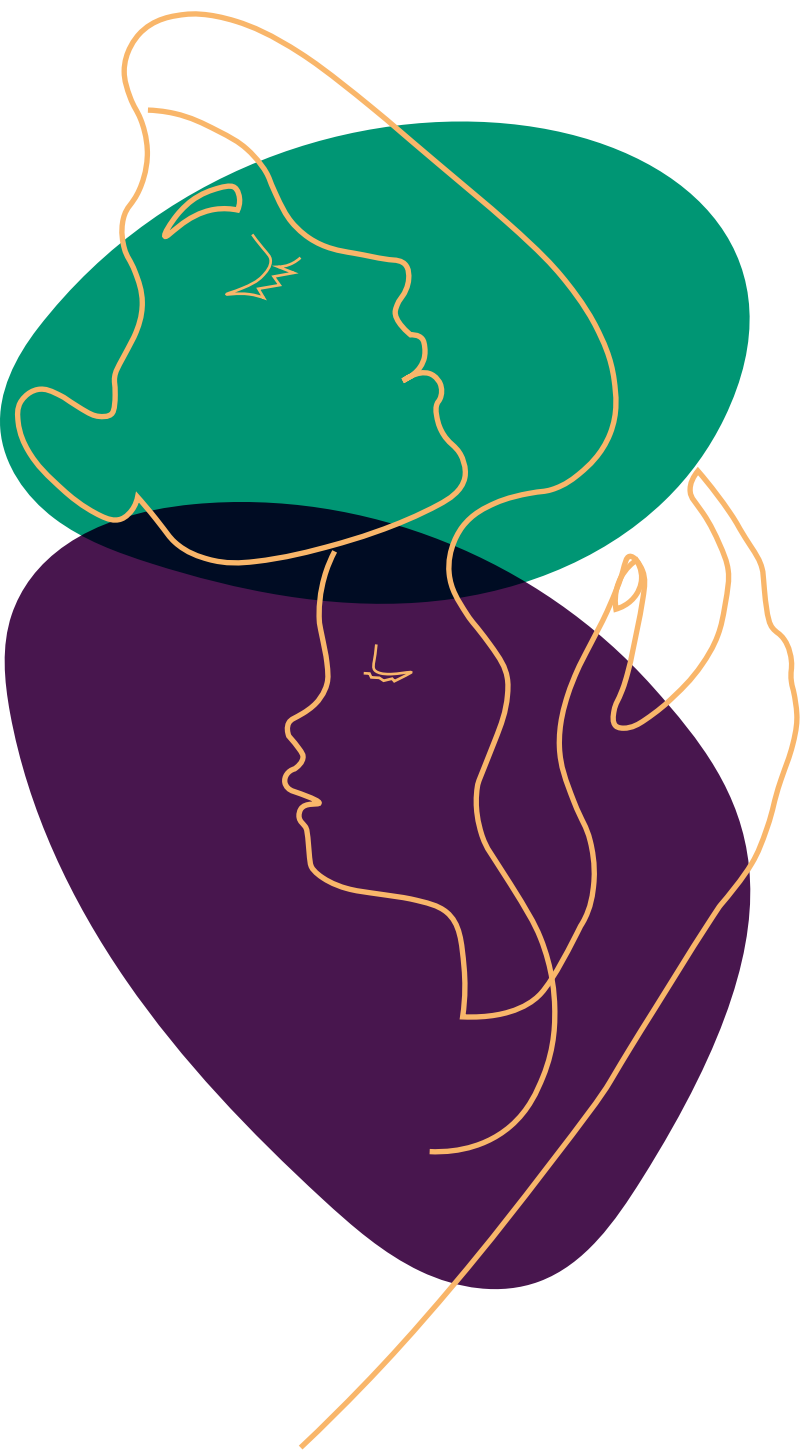
<sup>73</sup> See Art. 7(c) of the Child Abduction Convention, Art. 31(b) of the Child Protection Convention, and Art. 6(2)(d) of the Child Support Convention.

<sup>74</sup> See, *e.g.*, the cases cited, *supra*, note 13. Indeed Art. 5(a) of the Child Abduction Convention and Art. 3(b) of the Child Protection Convention include within the “rights of custody” the “right to determine the child’s place of residence”.

