AMICABLE

Best Practice Tools assisting with the enforceability of mediated agreements in the EU and a Model for incorporating mediation into child abduction cases

GERMANY
BEST PRACTICE TOOL
for the
Recognition and Enforceability of Mediated Agreements in the EU

MiKK e.V. International Mediation Centre for Family Conflict and Child Abduction

Uniwersytet Wrocławski

Università degli Studi di Milano Bicocca

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Universidad de Alicante

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Germany - Best Practice Tool for the Recognition and Enforceability of Family Law Agreements Involving Children within the European Union

Status of research December 2019 - unless otherwise stated. The Tool takes into consideration the new Brussels IIa (recast) Regulation and remains relevant in essence after 1.8.2022.

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Abbreviations of international and European legal framework

Abbreviation	Instrument
1980 Hague Child Abduction Convention	Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction[1]
1996 Hague Child Protection Convention	Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[2]
2007 Hague Maintenance Convention	Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance[3]
2007 Hague Protocol	Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations[4]
Brussels I (recast)	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[5] (recast)
Brussels IIa Regulation	Council Regulation (EC) No2201/2003 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[6]
Brussels IIa (recast) Regulation	COUNCIL REGULATION (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)[7]
Maintenance 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[8]
Matrimonial Property Regime Regulation	Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[9]
Registered Partnership Property Regime Regulation	Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships[10]
Rome III Regulation	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation[11]

1 For the text and further information see the Hague Conference website at < https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction > (last consulted 30.8.2019).
2 For the text and further information see the Hague Conference website at < https://www.hcch.net/en/instruments/conventions/full-text/?cid=70 > (last consulted 30.8.2019).
3 For the text and further information see the Hague Conference website at < https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support > (last consulted 30.8.2019).
4 For the text and further information see the Hague Conference website at < https://www.hcch.net/en/instruments/conventions/full-text/?cid=133 > (last consulted 30.8.2019).
5 For the text see < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF > (last consulted 30.8.2019).
6 For the text see < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201 > (last consulted 30.8.2019).
7 For the text see< https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1111&from=EN > (last consulted 30.8.2019).
8 For the text see < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0004&from=EN > (last consulted 30.8.2019).
9 For the text see < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1103 > (last consulted 30.8.2019).
10 For the text see < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1104 > (last consulted 30.8.2019).
11 For the text see < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1259 > (last consulted 30.8.2019).

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GERMANY: Abbreviations of national legal provisions

Abbreviation	Full title of the law
AUG	Gesetz zur Geltendmachung von Unterhaltsansprüchen im Verkehr mit ausländischen Staaten v. 23.5.2011[12] – Auslandsunterhaltsgesetz (Act on the Recovery of Maintenance in Relations with Foreign States- Foreign Maintenance Act)
BGB	Bürgerliches Gesetzbuch i.d.F. der Bekanntmachung v. 2.1.2002[13] (Civil Code)
BeurkG	Beurkundungsgesetz v. 28.8.1969[14] (Authentication Act)
BNotO	Bundesnotarordnung v. 13.2.1937[15] (Regulation for German Notaries)
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit v. 17.12.2008[16] (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction)
FamGKG	Gesetz über Gerichtskosten in Familiensachen v. 17.12.2008[17] (Law concerning Costs in Family Proceedings)
GNotKG	Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare v. 23.7.2013[18] (Law concerning costs in Matters of Non-contentious Jurisdiction for Courts and Notaries)
GVG	Gerichtsverfassungsgesetz i.d.F. der Bekanntmachung v. 9.5.1975[19] (Act on the Constitution of Courts)
IntFamRVG	Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts- Internationales Familienrechtsverfahrensgesetz v. 26.1.2005[20] (Act to Implement Certain Legal Instruments in the Field of International Family Law/ International Family Law Procedure Act – IFLPA)
IntGüRVG	Internationales Güterrechtsverfahrensgesetz v. 17.12.2018 (Act to Implement Certain Legal Instruments in the Field of Matrimonial Property)
JVEG	Gesetz über die Vergütung von Sachverständigen, Dolmetscherinnen, Dolmetschern, Übersetzerinnen und Übersetzern sowie die Entschädigung von ehrenamtlichen Richterinnen, ehrenamtlichen Richtern, Zeuginnen, Zeugen und Dritten v. 5.5.2004[21] (Law on the fees for experts, interpreters, translaters and the compensation of lay judges, witnesses and third persons)
MediationsG	Mediationsgesetz v. 21.7.2012[22] (Mediation Act)
RVG	Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte- Rechtsanwältevergütungsgesetz v. 5.5.2004[23] (Law on the Remuneration of Attorneys)
SGB VIII	Sozialgesetzbuch (SGB)- Achtes Buch (VIII)- Kinder- und Jugendhilfe i.d.F der Bekanntmachung v. 11.9.2012[24]- (Code of Social Law, Volume VIII, Youth Welfare)
ZPO	Zivilprozessordnung i.d.F. der Bekanntmachung v. 5.12.2005[25] (Code of Civil Procedure)

12 Last amended by Art. 1 of the Act of 20.11.2019 (Federal Law Gazette I p. 1724); for the English text see https://www.gesetze-im-internet.de/englisch_aug/ (last consulted 30.3.2020).
13 Last amended by Art. 1 of the Act of 21.12.2019 (Federal Law Gazette I p. 2911); for the English text see https://www.gesetze-im-internet.de/englisch_bgb/ (last consulted 30.3.2020).
14 Last amended by Art. 13 of the Act of 30.11.2019 (Federal Law Gazette I p. 1924).
15 Last amended by Art. 12 of the Act of 30.11.2019 (Federal Law Gazette I p. 1942).
16 Last amended by Art. 3 of the Act of 9.12.2019 (Federal Law Gazette I p. 2146); for the English text see https://www.gesetze-im-internet.de/englisch_famfg/ (last consulted 30.3.2020).
17 Last amended by Art. 5 of the Act of 19.6.2019 (Federal Law Gazette I p. 840).
18 Last amended by Art. 7 of the Act of 17.12.2018 (Federal Law Gazette I p.2573).
19 Last amended by Art. 3 and 4 of the Act of 10.12.2019 (Federal Law Gazette I p. 2121); for the English text see https://www.gesetze-im-internet.de/englisch_gvg/ (last consulted 30.3.2020).
20 Last amended by Art. 5 of the Act of 31.1.2019 (Federal Law Gazette I p. 54); for the English test see https://www.gesetze-im-internet.de/englisch_intfamrvg/ (last consulted 30.3.2020).
21 Last amended by Art. 5 Abs. 2 of the Act of 11.10.2016 (Federal Law Gazette I p. 2222).
22 Last amended by Art. 135 V of the Act of 31.8.2015 (Federal Law Gazette I p. 1474); for the English text see https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.pdf (last consulted 30.3.2020).
23 Last amended by Art. 7 of the law of 10.12.2019 (Federal Law Gazette I p. 2128); for the English text see https://www.gesetze-im-internet.de/englisch_rvg/ (last consulted 30.3.2020).
24 Last amended by Art. 8 of the Act of 30.11.2019 (Federal Law Gazette I p. 1948).
25 Last amended by Art 10 of the Act of 20.11.2019 (Federal Law Gazette I p. 1724); for the English text see https://www.gesetze-im-internet.de/englisch_zpo/ (last consulted 30.3.2020).

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Introduction

Definitions, Aim and Approach Taken

Definitions

International family agreement

1. For the purpose of this Best Practice Tool an international family agreement will be defined as: An agreement regulating a family situation with an international element involving children dealing with matters of parental responsibility and / or maintenance and possibly other matters.

Parental responsibility

2. The term parental responsibility will be used in this Best Practice Tool as defined in Article 2, Nos 7 et seq. of the Brussels IIa Regulation and "shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access."

Maintenance

3. Matters of maintenance used in this Tool will comprise child and spousal / ex-spousal maintenance. For the important differentiation of spousal maintenance from property matters reference is made to the decision of the Court of Justice of the European Union (hereinafter, "CJEU") in Van den Boogaard v. Laumen (C-220/95). The CJEU had to decide whether a lump sum payment was to be considered "maintenance" in the sense of the Brussels Convention, a European legal instrument later transformed into the Brussels I Regulation and now replaced, in respect of maintenance, by the Maintenance Regulation. The CJEU set forth that also a lump sum payment would qualify as maintenance if the reasoning gave indication that it was "designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses [were] taken into consideration in the determination of its amount" (para. 22).

Court and court decision

4. The term "court" will, unless otherwise specified, be used in this tool to cover also certain non-judicial authorities, which have jurisdiction under the European and international legal instruments for matters falling within the scope of these instruments.

5. The term "court decision" is, unless otherwise specified, used in this tool to comprise any form of court decision whatever it may be called, including judgements and orders.

Authentic instrument

6. The term "authentic instrument" as used in this tool means a document that has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

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(i) relates to the signature and the content of the authentic instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin.

7. This definition is in line with the definition used in Article 2 (2) 2 of the Brussels IIa (recast) Regulation.

Homologation

8. The term "homologation" is used very differently in national law and might roughly be described as a simplified process provided by some national laws to render agreements on a certain subject matter legally binding / enforceable. In some legal systems this may be a process by which an agreement is approved by court following an examination of the substance; in others, the process might not include a test to the content of the agreement. There is no autonomous European interpretation of the term "homologation" and the term does not find explicit mention in European family law instruments. The National Best Practice tools will explain what is understood in national by "homologation" should such a process exist in the relevant legal system and characterise the outcome in view of requirements set up by European and international legal instruments for a cross-border recognition.

Introduction

9. Solving international family disputes by agreement or setting up international family agreements to prevent disputes from occurring in the future is generally beneficiary to all concerned. International,[26] European[27] and national legal framework encourage family mediation and similar means of amicable dispute resolution to bring about such agreed solutions. However, once an agreement is obtained outside ongoing legal proceedings it is often not evident to the parties what legal standing the agreed result has.[28] Even for agreements in a purely national context there can be quite some uncertainty - not to speak of the cross-border validity of such agreements.

10. Parts of the agreement might have immediate legal validity if they fulfil necessary requirements for the conclusion of a contract on the matter concerned in a legal system; others, such as matters relating to custody, might not be validly agreed upon without the approval of an authority. Some agreements are expressly drawn up as a "memorandum of understanding" to avoid any immediate legal effects and an unwanted partial effect of the agreement before the respective lawyers take the steps to render the complete agreement binding. Once the agreement is legally binding in a given legal system, additional steps may be required to render the agreed solution enforceable in that legal system. The options available to render an agreement legally binding and enforceable will depend on the relevant national law. It may be required that the agreement will have to be included in a court decision, be homologated or approved by an authority or registered in a certain way to give it legal binding force.

11. International and regional legal framework can assist in making the agreement "travel" cross-border by providing simplified rules for cross-border recognition and enforcement. The **EU Best Practice Tool** provides a brief overview of this legal framework and analyses the different avenues offered to render a family agreement legally binding and enforceable in the two or more States concerned in an international family dispute. The **National Best Practice Tools** will shed light on how the national law links in with the international and regional legal framework. The National Best Practice Tools will set forth in detail for EU Member States[29] how a family agreement can be rendered enforceable under national law. They will set out the options available under national law, address questions of

26 See for example Article 7 (2)(c) of the 1980 Hague Child Abduction Convention, Article 31 (b) of the 1996 Hague Child Protection Convention, Article 31 of the 2000 Hague Protection of Adults Convention and Articles 6 (2) (d), 34 (2)(i) of the 2007 Hague Child Support Convention.

27 See in the EU for example Article 51 (2) (d) of the European Maintenance Regulation and Article 55 (e) of the Brussels IIa Regulation. The new Brussels IIa (recast) Regulation reinforces the call for mediation and similar means to assist in the resolution of cross-border family disputes involving children, see Recital 43 and Article 25 of the Regulation. See also the European Legal Aid Directive (Council Directive 2002/8/EC of 27 January 2003), applicable in all EU States (except Denmark) indicating in Recital 21 that "[l]egal aid is to be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court".
See further for the greater European region also the European Convention on the Exercise of Children's Rights prepared by the Council of Europe and adopted on 25 January 1996, Article 13; Convention text available at <http://conventions.coe.int/treaty/en/treaties/html/160.htm> (last consulted 10 October 2019).

28 Article 6 of the European Mediation Directive (European Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters) which requests Member States to "ensure that it is possible for the parties […] to request that the content of a written agreement resulting from mediation be made enforceable" was not able to remedy this; see more tin detail below under Chapter VIII "Relevant legal framework on mediation".

29 In the course of the Amicable Project four National Best Practice Tools are developed, namely for Germany, Italy, Poland and Spain.

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local jurisdiction, procedural law requirements and provide information on costs and the approximate time the process will require. The National Best Practice Tools will use the EU Best Practice Tool as a template so that the reader is offered a holistic view of a national law analysis embedded in the international and EU legal framework.

12. The Best Practice Tool will focus on agreements concerning matters of parental responsibility and maintenance but will also touch upon related matters. While the Best Practice Tool will concentrate on cross-border situations inside the EU, cases in which enforcement of an agreed solution outside the EU might be required cannot be left unconsidered.

13. The Best Practice Tool takes note of the work undertaken in this field by the Experts' Group[30] of the Hague Conference on Private International Law (HCCH) on the development of a non-binding 'navigation tool' to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign State under the 1980, 1996 and 2007 Hague Conventions.

Aim

14. The European Best Practice Tool aims to:

- assist with rendering international family agreements inside the European Union and beyond legally binding and enforceable;
- assist parents in giving legal force to their agreement in both / all legal systems concerned;
- provide guidance to stakeholders & legal practitioners on which steps to take;
- point to available options;
- indirectly, promote mediation and similar means by assisting in granting a solution agreed by both parties the same reliability as court decisions;
- identify existing problems and suggest good practices to overcome these obstacles;
- assist public authorities / legislators to take appropriate measures to facilitate rendering international family agreements legally binding and enforceable.

Approach taken

15. The European Best Practice Tool will set forth how applicable European / international legal framework relating to matters of parental responsibility and maintenance as well as related matters can assist in rendering international family agreements legally binding and enforceable in all legal systems concerned. The European Best Practice Tool will equally indicate where national law comes to play a role. The National Best Practice Tools[31] will explore the relevant national law provisions using the European Best Practice Tool as a template. It will also be the National Best Practice Tools that will bring clarity to questions of characterisation of processes offered by national law to render family agreements binding in order to justify the usage of available avenues for cross-border recognition offered by the European / international legal framework.

16. The Best Practice Tool will give guidance for the following family situations:

Situation I: Lawful relocation of minor child and one parent to another State

Situation II: Cross-border contact / maintenance case

Situation III: International child abduction return agreement

Situation IV: International child abduction non-return agreement

17. In view of the two main avenues offered by the current European / international legal framework for cross-border recognition, the Best Practice Tool distinguishes the following two main methods to make the agreement or its content travel cross-border:

Method A: Using the mechanisms of European / international legal framework for cross-border recognition of "decisions"

30 See the Revised draft Practical Guide: Cross-border recognition and enforcement of agreements reached in the course of family matters involving children, available at the Hague Conference website at < https://assets.hcch.net/docs/97681b48-86bb-4af4-9ced-a42f58380f82.pdf > (last consulted on 10 October 2019).

31 In the course of the Amicable Project four National Best Practice Tools are developed, namely for Germany, Italy, Poland and Spain.

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Method B: Using the mechanisms of European / international legal framework for the cross-border recognition of "authentic instruments" or "enforceable agreements"

18. For international child abduction cases, the Best Practice Tool will explore how family agreements concluded while Hague return proceedings are ongoing and aiming to end the abduction situation can best be rendered legally binding and enforceable. The particular challenges of Hague proceedings and especially the tight time requirements to end the Hague proceedings as well as the special rules for international jurisdiction on custody matters are setting the scene.

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European and International Legal Framework - Overview

European and international legal framework - Overview

19. This Chapter gives a brief overview of European / international legal framework assisting in the resolution of cross-border family disputes in form of two tables, one sorted by subject matter and another sorted by geographical scope. Subsequently, a brief summary of these instruments' content is provided, sorted by subject matter and focussing on how the instruments can assist with making agreements or their content "travel cross-border". The Chapter also includes an overview of human rights instruments that influence the interpretation of and the practice under the above PIL instruments in Europe. Finally, the Chapter contains a brief overview of international and EU legal frameworks with relevance for family mediation.