<sup>75</sup> See the INCADAT website at [www.incadat.com](http://www.incadat.com) for how habitual residence is interpreted in relation to the Child Abduction Convention.

70. In cases where it is expected that rendering all parts of the agreement legally binding and enforceable in all States concerned will be difficult, or where this result may not be obtained quickly, legal advisers should discuss this with the parties before finalising the family agreement. Moreover, where certain parts of the agreement are dependent on the fulfilment of other parts of the agreement, this interdependence should be expressly noted in the family agreement.





# IV

Typical  
Cross-Border  
Situations that  
May Involve  
Family  
Agreements

## Typical Cross-Border Situations that May Involve Family Agreements

- A Cross-Border Relocation
- B Cross-Border Contact
- C International Child Abduction

71. This section discusses typical cross-border situations that may involve family agreements, and how these family agreements can achieve recognition and enforcement in a foreign Contracting Party through the framework established by the Child Abduction, Child Protection and Child Support Conventions.

### A. Cross-Border Relocation

72. One category of cases involves the situation where one parent moves abroad with their child(ren) intending to establish their habitual residence in the State of relocation. This is known as cross-border relocation. It refers only to lawful relocation, and not to the wrongful removal or retention of a child in breach of custody rights.
73. The process of rendering a relocation agreement, including provisions on maintenance, legally binding and enforceable depends on the procedural law of the State where it is sought to give legal effect to it.
74. Besides the actual consent to the relocation, a family agreement in the context of cross-border relocation is likely to address contact arrangements and other matters of exercise of parental responsibility. The agreement may also deal with matters of child and spousal / ex-spousal maintenance, travel costs and education costs.<sup>76</sup>
75. Where the relocation agreement in question covers issues of both custody and contact, for the agreement to be recognised and enforced under the provisions of the Child Protection Convention, the agreement should be submitted to the judicial or administrative authorities of the State of the child's habitual residence,<sup>77</sup> unless there are ongoing divorce, annulment or legal separation proceedings in another State in which case that judicial or administrative authority may be asked to use the agreement as the basis for a measure of protection.<sup>78</sup> If the judicial or administrative authority has domestic jurisdiction for both custody and maintenance, consideration should be given to asking that authority to make the agreement as a whole enforceable in that State. This may result in savings of procedural formalities as well as costs, and may provide legal certainty, since indirect jurisdiction could be founded on the basis of Article 20(1)(b) or (d) of the Child Support Convention when it is sought to make the decision of that authority in respect of maintenance enforceable in another Contracting Party.<sup>79</sup>
76. If the judicial or administrative authority of the State of the child's habitual residence does not have domestic jurisdiction for both custody and maintenance, these matters will need to be treated separately. Regarding maintenance, consideration could be given to making a maintenance arrangement<sup>80</sup> under the law of the State of the habitual residence of the child, assuming the law of this State allows for this option.

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<sup>76</sup> See, *supra*, para. 10 for the subjects typically contained in agreements made in international family disputes concerning children.

<sup>77</sup> See Art. 5 of the Child Protection Convention.

<sup>78</sup> See Art. 10 of the Child Protection Convention.

<sup>79</sup> In the case of a divorce, legal separation or annulment, see also Art. 20(1)(f) of the Child Support Convention.

<sup>80</sup> Art. 3(e) of the Child Support Convention provides that a "maintenance arrangement" is an agreement in writing relating to the "payment of maintenance". It can either be "formally drawn up or registered as an authentic instrument by a competent authority" or "authenticated by, or concluded, registered or filed with a competent authority". Therefore, if the law of the relevant State so permits the "maintenance arrangement" may be drawn up and concluded in another State provided it is "registered" as an "authentic instrument by" or "registered or filed with" a "competent authority" in the State of habitual residence of the child.



Any such maintenance arrangement will then be enforceable in this State and in any other Contracting Party the debtor may move to in the future, provided the latter has not made a reservation that it may not recognise and enforce maintenance arrangements in accordance with Article 30(8) of the Child Support Convention. Alternatively, consideration could be given to filing separate maintenance proceedings before the competent authority of the State of habitual residence and having it approve the agreement as a settlement.