Overview sorted by subject matter

20. A brief overview shall be given of applicable international and European legal framework containing rules on international jurisdiction, applicable law and / or recognition and enforcement.

21. The following table lists the relevant instruments sorted by subject matter and set of rules.

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Subject Matter	International jurisdiction	Applicable law	Recognition & enforcement within EU	Recognition & enforcement in non-EU-States or from outside the EU
Parental responsibility	Brussels IIa Regulation, for proceedings instituted as of 1.8.2022 Brussels IIa (recast) Regulation	1996 Hague Child Protection Convention	Brussels IIa Regulation, for proceedings instituted as of 1.8.2022 Brussels IIa (recast) Regulation	1996 Hague Convention among Contracting States
Maintenance	Maintenance Regulation (& Lugano II Convention)	Art. 15 Maintenance Reg in connection with 2007 Hague Protocol	Maintenance Regulation	2007 Hague Maintenance Convention among Contracting States & a number of other instruments
Divorce	Brussels IIa Regulation, for proceedings instituted as of 1.8.2022 Brussels IIa (recast) Regulation	Rome III Regulation	Brussels IIa Regulation, for proceedings instituted as of 1.8.2022 Brussels IIa (recast) Regulation	Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
Property regime of spouses and registered partners	Property Regime Regulations	Property Regime Regulations	Property Regime Regulations	/

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Overview of geographic scope

22. The following table provides an overview of the geographic scope of the above listed instruments with some details on the scope of application of certain parts of these instruments.

Instrument	States bound	Rules on international jurisdiction	Rules on applicable law	Rules on recognition & enforcement within EU	Rules on recognition & enforcement in non-EU-States or from outside the EU
Brussels IIa Regulation (Temporal application, Art. 64)	All EU-Member States except Denmark	Universal application in all cases falling within the Regulation's material scope	/	Applicable to decisions etc. originating from EU-States bound by the Regulation	/
Brussels IIa (recast) Regulation (Temporal application, Art. 100)	All EU-Member States except Denmark	Universal application in all cases falling within the Regulation's material scope		Applicable to decisions etc. originating from EU-States bound by the Regulation.	
Maintenance Regulation (Temporal application, Art. 69)	All EU-Member States (Denmark partially)	Universal application in all cases the Regulation's material scope and for all EU-States (including Denmark); conclusive rules; minor remaining scope of application for Lugano II Convention	Universal application of the applicable law rules contained in the Hague Protocol in all EU Member States except Denmark and the UK	Among EU-States bound by the Regulation. However, two different sets of rules for States bound by the applicable law rules and States not bound by them (namely the Denmark and the UK)	/
Rome III Regulation (Enhanced cooperation) (Temporal application, Art. 18)	Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Portugal Romania, Slovenia and Spain	/	Universal application in all States bound by the Regulation	/	/
Matrimonial Property Regime Regulation (Enhanced cooperation) (Temporal application, Art. 69)	Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Finland, France, Germany, Greece, Italy, Luxemburg, Malta, Netherlands, Portugal, Slovenia, Sweden and Spain	Universal application in all cases falling within the material scope of the Regulation	Universal application in all States bound by the Regulation	Applicable to decisions etc. originating from EU-States bound by the Regulation	/
Registered Partnership Property Regime Regulation (Enhanced cooperation) (Temporal application, Art. 69)	Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Finland, France, Germany, Greece, Italy, Luxemburg, Malta, Netherlands, Portugal, Slovenia, Sweden and Spain	Universal application in all cases falling within the material scope of the Regulation	Universal application in all States bound by the Regulation	Applicable to decisions etc. originating from EU-States bound by the Regulation	

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1996 Hague Child Protection Convention	Worldwide 52 Contracting States (status: January 2020), including all EU-Member States (also Denmark)	Universal application in all cases falling within the material scope of the Convention – provisions of the Brussels IIa Regulation are predominant	Universal application in all States bound by the Convention	Rules of the Brussels IIa Regulation are predominant regarding decisions originating from EU-States (except Denmark)	Applicable to decisions etc. originating from a Contracting State to the Convention
2007 Hague Maintenance Convention	Worldwide 40 States bound by the Convention (status January 2020), including all EU-Member States bound through EU approval except Denmark	/ (Only indirect and negative rules of jurisdiction contained)	/ (Applicable law rules are contained in the 2007 Hague Protocol)	Rules of the Maintenance Regulation are predominant regarding decisions originating from EU-States (except Denmark)	Applicable to decisions etc. originating from a State bound by the Convention
Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations	Albania, Australia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Moldova, Slovakia, Sweden, Switzerland, UK	/	/	/	Applicable to divorce and legal separation decisions originating from a State bound by the Convention

Matters of parental responsibility – summary of legal framework

Relevant instruments, scope and interrelation

23. Matters of parental responsibility fall within the material scope of both the **Brussels IIa Regulation** and the **1996 Hague Child Protection Convention**. The 1996 Hague Convention contains rules on international jurisdiction, applicable law and recognition and enforcement. The Brussels IIa Regulation contains rules on international jurisdiction, which are to a large extent identical with those of the 1996 Hague Convention, and rules on recognition and enforcement, which go further than those of the 1996 Hague Convention in facilitating the circulation of decisions on parental responsibility.

24. All EU Member States, except Denmark, are bound by the Brussels IIa Regulation. The 1996 Hague Child Protection Convention has 52 Contracting States worldwide (status January 2020) including all EU Member States, i.e. also Denmark. The Brussels IIa Regulation prevails over the 1996 Hague Convention within its scope of application. Since the Brussels IIa Regulation does not contain applicable law rules, the 1996 Hague Convention remains applicable alongside the Brussels IIa Regulation in this regard.

25. On 25 July 2019 the **Brussels IIa (recast) Regulation** was adopted. The Regulation has the same material and geographic scope of application as the Brussels IIa Regulation, which it will replace as of 1 August 2022 for proceedings instituted as of that date as well as for authentic instruments formally drawn up or registered and agreements registered as of that date. The Brussels IIa (recast) Regulation contains rules on international jurisdiction and on recognition and enforcement; differences to the predecessor Regulation will be pointed out below. The new Regulation will have the same interrelation with the 1996 Hague Convention as the predecessor Regulation, although certain issues formerly left to interpretation are now clarified in Article 97 of the Brussels IIa (recast) Regulation.

26. For cases of wrongful cross-border retention or removal of children, the **1980 Hague Child Abduction Convention** provides for expeditious return proceedings in all Contracting States. Worldwide the Convention is in force in 101 States (status January 2020) including all EU Member States. The Brussels IIa Regulation contains special rules of international jurisdiction for cases of wrongful cross-border removal or retention of children and an additional set of rules that is to be observed in international child abduction cases falling within the scope of the 1980 Hague Convention. The Brussels IIa (recast) Regulation adds some nuance to the rules contained in the predecessor Regulation regarding international child abduction cases and further elaborates the additional set of rules for child abduction cases, both of which will be described below.

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International jurisdiction

27. Courts in EU Member States, except Denmark, are bound by the international jurisdiction rules of the Brussels IIa Regulation in matters of parental responsibility. This means, they can only embody the content of a parental agreement on these matters in a decision if they have international jurisdiction. Once the decision is rendered it can freely circulate in all other EU Member States bound by the Regulation; international jurisdiction cannot be questioned later by the other EU Member States (see Article 24 Brussels IIa Regulation).

28. International jurisdiction on matters of parental responsibility lies, as a general rule, with the authorities in the State of the child's habitual residence, Article 8 Brussels IIa Regulation (Article 5 of the 1996 Hague Convention contains the same general rule).

29. Deviations from this general rule are regulated in Articles 9, 10 and 12 of the Brussels IIa Regulation. Article 9 Brussels IIa Regulation foresees a continuing jurisdiction of the child's former habitual residence for modifying decisions on contact issued in that State before a child relocated (there is no equivalent of this rule in the 1996 Hague Convention). Article 10 of the Brussels IIa Regulation applies in cases of international child abduction and is modelled on Article 7 of the 1996 Hague Convention (see further below under "international child abduction cases"). Article 12 of the Brussels IIa Regulation allows for prorogation of international jurisdiction on matters of parental responsibility under certain circumstances when divorce proceedings are ongoing (a similar rule is contained in Article 10 of the 1996 Hague Convention).