## B. Cross-Border Contact

77. Another category of cases involves situations in which one holder of parental responsibility lives in a State other than the State of habitual residence of the child and the other parent. Disputes can arise in such cases, for example, if one of the holders of parental responsibility wishes to alter the contact arrangement, or if the primary carer obstructs the contact between the child and the person entitled to contact with the child.
78. A family agreement could, of course, concern matters of both contact and maintenance.<sup>81</sup> Where the contact agreement deals only with matters falling within the scope of the Child Protection Convention, and the contact agreement is incorporated in a measure of protection, that measure can be recognised and enforced in a foreign Contracting Party under the framework of this Convention.

## C. International Child Abduction

79. Return proceedings under the Child Abduction Convention are intended to be expeditious, and decisions should be rendered within six weeks from the date of commencement of court proceedings. Attempting to settle the dispute amicably should not unduly delay the return proceedings.<sup>82</sup> Other issues may further complicate the resolution of the dispute.<sup>83</sup>
80. Article 16 of the Child Abduction Convention provides that, after receiving notice of a wrongful removal or retention of a child, the courts in the State to which the child was removed or where the child was retained shall not decide on the merits of custody until it has been determined that the child will not be returned under the Convention or unless a return application under the Convention is not lodged within a reasonable time following receipt of the notice.<sup>84</sup> It should be noted that Article 16 does not prevent the court of the child's State of habitual residence immediately prior to the wrongful removal or retention from deciding on the merits of custody. Nor does it prevent parties from seising the competent court in the child's State of habitual residence while the proceedings under the Child Abduction Convention are pending.<sup>85</sup>

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<sup>81</sup> Rights to maintenance and contact rights are legally distinct issues.

<sup>82</sup> See the Guide to Good Practice on Mediation (*op. cit.* note 5), Chapter 2, for the particular challenges for mediation in international child abduction cases.

<sup>83</sup> See, *supra*, Section II.A.4.

<sup>84</sup> Art. 16 of the Child Abduction Convention.

<sup>85</sup> Art. 16 of the Child Abduction Convention does not confer international jurisdiction on the court of the State to which the child was wrongfully removed or retained. International jurisdiction is based on Art. 7 of the

81. The Child Protection Convention provides that, until the conditions for a transfer of international jurisdiction are met, the international jurisdiction for matters falling within its scope remains with the authorities of the State where the child habitually resided immediately before the abduction. For a change of international jurisdiction, Article 7 of the Child Protection Convention provides that the child must have:

"acquired a habitual residence in another State" **and**

"(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

(b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment."<sup>86</sup>

### 1. Return Agreement

Example scenario: Return proceedings under the Child Abduction Convention are ongoing in State A after a wrongful removal from State B. Following specialised mediation,<sup>87</sup> the parents reach a detailed agreement in accordance with which the child and mother (taking parent) are to return to the State from which the child was taken (State B). The agreement may set rules and requirements for how the family continues to maintain contact with each other, such as through designation of the mother as primary carer within State B, and setting a detailed contact arrangement between the child and father.

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Child Protection Convention, where the relevant States are Parties to that Convention. The Court of Justice of the European Union has recently considered the meaning of Art. 16 of the Child Abduction Convention, Case C-603/20 PPU *SS v. MCP* EU:C:2021:231. The Court stated at para. 61 that: "if, in accordance with Art. 16 [of the Child Abduction Convention], it is established that the conditions laid down by that convention for return of the child are not satisfied, or if an application under that convention has not been made within a reasonable time, the authorities of the State to which the child has been removed or in which the child has been retained become the authorities of the State of habitual residence of the child, and should, as the courts that are geographically closest to that place of habitual residence, have the power to exercise their jurisdiction in matters of parental responsibility."

<sup>86</sup> Notably, Art. 7(a) of the Child Protection Convention requires that "each person, institution or other body having rights of custody has acquiesced in the removal or retention". Apart from the parents, there may be other individuals or authorities that are considered to have rights of custody in accordance with the law of the State of the child's habitual residence. These individuals or authorities must give their approval or at least be deemed to have acquiesced in the removal or retention after the parents have reached an agreement. For a discussion of the provisions on transfer of international jurisdiction under Art. 7 of the Child Protection Convention and why the fact that the Child Protection Convention is part of the EU *acquis* helps to prevent an interpretation of EU law that would give the State of habitual residence immediately before the wrongful removal or retention, if it was in the EU, perpetual jurisdiction over the parental responsibility of the child, see *SS v. MCP (ibid.)*, at paras 49-63.