30. Article 15 Brussels IIa Regulation allows for a transfer of international jurisdiction on matters of parental responsibility to the court better placed to hear the case (a transfer of jurisdiction is also possible in accordance with Articles 8 and 9 of the 1996 Hague Convention).

31. Furthermore, Article 20 Brussels IIa Regulation provides for a basis of international jurisdiction for provisional measures, including protective, (a similar rule is contained in Article 11 of the 1996 Hague Convention[32]).

32. The Brussels IIa (recast) Regulation will bring a number of smaller changes to the rules of international jurisdiction in matters of parental responsibility. In particular, the rules on a prorogation of jurisdiction (Article 12 Brussels IIa Regulation) have been extended and further specified (new Article 10 Brussels IIa (recast) Regulation on Choice of court). In addition, the transfer of jurisdiction (Article 15 Brussels IIa Regulation, then Article 12 and 13 Brussels IIa (recast) Regulation) is now regulated with much precision. Furthermore, the special rules on jurisdiction in international child abduction cases (Article 10 Brussels IIa, new Article 9 Brussels IIa (recast) Regulation) have been slightly modified.

Applicable Law

33. Contrary to the 1996 Hague Child Protection Convention, the Brussels IIa Regulation does not contain any rules on applicable law. Thus there is no predominance of EU-internal rules over the 1996 Hague Convention in this regard and the law applicable to matters on parental responsibly is determined in accordance with Article 15 of the 1996 Hague Convention. As a general rule, authorities with international jurisdiction on matters of parental responsibility apply their own law ("lex fori") Article 15(1) of the 1996 Hague Convention.[33]

Recognition and enforcement within the EU (except Denmark)

34. Once the content of an agreement is turned into a court decision in an EU Member State, except Denmark, the agreement embodied in the decision will automatically be recognised in all other EU Member States bound by the Regulation (Article 21 Brussels

32 There is an important difference between urgent measures under Article 11 of the 1996 Hague Convention and those under Article 20 of the Brussels IIa Regulation. As clarified by the CJEU in Purrucker I (Case C-256/09 [2010] ECR I-7349 at para. 87), measures taken in a Member State based on Article 20 of the Regulation cannot be enforced under the Regulation in other Member States. Measures under Article 11 of the 1996 Hague Convention can also be enforced in other Contracting States and remain valid until the authority with regular international jurisdiction under the 1996 Hague Convention has taken the measures required by the situation. It is important to note that the fact that "measures falling within the scope of Article 20 of Regulation No 2201/2003 do not qualify for the system of recognition and enforcement provided for under that regulation does not, however, prevent all recognition or all enforcement of those measures in another Member State", see Purrucker I at para. 92. The CJEU notes here that "Other international instruments or other national legislation may be used, in a way that is compatible with the regulation."

33 To be precise, Article 15(1) of the 1996 Hague Convention provides that the authority "exercising their jurisdiction under the provisions of Chapter II" of the Convention shall "apply their own law". As stated above the rules on international jurisdiction of the Convention are superimposed by predominant and to a large extent identical EU rules. A teleological interpretation of Article 15(1) of the 1996 Hague Convention should therefore allow the EU authorities having international jurisdiction in accordance with the Brussels IIa Regulation to apply their own law.

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IIa Regulation). Upon application of any interested party the decision will be declared enforceable and can then enforced in accordance with the national enforcement law of the relevant State. Certain decisions on parental responsibility, namely decisions on rights of access referred to in Article 40(1)(a) of the Regulation, are enforceable without the need for a declaration of enforceability (exequatur) (Article 41 of the Regulation). This however requires that the conditions provided by Article 41(2) of the Regulation are met and that a certificate using the standard form in Annex III of the Regulation has been issued by the judge of origin of the decision.

35. In accordance with Article 46 of the Brussels IIa Regulation enforceable authentic instruments as well as enforceable agreements can circulate between the States bound by the Brussels IIa Regulation under the same conditions as judgements.

36. The Brussels IIa (recast) Regulation brings a further simplification of recognition and enforcement of court decisions among States bound by the Regulation by generally abolishing the requirement of an exequatur. The limited grounds for refusal of recognition of a decision in matters of parental responsibility are listed in Article 39 Brussels IIa (recast) Regulation and can be used to oppose the enforcement following the procedure set forth in Articles 59- 62 Brussels IIa (recast) Regulation.

Recognition and enforcement outside the EU (including Denmark)

37. For the recognition and enforcement of a court decision originating from a Brussels IIa State in a State not bound by the Regulation (i.e. States outside the EU or Denmark), the 1996 Child Protection Convention can be used provided the State in which recognition is sought is a Contracting State to the Convention. In accordance with Article 23 of the Convention, the court decision is recognised by operation of law in all other Contracting States. Limited grounds of non-recognition are listed in Article 23(2) of the Convention. To dispel doubts regarding the enforceability of the decision as a measure of child protection in the sense of the Convention, an advance recognition in accordance with Article 24 of the Convention can applied for.

International child abduction cases

38. For cases of wrongful cross-border retention or removal of children, two important questions have to be distinguished: (1) How can the prompt return of the child be achieved? (2) The courts of which State have international jurisdiction on matters of parental responsibility in the situation of international child abduction?

39. The 1980 Hague Child Abduction Convention provides an answer to the first question, setting up expeditious return proceedings, which are proceedings “sui generis” and are without prejudice to the determination of custody. The Brussels IIa Regulation provides in its Article 11 an additional set of rules for international child abduction cases inside the EU.

40. The second question finds an answer in Article 10 of the Brussels IIa Regulation, which provides (as Article 7 of the 1996 Hague Convention) that “the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction” on matters of parental responsibility in a scenario of child abduction. A shift of jurisdiction occurs when the child has acquired a habitual residence in another Member State and each person, institution or other body having rights of custody has acquiesced in the removal or retention or when the conditions of Article 10 b) Brussels IIa Regulation are met.

41. This approach is generally retained by the new Brussels IIa (recast) Regulation which applies as of 1 August 2022. However, as a big novelty the new Regulation allows for a choice of court solution in child abduction cases; it thereby provides support for agreed solutions found by the parents in the course of Hague return proceedings (see further below Guidance for Situation III and IV).

42. The additional rules for international child abduction cases formerly contained in Article 11 Brussels IIa Regulation are further specified in a separate Chapter (see Chapter III Brussels IIa (recast) Regulation): The Brussels IIa (recast) Regulation clarifies the relation to the 1980 Hague Child Abduction Convention (Article 22), contains an express obligation for Central Authorities to act promptly in handling child abduction cases (Article 23) sets forth clear deadlines for the prompt handling of child abduction cases by courts in the first and

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higher instance (Article 24) and provides an explicit encouragement for the use of mediation and other means of alternative dispute resolution in these cases (Article 25). The new Regulation furthermore makes the respect of the child's right to express her / his views also obligatory in international child abduction cases (Article 26 in connection with 21 Brussels IIa (recast) Regulation. It encourages contact arrangements between the left-behind parent and the abducted child in the course of the Hague return proceedings (Article 27 (2)) and direct judicial communications (Article 27(4)). In addition, the new Regulation introduces an express obligation for a speedy enforcement of return decisions (Article 28). Finally, the overriding-mechanism contained in the old Article 11 (6)-(8) Brussels IIa Regulation is further refined and specified in the new Regulation (Article 29 Brussels IIa (recast) Regulation).

Matters of maintenance – summary of legal framework

Relevant instruments, scope and interrelation

43. Matters related to child and spousal maintenance fall within the material scope of the Maintenance Regulation and of a number of international instruments, including the 2007 Hague Maintenance Convention, the Lugano II Convention, the 1973 Hague Convention, the 1958 Hague Convention, the 1956 New York Convention[34].

44. The **Maintenance Regulation** is applicable as of 18 June 2011 in all EU Member States, including Denmark. However, for Denmark the Regulation applies only partially (the Chapters III and VII are not applicable). The Maintenance Regulation contains rules on international jurisdiction, recognition and enforcement and on Central Authority – cooperation. Furthermore, by reference, the Maintenance Regulation incorporates into EU law the applicable law rules of the **2007 Hague Protocol** for all EU States bound by the Protocol, namely all EU Member States except Denmark and the UK.

45. The international "equivalent" to the EU Maintenance Regulation is the **2007 Hague Maintenance Convention**, which is in force in the EU, except Denmark, since 1 August 2013. The 2007 Hague Convention does however neither contain a reference to the applicable law rules of the 2007 Hague Protocol nor direct rules on international jurisdiction, but instead indirect rules of jurisdiction in the Chapter on recognition and enforcement. A further difference between the European Maintenance Regulation and the 2007 Hague Convention is the material scope. While the former is applicable to all forms of "maintenance obligations arising from a family relationship, parentage, marriage or affinity" (Article 1(1) Maintenance Regulation), the latter is, in accordance with the default scope of application only applicable to child maintenance and only to some extent to spousal maintenance (Article 2 of the 2007 Hague Convention). The scope of the 2007 Hague Convention can however be extended by those joining the Convention and the EU has indeed extended the scope regarding spousal maintenance[35]. Nonetheless, the Convention applies between any two States bound only with regard to the reciprocal scope.

46. The Maintenance Regulation prevails over the 2007 Hague Convention within its scope of application.

International jurisdiction

47. Authorities in EU Member States (including Denmark) are bound by the rules of the Maintenance Regulation on international jurisdiction. These rules are at the same time rules on local jurisdiction. They are meant to be conclusive and leave no space for the application of other rules on international jurisdiction apart from a remaining scope of application of the jurisdiction rules of the Lugano II Convention.

48. Authorities in an EU Member State can only embody the content of a parental agreement on matter of maintenance in a decision if they have international jurisdiction under the Regulation.

49. The Regulation provides in its Article 3 for a number of alternative grounds of jurisdiction, including the creditor's habitual residence and the defendant's habitual residence. Furthermore, jurisdiction in connection with divorce or custody proceedings is

34 UN Convention on the Recovery Abroad of Maintenance of 20 June 1956.

35 When joining the 2007 Hague Convention, the EU declared: "to extend the application of Chapters II and III of the Convention to spousal support when the Convention enters into force with regard to the Union", see further regarding the declarations of the EU the Hague Conference Website under: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1109&disp=resdnthe> (last consulted 15 July 2019).

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possible. As soon as a court with jurisdiction under the Regulation is seized, no other court can assume jurisdiction on matters covered by the Regulation (Art 12 of the Maintenance Regulation).

50. The 2007 Hague Maintenance Convention does not contain direct rules on jurisdiction, but makes recognition of foreign maintenance decisions dependent on the respect of certain indirect rules of jurisdiction, see below under recognition and enforcement.

Applicable law

51. The law applicable to maintenance obligations is determined in accordance with Article 15 of the Maintenance Regulation in connection with the 2007 Hague Protocol on the law applicable to maintenance obligations. The United Kingdom and Denmark are not bound by the Hague Protocol, the uniform applicable law rules therefore do not apply for these States.

52. As a general rule, maintenance obligations are governed by the law of the State of the creditor's habitual residence according to Article 3 of the 2007 Hague Protocol.

53. For child maintenance special rules apply. Article 4 of the Hague Protocol contains a three-step cascade to determine the applicable law which provides two fall-back options should child maintenance not be obtainable in accordance with the primarily applicable law.

54. For spousal and ex-spousal maintenance, Article 5 of the Hague Protocol contains a special rule of defence, in accordance with which a spouse can oppose the application of the law of the creditor's habitual residence, should another law have a closer connection with the marriage.

Recognition and enforcement within the EU

55. Once the decision is rendered falling within the scope of the Maintenance Regulation it is automatically recognised in all other EU Member States. Provided it originates from a State bound by the applicable law rules of the 2007 Hague Protocol (i.e. all EU Member States, except the UK and Denmark), it can be enforced in all EU-States without the need for an exequatur. Decisions from the States not bound by the 2007 Hague Protocol can be declared enforceable in accordance with section 2 of chapter 4 of the Regulation.

56. Enforceable court settlements and authentic instruments originating from an EU Member State are automatically recognised in other EU Member States and are enforceable there in same way as decisions, Article 48 of the Maintenance Regulation.

Recognition and enforcement outside the EU

57. For the recognition and enforcement of a court decision from an EU Member State in States outside the EU, a number of international instruments can be of assistance. The substantive, geographic and temporal scope will determine their applicability in the individual case. The 2007 Hague Maintenance Convention, in force in the EU (except Denmark) and in 13 further States (status 15 July 2019) has the potential to replace in the long run most of the older international instruments. Its material default scope is not as wide as that of the Maintenance Regulation but can be extended by States joining the Convention (see above paragraph 45).

58. Even though the 2007 Hague Convention does not include direct rules on jurisdiction cross-border recognition of decisions is made dependent on the observance of certain indirect rules of jurisdiction listed in Article 20(1) of the Convention.

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Other matters

Divorce

Relevant instruments, scope and interrelation

59. The **Brussels IIa Regulation** contains rules on international jurisdiction for matters of divorce and legal separation as well as rules on recognition. As stated above, all EU Member States except Denmark are bound by the Brussels IIa Regulation.

60. The **Brussels IIa (recast) Regulation** has the same material and geographic scope of application as the Brussels IIa Regulation which it will replace as of 1 August 2022 for proceedings instituted as of that date.

61. The **Rome III Regulation** contains rules on applicable law and has been set up in enhanced cooperation, i.e. only certain Member States decided to adopt this instrument. Any EU Member State can join the enhanced cooperation at a later time. Currently (May 2019), the following EU States are bound: Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Portugal Romania, Slovenia and Spain. However, given the universal scope of application of the rules provided by the Rome III Regulation, when the court of a EU Member State that is participating in the enhanced cooperation is seized, the court will determine the law applicable to divorce in accordance with the Rome III Regulation independent of whether these rules lead to the application of a participating or none-participating State.

62. The **Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations** currently (15 July 2019) has 20 Contracting States including the following 13 EU Member States: Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Sweden and the UK. The Convention further applies in Albania, Australia, China (Hongkong), Egypt, Norway, the Republic of Moldova and Switzerland).[36] The Convention merely contains rules on recognition of divorce and legal separation but no rules on jurisdiction and applicable law. In relation as between EU Member States recognition rules of the Brussels IIa Regulation prevail, Article 60 c) of the Regulation; an equivalent rule is contained in Article 94 c) of the Brussels IIa (recast) Regulation.

International Jurisdiction

63. Authorities in all EU Member States, except Denmark, are bound by the rules of the Brussels IIa Regulation on international jurisdiction in matters of divorce and legal separation. Recourse to domestic rules on international jurisdiction is only possible under the restrictive conditions set forth in Articles 6 and 7 of the Regulation, i.e. when no court of any other EU Member State has jurisdiction and the recourse to national law is not blocked as a result of the EU nationality of the defendant residing outside Europe (Article 6 b of the Regulation).

64. The Regulation provides in its Article 3 for a number of alternative grounds of jurisdiction. These include the common spouses' habitual residence, under certain conditions also the habitual residence of one of the spouses and the spouses' common nationality (or domicile for the UK and Ireland) former habitual.

65. The Brussels IIa (recast) Regulation generally maintains these rules, but merges Articles 6 and 7 of the predecessor Regulation in one single Article.

Applicable Law

66. The law applicable to divorce and separation is determined in accordance the Rome III Regulation in all EU Member States bound by this Regulation.

Recognition within the EU (except Denmark)

67. Once a decision on divorce or legal separation is rendered in an EU Member State (except Denmark) it is automatically recognised in all other EU Member States (except Denmark), Article 21(1) Brussels IIa Regulation.

68. An equivalent rule is contained in Article 30(1) of the Brussels IIa (recast) Regulation. The limited grounds for refusal of recognition of a decision in matrimonial matters are listed in Article 38 Brussels IIa (recast) Regulation; the recognition can be

36 See for details the status table at the Hague Conference website at < https://www.hcch.net/en/instruments/conventions/status-table/?cid=80 > (last consulted 31 October 2019).