<sup>87</sup> As recommended by the Guide to Good Practice on Mediation, mediation in international child abduction cases should be conducted by experienced family mediators having received specific training for international family mediation and, more specifically, mediation in international child abduction cases. For more information on the requirements for specialised mediation in international child abduction cases, see the Guide to Good Practice on Mediation (*op. cit.* note 5), Chapters 3 and 6.

82. The court seized with the return proceedings under the Child Abduction Convention can conclude the proceedings by consent, but that court does not have international jurisdiction to render a decision on the merits of custody and contact. This international jurisdiction remains with the authorities in the State of the child's habitual residence, in accordance with Article 7 of the Child Protection Convention. This means that the necessary proceedings will need to be undertaken in the State of the child's habitual residence (in the example, State B) to obtain a measure of protection incorporating the terms of the agreement regarding custody and contact, which will then be enforceable in the State of habitual residence and all other Contracting Parties to the Child Protection Convention. Note that issues of the long-term exercise of parental responsibility falling under the Child Protection Convention as a "measure of protection", including in relation to custody, care and contact, give rise to the same considerations as the exercise of parental responsibility in the context of a relocation agreement.
83. In cases of urgency, Article 11 of the Child Protection Convention grants jurisdiction for measures of protection to the authorities of any Contracting Party to the Convention in the territory of which the child is present. This may include giving provisional force to contact and primary carer arrangements. It is for the competent authority to determine if the circumstances warrant such remedial action outside the State of the child's habitual residence.<sup>88</sup> Considering the particular circumstances of the return proceedings under the Child Abduction Convention, Article 11 of the Child Protection Convention may apply to allow certain measures of protection in relation to the safe return of the child.<sup>89</sup> Advisers should note, however, the measures taken in accordance with Article 11 are, by their nature, "temporary measures" that "lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 [of the Child Protection Convention] have taken the measures required by the situation".<sup>90</sup> Article 11 of the Child Protection Convention therefore is not a means by which to implement long-term arrangements for custody and contact, though it may add complementary protections to help resolve the return proceedings.
84. However, even if the court seized with the return proceedings under the Child Abduction Convention (in the State to which the child was taken or in which the child was retained) includes the full terms of the agreement in its decision, the authorities in other Contracting Parties to the Child Protection Convention are under no obligation to recognise the decision with regard to custody and contact.<sup>91</sup> Therefore, consideration should be given to rendering the agreement on custody and contact issues legally binding in the State of the child's habitual residence. In this way, the agreement will fall under the framework of the Child Protection Convention.<sup>92</sup> However, any delay in getting the authorities in the State of habitual residence to take a measure of protection incorporating the terms of the family agreement may

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<sup>88</sup> See the Explanatory Report on the Child Protection Convention (*op. cit.* note 32), para. 68, and the Practical Handbook on the Child Protection Convention (*op. cit.* note 32), para. 6.2.

<sup>89</sup> See the Practical Handbook (*ibid.*), para. 6.4.

<sup>90</sup> See Art. 11(2) of the Child Protection Convention.

<sup>91</sup> See Art. 23(2)(a) of the Child Protection Convention.

<sup>92</sup> However, there may be certain obstacles to obtaining the measure of protection in the State of the child's habitual residence. For example, the authorities in the State of the child's habitual residence may request the presence of both parties in court or may wish to interview the child. Of course, depending on the circumstances, a video hearing of the child and the taking parent may be possible to avoid the need for the taking parent and child to return to the State of habitual residence of the child before the wrongful removal or retention.

prevent the "prompt"<sup>93</sup> return of the child to that State which the Child Abduction Convention requires. Legal advisers who have helped the parties reach a family agreement that involves the return of the child may urge the authorities in the State where the child was taken to facilitate the "prompt" return of the child by making such aspects of the "return agreement" entered into by the parties enforceable, which they have jurisdiction to do (including using the urgent jurisdiction of Article 11 of the Child Protection Convention). Urgent measures under Article 11 of the Child Protection Convention are automatically recognised by operation of law in the State of habitual residence of the child<sup>94</sup> until the authorities there have taken the measures required by the situation.<sup>95</sup>

85. If allowed under domestic law, the use of direct judicial communications can assist in resolving these complex situations. Courts may contact a member of the International Hague Network of Judges (hereinafter, "IHNJ"), a network comprised of one or more members of the judiciary of Contracting Parties.<sup>96</sup> The role of the IHNJ member is to receive (and, where necessary, channel) incoming judicial communications, and initiate or facilitate outgoing communications. Judges can verify on the HCCH website whether there is a judge in their jurisdiction designated to the IHNJ. If so, judges may contact their member of the IHNJ to initiate direct judicial communications through the network or obtain support in order to do so. Judges contemplating the initiation of direct judicial communications are invited to consult the Emerging Guidance and General Principles for Judicial Communications published by the HCCH.<sup>97</sup>
86. In relation to matters of maintenance within the scope of the Child Support Convention, the abduction situation does not impact on matters of international jurisdiction. Where the court in the State of habitual residence can hear matters of both maintenance and parental responsibility, parties could bring their agreement to that court. Alternatively, the authorities in the State to which the child was taken or in which the child was retained, provided they have jurisdiction under their own rules, could render a decision incorporating the terms of the agreement on maintenance if maintenance proceedings are initiated in this State, which would represent additional costs. The decision would be recognisable and enforceable in the State of the child's habitual residence provided that one of the indirect grounds of jurisdiction in Article 20 of the Child Support Convention is satisfied (see, *supra*, para. 58). Another option is that, should the laws of the State to which the child was taken offer the possibility to make a "maintenance arrangement", Article 30 of that Convention could be used to give the agreed terms on maintenance legal effect in the State of the child's habitual residence, assuming this State has not made a reservation in accordance with Article 30(8). This option is independent of considerations of international jurisdiction. However, this may be a riskier option as the debtor could

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<sup>93</sup> See Art. 1(a) of the Child Abduction Convention and the requirement in Art. 12 on the authority concerned to order the return of the child "forthwith".

<sup>94</sup> See Art. 23(1) of the Child Protection Convention.

<sup>95</sup> See Art. 11(2) of the Child Protection Convention.

<sup>96</sup> See the HCCH website for details about the International Hague Network of Judges at [www.hcch.net](http://www.hcch.net) under "Child Abduction Section".

<sup>97</sup> See HCCH, *Direct Judicial Communications – Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges*, The Hague, 2013, p. 12 (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction Section" then "Direct Judicial Communications").

eventually move to a Contracting Party that has made a reservation under Article 30(8).

## 2. Non-Return Agreement

Example scenario: Return proceedings under the Child Abduction Convention are ongoing in State A after a wrongful removal from State B. Following specialised mediation,<sup>98</sup> the parents reach a detailed agreement in accordance with which the child and mother (taking parent) are not to return to the State from which the child was taken (State B). The agreement sets rules and requirements for how the family continues to maintain contact with each other, such as through designation of the mother as primary carer within State A and a detailed contact arrangement between the child and father.

87. In the case of an agreement not to return the child to the State of the child's habitual residence, the same considerations in relation to issues relating to custody and contact, international jurisdiction, the expeditious nature of return proceedings, and matters of maintenance apply as in the case of a return agreement. These considerations are discussed above.
88. It should be kept in mind that, due to the interdependence of the terms of the agreement, the left-behind parent may not be willing to end the return proceedings under the Child Abduction Convention unless the family agreement is enforceable.
89. An agreement not to return the child may be concluded on the basis of the parties' view that the transfer of international jurisdiction on matters of custody and contact from the State of the child's habitual residence to the State to which the child was taken has occurred because the cumulative conditions of Article 7 of the Child Protection Convention are met. Whether such transfer has indeed occurred is a matter for the relevant court to determine. This is discussed, *supra*, in paragraph 81.
90. If the court seised with the return proceedings under the Child Abduction Convention finds that
- the State of the child's habitual residence has in fact changed to the State to which the child was taken;
  - the other conditions for a transfer of international jurisdiction in accordance with Article 7(1)(a) of the Child Protection Convention are met, **and**
  - the court also has jurisdiction under its domestic law(s) on custody and contact to approve the agreement between the parties,<sup>99</sup>

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<sup>98</sup> See, *supra*, note 87.