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opposed in special procedures set forth in Article 40 in connection with Articles 59- 62 Brussels IIa (recast) Regulation.

Recognition outside the EU and in Denmark

69. When it comes to the recognition of a decision on divorce and legal separation rendered in a EU State in a State outside the EU or in Denmark, the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations can be of assistance, provided the Convention is in force between the State from which the decision originates and the State of recognition.

Matrimonial property regime & registered partnership property regime

Relevant instruments

70. The Marital Property Regime Regulation and the Registered Partnership Property Regime Regulation have both been adopted in enhanced cooperation. Only Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Finland, France, Germany, Greece, Italy, Luxemburg, Malta, Netherlands, Portugal, Slovenia, Sweden and Spain are bound by these Regulations. The Regulations follow the same structure and contain to some extent identical or parallel rules. Both regulate international jurisdiction, applicable law and recognition and enforcement.

Relevant human rights legal framework

71. Apart from the above listed instruments of private international law, a number of human rights instruments that influence the interpretation of and the practice under these instruments in Europe must be mentioned. As will be detailed when exploring the European and international legal framework, the requirement to observe certain fundamental children's rights may influence the cross-border recognition of family agreements.

72. The **United Nations Convention of 20 November 1989 on the Rights of the Child** (hereinafter "UNCRC"), which establishes fundamental principles for the protection of children's rights with particular attention given to children's rights in cross-border family matters, has been ratified by all EU Member State. Particularly, the Contracting States' obligation to guarantee that the best interests of the child be a primary consideration in our actions concerning children (Article 3 UNCRC) as well as the right of the child to be heard and have his / her views taken into consideration in accordance with the age and maturity of the child (Article 12 UNCRC) have shaped national, European and international legal frameworks in the area of family law in the past years.

73. Article 24 of the **Charter of Fundamental Rights of the European Union (2010/C 83/02)** integrates these fundamental children's rights set forth in Article 3 and 12 UNCRC into EU law. With the binding force given as of 2009 to the Charter of Fundamental Rights of the European Union, the obligation to guarantee these rights has now become part of binding EU law.

74. Furthermore, all EU Member States are Parties to the **Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950** which sets forth fundamental rights and freedoms, including the right to respect for private and family life, Article 8. The European Court of Human Rights in Strasbourg established to ensure the observance of the State Parties' engagements has at various occasions where individual complaints alleged a breach of Article 8 ECHR (right to respect for family life) underpinned the UNCRC principle that the best interests of the child must be a primary consideration in all actions concerning the child and that the child must be given the opportunity to be heard.

75. Finally, the **European Convention on the Exercise of Children's Rights of 25 January 1996** which aims to protect the best interests of children and promotes the exercise of children's rights in legal proceedings concerning the child. This Convention is open for signature by all Council of Europe Member States as well as non-Member States that have participated in the Convention's elaboration. Currently (status 12 July 2019), the Convention has 20 State Parties, including Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Poland, Portugal, Slovenia and Spain.

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Relevant legal framework on mediation and similar means of amicable dispute resolution in family matters

76. Despite the fact that all modern international and European instruments assisting in the resolution of cross-border family disputes encourage the use of mediation (see above at paragraph 9) in the resolution of these dispute, very little supranational legal framework can be found on family mediation itself that would guarantee common standards in safeguarding the quality of this process and the compatibility of national approaches to mediation.

77. The sole EU instrument that can be said to work towards the harmonisation of legislation with regard to cross-border mediation is the **European Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters**, which had to be transposed into national law by the EU Member States before 21 May 2011. However this instrument has its shortcomings. First of all, it is only a Directive and naturally gives considerable discretion to Member States on how to transpose the provisions. Furthermore, the Directive's scope of application is limited – out of competency reasons, the EU could only address "cross-border mediation" although it was hoped that the minimum standards called for in the Directive would be implemented by States also with a view to national mediation processes (see Recital 8 of the Mediation Directive). It is to be emphasised that the definition of "cross-border mediation" set forth in Article 2 of the Directive generally requires the parties to the dispute to be domiciled or habitually resident in two different States, i.e. a mediation in a cross-border relocation case before the relocation has occurred (Situation 1 at paras 103 et seq. below) would not count as such a "cross-border mediation".

78. The Directive promotes a number of important principles safeguarding the quality of mediation and the sustainability of the dispute resolution found in mediation. Article 6 of the Directive covers the important matter of enforceability of mediated agreements and shall to be looked at in more detail here. Article 6(1) calls on Member States to ensure that the content of a written mediated agreement can be made enforceable and specifies that the content of the mediated agreement "shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability". Article 6(2) suggests that the agreement's content could be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument. Which options are available in a given State will depend on that law of that State. Article 6(3) of the Directive requests Member States to inform the Commission of the courts and other authorities competent to receive requests for rendering an agreement's content enforceable. The Member State's information on competent authorities is available online at the website of the E-Justice Portal.

79. Unfortunately, Article 6 and with it the whole Mediation Directive falls far short of the declared ambition to ensure that mediation "should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties" and to "ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable" (Recital 19 of the Mediation Directive). The Directive was not able to create straight forward solutions in national law.[37] Particularly for the so-called package agreements, national law does not necessarily provide for simple solutions. Furthermore, the Directive's approach to call for rendering mediated agreements in cross-border family disputes binding in form of judgements, decisions or authentic instruments irrespective of the applicable EU rules on international jurisdiction is more than problematic. And it is misleading in this regard that Recital 20 of the Mediation Directive suggests that once the content of the agreement is made enforceable in a EU Member State it should be able to travel cross-border with the help of Community law such as the Brussels IIa Regulation which essentially relies on the adherence to strict rules on international jurisdiction. In compliance with EU law, a court in a EU Member State called upon to embody the content of an agreement in a decision must ex officio decline jurisdiction where international jurisdiction on the matter dealt with by the agreement lies with the authorities of another EU Member State.

37 As the national law research of the Amicable project exemplifies, EU Member States provide very different solutions to render mediated agreements enforceable; the available options are not necessarily well known by mediators those relying on the mediated agreement.

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80. Besides the binding EU Mediation Directive a number of non-binding instruments which were drawn up to promote the quality of mediation and which in the past decades have influenced the development of mediation along with cross-border family mediation shall be mentioned here. These include the **Council of Europe Recommendation No R (98) 1 on Family Mediation**[38] and the **Council of Europe Recommendation Rec (2002)10 on Mediation in Civil Matters;**[39] furthermore, the "**European Code of Conduct for Mediators"**[40] drawn up by a group of stakeholders with the assistance of the European Commission and the Hague Conference's **Principles for the establishment of mediation structures**[41] drawn up in 2010 in the context of the Malta Process. More recently the Council of Europe Commission for the Efficiency of Justice adopted the **European Code of Conduct for Mediation Providers**.[42]

38 Recommendation No R (98) 1 of the Committee of Ministers to Member States on family mediation, adopted by the Committee of Ministers on 21 January 1998, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2> (last consulted 31 October 2019).

39 Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002, available at <https://wcd.coe.int/ViewDoc.jsp?id=306401&Site=CM> (last consulted 31 October 2019).

40 Available at <https://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf> (last consulted 31 October 2019). The European Code of Conduct for Mediators is a non-binding set of rules to which mediators and mediation organisation can commit themselves on a voluntary basis. It is the responsibility of the individual mediators and organisations subscribing to the Code of Conduct to implement the rules contained. A list of mediation organisations and mediators that have subscribed to the Code of Conduct can be found at <http://ec.europa.eu/civiljustice/adr/adr_ec_list_org_en.pdf> (last consulted 31 October 2019).

41 Available at < https://assets.hcch.net/docs/c96c1e3d-5335-4133-ad66-6f821917326d.pdf > (last consulted 31 October 2019).