<sup>99</sup> Recital 22 to the Brussels IIb Regulation states that: "Member States which have concentrated jurisdiction should consider enabling the court seised with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence

the court can terminate the return proceedings, either by the applicant withdrawing the return application or the taking parent asking for a decision to reject the return application due to the left-behind parent's acquiescence (Art. 13(1)(a)). If the court has jurisdiction over both the return proceedings and the proceedings to approve the parties' family agreement, assuming separate proceedings can be initiated, the court could incorporate the terms of the agreement on custody and contact into a measure of protection. This allows for easier coordination in accordance with the relevant domestic procedural rules.<sup>100</sup>

91. Where the conditions for a transfer of jurisdiction under Article 7 of the Child Protection Convention are not fulfilled, a transfer of jurisdiction from the State of the child's habitual residence to the State to which the child was wrongfully removed or retained could be sought in accordance with Article 8 or 9 of the Child Protection Convention. This would enable the agreement not to return the child to be rendered binding, by court order, in the State to which the child was taken or in which the child was retained. However, the court in the State of the child's habitual residence is not under an obligation to decide expeditiously on the transfer of jurisdiction. The necessary exchange that is to take place between the authorities in both States under Articles 8 and 9 can be facilitated by direct judicial communications.<sup>101</sup>

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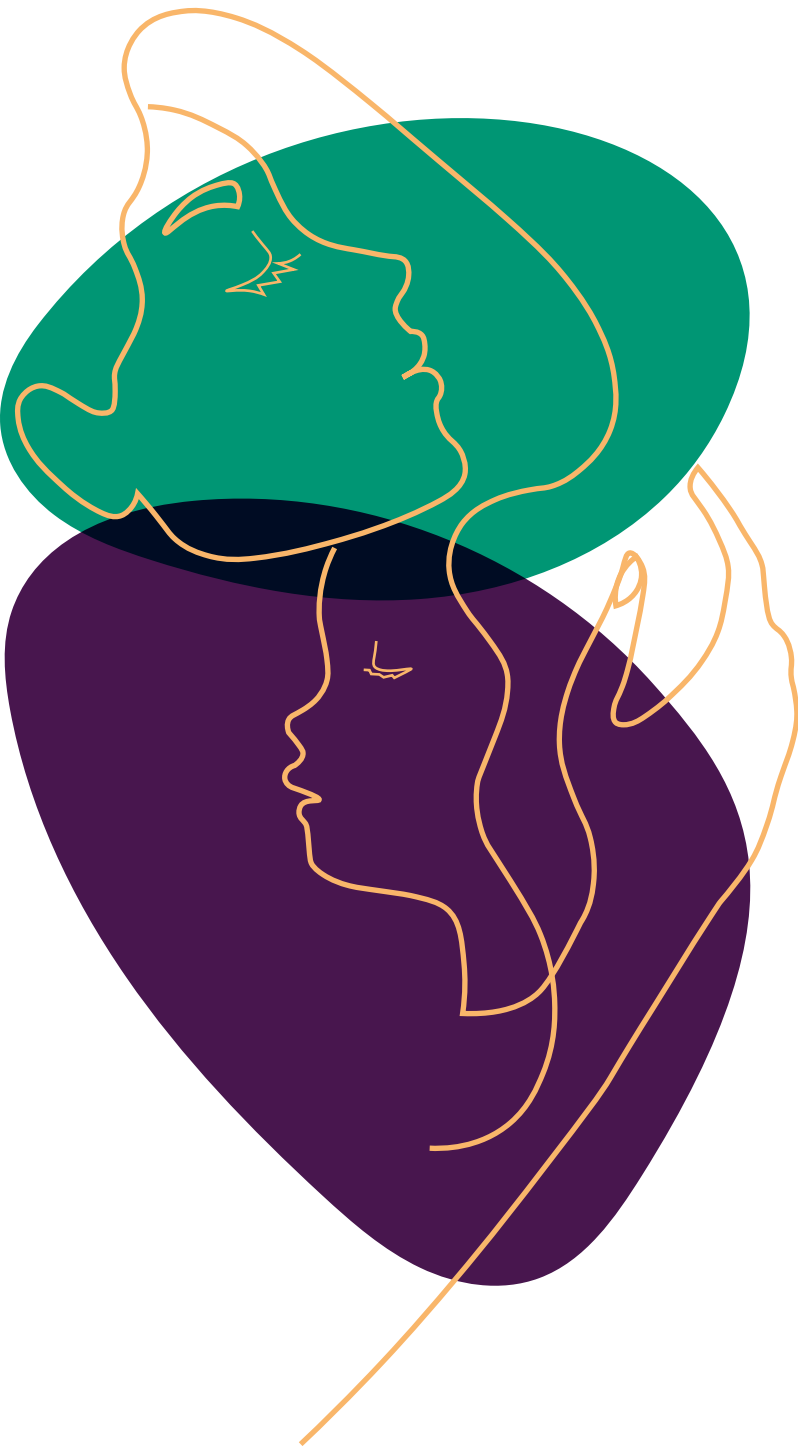
and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child." Greater party autonomy is permitted in intra-EU cases than under the Child Protection Convention by virtue of Art. 10 of the Brussels IIb Regulation (see also recital 43).

<sup>100</sup> Conclusions and Recommendations of the Special Commission of 2001, para. 3.1: "The Special Commission calls upon Contracting States to bear in mind the considerable advantages to be gained by a concentration of jurisdiction to deal with Hague Convention cases within a limited number of courts"; available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction Section" then "Special Commission meetings".

The Explanatory Report on the Child Abduction Convention (*op. cit.* note 14, para. 121) notes that Art. 16 is meant to promote the realisation of the Child Abduction Convention's objects regarding the return of the child, and aims to avoid the misuse of custody proceedings by the taking parent in the State to which the child was taken, bringing about conflicting custody decisions and circumventing the Convention's return mechanism. Hence Art. 16 of the Convention should not prevent the court from approving the agreement. The Explanatory Report goes on to note that "it is perfectly logical to provide that this obligation [...] prohibition against deciding upon the merits of custody rights [...] will cease as soon as it is established that the conditions for a child's return have not been met [...] because the parties have come to an amicable arrangement [...]".

<sup>101</sup> See, *supra*, para.85.





**V**

**General Questions  
to Consider for  
a Family  
Agreement to be  
Legally Binding  
and Enforceable  
Under the  
HCCH Conventions**





92. This section consists of general questions that may be considered in the course of the conclusion of a family agreement within the framework of the Child Abduction, Child Protection and Child Support Conventions. The questions and practice points shared in this section of the Practitioners' Tool should only be considered if appropriate to, and permitted under, the relevant laws and procedures of the individual Contracting Parties to the HCCH Conventions, and if considered to be appropriate to their specific case.
93. Content of the family agreement:
- What subject matter does the agreement cover?
  - With which States does the dispute have a connection? With which States will the agreement, once implemented, have a link?
  - With regard to which subject matter must the agreement be legally binding and enforceable, and in which State(s)?
94. The scope and application of the HCCH Conventions:
- Are the Child Abduction, Child Protection, and / or Child Support Conventions in force between the States concerned?<sup>102</sup>
95. Identifying the jurisdiction in which the agreement should first be rendered legally binding and enforceable:
- In which jurisdiction should the agreement first be rendered legally binding and enforceable ("first State") so that later it can be given cross-border effect and enforceability in as many of the jurisdictions concerned as possible?
  - Are civil legal proceedings concerning matters covered by the agreement currently ongoing in one or more States? What does the agreement envisage for these proceedings? Do these proceedings affect the choice of the first State?
96. Cross-border effect of the family agreement — after identifying the HCCH Conventions that apply and the jurisdiction in which the agreement should first be rendered legally binding and enforceable, the following questions may be considered:
- In the first State, what are the conditions for the agreement to become legally binding and enforceable in that State?
  - What are the substantive law rules in the first State applicable to the subject matter covered by the agreement and what limits to party autonomy do they foresee?
  - Which steps must be taken to render the agreement binding and enforceable?

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<sup>102</sup> It is necessary to confirm that the Conventions under consideration are in force between the Contracting Parties concerned. For up-to-date information on which States are Contracting Parties to these Conventions, see the HCCH website at [www.hcch.net](http://www.hcch.net) under "Instruments" then "Conventions" then "Status table". A complete overview of States having ratified HCCH Conventions can furthermore be found on the HCCH website under "Instruments" then "Status chart".

- If there are different ways to render the agreement or its content enforceable, which way most easily allows the agreement to be rendered legally binding and enforceable in a foreign State in accordance with the relevant HCCH Conventions?
- What are the conditions for the cross-border recognition and enforcement of the agreement imposed by the private international law rules in force in the State addressed? What does this imply for the content of the agreement, the process followed, and steps taken in the first legal system?