42 Available at < https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6 > (last consulted 31 October 2019).

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SECTION II

Rendering Agreements Legally Binding and Enforceable

Non-abduction Context

Rendering agreements legally binding in all legal systems concerned (non-abduction context)

81. Domestic law differs considerably when it comes to the options available to render family agreements legally binding and enforceable. Where a family agreement concerns two or more legal systems and shall acquire binding force there, one could, in theory, turn to each legal system in order to obtain enforceability in accordance with domestic provisions. This would not only be cumbersome but also costly and time-consuming. In addition, where the connection with one of the legal systems before the agreement's implementation is not yet established (for example, parents agree on cross-border contact between father and child before the child's relocation with the mother to another State) the legal system concerned might refuse access to domestic law procedures due to the lacking current connection.

82. Ideally, the international family agreement should be rendered legally binding and enforceable in one legal system and obtain, with that same step, recognition in all legal systems concerned. This is possible where European and international legal instruments provide pertinent rules for cross-border recognition that can be used to make the agreement, or at least the agreement's content embodied in a decision, travel cross-border.

83. Traditionally, international family law instruments are centred on the recognition of court "decisions". With the growing acceptance of party autonomy in family law on the national and international level much attention has been given to provide the required flexibility of European and international legal frameworks facing this development. Besides choice of law and choice of court provisions, many modern European and international family law instruments today also respect and encourage agreement on the substance found by those in dispute and allow those agreements under certain conditions to travel cross-border. Unfortunately, despite the express promotion of agreed solutions of international family disputes, international and European PIL instruments maintain, for the time being, a visible focus on the cross-border recognition of decisions and are not entirely adapted to accommodate the cross border recognition on family agreements (see further Section IV "Problems identified" below).

84. Hence, with international and European legal frameworks in the area of family law still majorly marked by the traditional decision-centred approach[43], using this well paved avenue for the recognition of what was agreed upon between the

43 See Section IV below.

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parties by transforming the agreement's content into a court decision as a first step can in practice have some advantages. For the future it is to be hoped that family agreements could circulate more easily between EU Member States, as they already can with respect to certain subject matters (see below).

85. As explained above, for the sake of this Best Practice Tool two "Methods" shall be considered to make an agreement travel cross-border:

Method A: Using the mechanisms of European / international legal framework for cross-border recognition of "decisions"

Method B: Using the mechanisms of European / international legal framework for the cross-border recognition of "authentic instruments" or "enforceable agreements"

Overview – Method A: Embodying the agreement's content in a decision

86. When using Method A, the agreement must first be transposed into a decision that embodies the content of the agreement. To benefit from European and international recognition and enforcement provisions, the decision must stem from the "right starting point legal system" (see further below).

87. How the agreement might be transposed into a decision depends on the domestic law of the "starting point jurisdiction". Options available in domestic law vary: It may be possible to seize the court in order to turn the agreement into a decision and / or to request the court to homologate or approve the agreement. In some States decisions on certain subject matters can also be rendered by administrative authorities. The options available in domestic law in European Member States are described in the relevant National Best Practice Tools.[44]

88. When it comes to the homologation or approval of an agreement by a court or other authority through a specific process, it can be questionable whether the result can be understood as a "decision" by the homologating or approving authority in the sense of the EU and international legal frameworks. National law provides for many different facets with respect to such processes. It may be that the "homologation" of an agreement will under national law simply mean some kind of registration of the agreement without checking the content of the agreements. In other States homologation may be understood as an approval of the agreement by an authority with subject matter jurisdiction which will only occur where the agreement is in line with public policy and – in cases that relate to children – does not conflict with the best interests of the child. The National Best Practice Tools will describe the details of available processes and will have to determine which of the results obtained by homologation can be characterised as "decision" under relevant EU and international legal frameworks. It should be mentioned that there is no "EU"- definition of homologation and that neither the Brussels IIa nor the Maintenance Regulation contain a clear indication of when a homologated agreement may amount to a "decision" as understood by the instruments. However, Recital 14[45] of the new Brussels IIa (recast) Regulation gives some indication as to the distinction under EU law. In view of this, in order for the result of the homologation or approval of an agreement by an authority to be characterised as a "decision" in the sense of the above "Method A" under the EU Best Practice Tool, is to be requested that the authority has the powers under national law to examine the substance of the agreement.

89. When it comes to choosing the legal system in which to embody the agreement in a judicial decision, particular attention has to be given to the applicable rules of international jurisdiction[46] under the relevant European or international legal instrument that is meant to make the decision travel cross-border. That is to say, the State whose au-

44 In the course of the Amicable Project four National Best Practice Tools are developed, namely for Germany, Italy, Poland and Spain.

45 Recital 14 reads: "According to the case-law of the Court of Justice, the term ‚court' should be given a broad meaning so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility. Any agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a ‚decision'. Other agreements which acquire binding legal effect in the Member State of origin following the formal intervention of a public authority or other authority as communicated to the Commission by a Member State for that purpose should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation. This Regulation should not allow free circulation of mere private agreements. However, agreements which are neither a decision nor an authentic instrument, but have been registered by a public authority competent to do so, should circulate. Such public authorities might include notaries registering agreements, even where they are exercising a liberal profession."

46 Direct (see for example, Brussels IIa and the Maintenance Regulation) or indirect (see for example, the 2007 Hague Convention) rules of international jurisdiction, as the case may be.

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thorities have international jurisdiction under the relevant international and European instrument regarding the subject matters at stake has to be identified.[47] This is the State in which the agreement should be turned into a court decision; i.e. this is the "right starting point jurisdiction".

90. As set out above in the summary of relevant European and international family law instruments, the rules on international jurisdiction contained in these instruments differ considerably. Where the agreement contains several subject matters falling within the scope of different of these instruments, the common denominator has to be found. Where the agreement deals with a number of family law matters comprising matters of parental responsibility, the State of habitual residence of the child will most likely be the ideal "starting point jurisdiction" (see below).

91. However, a detailed analysis of the legal situation should be complemented by looking into the procedural history of the individual case. Where the court of one State is already seized with one of the matters dealt with in the agreement, the abstract determination of the "ideal starting point jurisdiction" would not be expedient.[48] Here the question should rather be, whether the court seized could assume international jurisdiction on all matters covered by the agreement in order to end the case with a decision / court settlement / consent order on all subject matters the agreement covers. Where this is not possible, different options will have to be explored. The agreement could possibly be rendered enforceable partially by the foreign court and partially in the State of habitual residence of the child. Or the foreign proceedings could be withdrawn etc.

Overview – Method B: Making the agreement travel as such

92. Using Method B means benefiting in particular from the following provisions of European and international instruments regarding matters of parental responsibility and maintenance: Article 46 Brussels IIa Regulation, Article 48(1) Maintenance Regulation and Article 30 of the 2007 Hague Convention.

93. It has to be noted that in comparison to Method A, using Method B is less clear-cut since the mechanisms to make enforceable agreements travel cross-border differ from instrument to instrument. Furthermore, most instruments do not provide for specific rules for the recognition and enforcement of agreements but rather declare the rules for the recognition and enforcement of decisions accordingly applicable. This leaves a number of questions unanswered and is emblematic for the second-class status which agreements unfortunately still have in European and international legal frameworks in comparison to decisions.

94. Both, the Maintenance Regulation and the Brussels IIa Regulation can be used to make an agreement that has been formally drawn up or registered as "authentic instrument" travel cross-border. The Brussels IIa Regulation furthermore, offers the same mechanism to "agreements between the parties that are enforceable in the Member States". The Maintenance Regulation arrives at a similar result, since the definition of authentic instrument in Article 2(3) of the Maintenance Regulation makes it clear that this term shall also include "an arrangement relating to maintenance obligations concluded with administrative authorities of the Member State of origin or authenticated by them".

95. Article 30 of the 2007 Hague Convention provides an exception to the above said since it offers a separate set of rules for the cross-border recognition of agreements allowing so-called "maintenance arrangements" to travel cross-border. A "maintenance arrangement" is defined as "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", Article 3 e) of the 2007 Hague Convention.

47 Or in the case of the indirect rules of jurisdiction contained in the 2007 Hague Convention, on which jurisdiction the decision should be based in order to be recognised under the Convention.

48 The predominant EU instruments regulating international jurisdiction in matters of parental responsibility and maintenance, contain lis pendens rules in accordance with which courts of other Member States seized with the same matter between the same parties must decline jurisdiction in favour of the court first seized, see Article 19 Brussels IIa Regulation, Article 12 Maintenance Regulation.