# VI

## Useful Resources

## Useful Resources

- A The Child Abduction Convention
- B The Child Protection Convention
- C The Child Support Convention

97. In order to acquire and enhance knowledge and understanding of the Child Abduction, Child Protection, and Child Support Conventions, readers may refer to the following resources.

### A. The Child Abduction Convention

98. The following resources on the Child Abduction Convention may be helpful:
- The **Explanatory Report on the Child Abduction Convention**<sup>103</sup> provides information on the preparatory work and the circumstances of the conclusion of the Convention, and can sometimes be used as a supplementary means of interpretation of the Convention. Generally, judicial authorities may have regard to the Explanatory Reports for all HCCH Conventions.
  - The **Proceedings of the Fourteenth Session**<sup>104</sup> include the Explanatory Report and all preparatory work that led to the adoption of the Convention text such as Reports, Conclusions of the Special Commission, comments of governments and international organisations and minutes of the meetings of the Session.
  - Some information about applicable rules is provided by Contracting Parties in their **Country Profiles**.<sup>105</sup>
  - **The International Child Abduction Database, or INCADAT**<sup>106</sup> was established to facilitate mutual understanding and more consistent interpretation of the Convention. It is available online at no charge in English, French and Spanish. INCADAT contains summaries and the full texts of significant decisions relevant to international child abduction from around the world.
  - The HCCH has published **Guides to Good Practice**<sup>107</sup> under the Child Abduction Convention:
    - Part I – Central Authority Practice;
    - Part II – Implementing Measures;
    - Part III – Preventive Measures;
    - Part IV – Enforcement;
    - Part V – Mediation;
    - Part VI – Article 13(1)(b); and
    - *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice*.

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<sup>103</sup> See, *supra*, note 21.

<sup>104</sup> *Id.*

<sup>105</sup> The Country Profiles are available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Child Abduction Section" then "Country Profiles".

<sup>106</sup> Available at [www.incadat.com](http://www.incadat.com).

<sup>107</sup> See, *supra*, notes 5, 8, 16 and 22.

## B. The Child Protection Convention

99. The following resources on the Child Protection Convention may be helpful:

- The **Explanatory Report on the Child Protection Convention**<sup>108</sup> contains relevant information regarding the preparatory work in addition to the circumstances of the conclusion of the Convention.
- The **Proceedings of the Eighteenth Session**<sup>109</sup> include the Explanatory Report and all preparatory work that led to the adoption of the Convention text such as Reports, Conclusions of the Special Commission, comments of governments and international organisations and minutes of the meetings of the Session.
- The HCCH has published the **Practical Handbook on the Operation of the Child Protection Convention**,<sup>110</sup> which may be helpful for the interpretation of the Child Protection Convention.

## C. The Child Support Convention

100. The following resources on the Child Support Convention may be helpful:

- The **Explanatory Report on the Child Support Convention**<sup>111</sup> contains relevant information regarding the preparatory work in addition to the circumstances of the conclusion of the Convention.
- The **Proceedings of the Twenty-First Session (Parts 1 and 2)**<sup>112</sup> include the Explanatory Report and all preparatory work that led to the adoption of the Convention text such as Reports, Conclusions of the Special Commission, comments of governments and international organisations and minutes of the meetings of the Session.
- The HCCH has published two Practical Handbooks on the Child Support Convention:<sup>113</sup>
  - **Practical Handbook for Caseworkers under the Child Support Convention**; and
  - **Practical Handbook for Competent Authorities: The HCCH 2007 Child Support Convention, the HCCH 2007 Protocol on Applicable Law (Maintenance) and the 2009 European Union Maintenance Regulation.**

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<sup>108</sup> See the Explanatory Report on the Child Protection Convention (*op. cit.* note 32), pp. 535-605.

<sup>109</sup> See, *supra*, note 32.

<sup>110</sup> *Id.*

<sup>111</sup> See, *supra*, note 54.

<sup>112</sup> HCCH, *Proceedings of the Twenty-First Session (2007)*, Tome I (Parts 1 and 2), *Child support*, The Hague, 2020; available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Publications & Studies", then "Publications" and "Proceedings of the Diplomatic Sessions".

<sup>113</sup> See, *supra*, note 55.

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