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It thus also includes "authentic instruments".

96. As an initial question, it has to be considered whether the rules of international jurisdiction concerning the subject matters covered by the agreement need to be considered when using Method B. To answer this question, the individual rules set forth by the relevant European and international instruments in relation to recognition and enforcement of authentic instruments and enforceable agreements need to be explored.

97. Article 46 Brussels IIa Regulation states that authentic instruments which are enforceable in one EU Member State as well as agreements between the parties enforceable in the Member State where they were concluded, can be recognised and declared enforceable under the same conditions as judgements. Even though the system of simplified recognition and enforcement among States bound by the Regulation is based on mutual trust and the general respect of the obligatory rules on international jurisdiction, the Chapter on recognition and enforcement does not allow questioning international jurisdiction. The referral in Article 46 of the Brussels IIa Regulation does not provide an explicit answer to the question, whether the authority setting up or registering the authentic instrument is bound by the rules of international jurisdiction. Here we have one of the above-mentioned shortcomings in the current EU legislation, which leaves an important aspect of cross-border recognition of agreements to interpretation.

98. On the one hand, Article 46 of the Brussels IIa Regulation might be read to mean that the authentic instrument or enforceable agreement could originate from any EU Member State independent of the rules of international jurisdiction. On the other hand, the Regulation's rules of international jurisdiction are of central importance in the Regulation and a prorogation of the predominant jurisdiction in matters of parental responsibility which are principally lying with the authorities of the State of habitual residence of the child is - despite the parents' agreement - only permitted if the prorogation is in the best interests of the child. It is therefore questionable whether Article 46 wants to allow parties to "circumvent" these rules by setting up an "authentic instrument" instead of going to court and then have the "authentic instrument" freely circulate in all Brussels IIa States. A further argument that could be put in favour of the latter interpretation is the wording of the new Brussels IIa (recast) Regulation which clarifies in its Article 64 that the section on "authentic instruments and agreements" shall only apply to "[…] authentic instruments which have been formally drawn up or registered, and to agreements which have been registered, in a Member State assuming jurisdiction under Chapter II" (emphasis added). Of course, one could also argue that this is not a clarification but a change of the existing EU law.

99. Article 48(1) of the Maintenance Regulation declares the rules on recognition and enforcement of the Regulation applicable to authentic instruments. As in the Brussels IIa Regulation, the Chapter on recognition and enforcement does not make the respect of rules on international jurisdiction an explicit condition for the recognition and enforcement. A similar uncertainty exists thus regarding the need to respect the rules of international jurisdiction in the establishment of the authentic instrument. However, in view of the extensive list of grounds of jurisdiction contained in Article 3 of the Maintenance Regulation between which the parties may choose, avoiding circumvention of crucial rules of jurisdiction is less of an argument here.

100. Article 30 of the 2007 Hague Maintenance Convention provides for the recognition and enforcement of so called "maintenance arrangements", see for the definition above paragraph 95. Article 30 of the 2007 Hague Convention contains a specific set of rules for the cross-border recognition of maintenance arrangements. These rules declare Article 20 of the Convention, i.e. the provision that contains the Convention's indirect rules of jurisdiction, inapplicable, see Article 30(5) of the Convention. Consequently, maintenance arrangements set up in any State bound by the Convention will be recognised in any other Contracting States, provided the Contracting States concerned have not made a reservation in accordance with Article 30(8) of the Convention to not recognise maintenance arrangements at all.

101. Given the probability that authentic instruments and enforceable agreements under Article 46 Brussels IIa Regulation are meant to originate from a EU Member State with international jurisdiction under the Regulation, it is good practice to recommend that in parallel to what was set out under Method A the starting point jurisdiction for setting up an authentic instrument relating to matters of parental responsibility should be determined in

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respect of these rules. This approach is furthermore highly recommended where it cannot be excluded that the agreement might require enforcement outside the geographical scope of the Brussels IIa Regulation and within the scope of the 1996 Hague Child Protection Convention.[49]

102. Finally, as is true for Method A, when using Method B, a detailed analysis of the legal situation of the individual case must involve inquiries into the possible procedural history of the case. Should the court of one State already be seized with one of the matters dealt with in the agreement, an abstract determination of the "ideal starting point jurisdiction" is not sufficient. The pending proceedings have to be considered when determining the best way forward in rendering the agreement binding. It may be that the court seized could also assume international jurisdiction on the other matters covered by the agreement and in that case using method A might be the most cost- and time-efficient way to render the agreement. As the case may be, the court proceedings might also be abandoned and an authentic instrument set up using Method B to make the agreement travel cross-border. All will depend on the circumstances of the individual case and the available options in the legal systems concerned.

49 When wanting to have the agreements concluded in front of an authority travel cross-border as "child protection measure" under the 1996 Hague Convention the Convention's rules on international jurisdiction have to be respected, see Article 23(2)a) of the Convention.

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Overview

GERMANY: Overview – Available options to render family agreements legally binding and enforceable in accordance with the national law of Germany and characterisation of available options as falling under Method A or Method B

General overview

In Germany, no straightforward way exists to render a package agreement dealing with a number of different family law matters (including custody and maintenance) legally binding and enforceable. Where the parties come to such an agreement outside of pending court proceedings, no option exists to give binding force to the package agreement *at once*. In other words, the German procedural law does not foresee the possibility to seize a court in order to render the package agreement legally binding by embodying it into a decision or otherwise approve the agreement, neither does the law grant such a competency to other bodies such as notaries. German national law offers only piecemeal solutions. As a result, giving legal force to a package agreement can be cumbersome, time-consuming and expensive.

The options available to render agreements legally binding and enforceable include, obtaining:

1. judicial or judicially approved settlements (gerichtliche oder gerichtlich gebilligte Vergleiche), Section 794(1)(1) ZPO (Code of Civil Procedure)[50]; Sections 86(1)(2) and 156(2) FamFG (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction);
2. enforceable notarial instruments/ authentic instruments in accordance with Sections 86(1)(3) and 36 FamFG (vollstreckbare notarielle Urkunden), Sections 794(1)(5) and 797 ZPO; Section 86(1)(3) FamFG, Section 794(1)(5) ZPO) or
3. enforceable/ authentic instruments from the Youth Welfare Office concerning maintenance (vollstreckbare Urkunden des Jugendamtes über Unterhalt), Section 59(1), first sentence, points 3 and 4, and Section 60 of SGB VIII (Social Code Volume VIII), or
4. settlements drawn up by lawyers and declared enforceable (für vollstreckbar erklärte Anwaltsvergleiche), Sections 794(1)(4b), 796a and 796b ZPO, or
5. enforceable settlements reached before recognised dispute resolution bodies (vollstreckbare Vergleiche vor anerkannten Gütestellen), Sections 794(1)(1) and 797a ZPO.

"Homologation" as a simplified process provided by some national laws to render agreements on a certain subject matter legally binding / enforceable is not known under German national law.

Mediation

The Mediationsgesetz (Mediation Act) in Germany does not give guidance on how to render a mediated agreement legally binding and enforceable. The enforceability of a mediation agreement is governed by the ordinary rules.

The European Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters had to be transposed into national law by the EU Member States. The German Mediationsgesetz (Mediation Act) which entered into force on 26 July 2012, transposes the European Mediation Directive into German law and formally regulates mediation services in Germany. The scope of the German Mediation Act exceeds the requirements of the European Directive in so far as it is not restricted to cross-border disputes in the sense of Article 2 of the Directive (see on the Directive paragraph 77). The Mediationsgesetz (Mediation Act) applies for every mediation which takes place in Germany and therefore also applies to mediation in a cross-border relocation case before relocation (Situation 1 at paragraph ## above).

The German Mediationsgesetz (Mediation Act) only establishes general guidelines, as the mediators and the parties concerned need significant scope for manoeuvre during the mediation process. The Act defines the terms 'mediation' and 'mediator', to differentiate mediation from other forms of dispute settlement. According to the Act, mediation is a structured process in which the parties involved in the process voluntarily

50 For detailed information and links to the German laws mentioned please see the Table of Abbreviations of national legal provisions above.

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and autonomously seek to settle their dispute with the help of one or more mediators. Mediators are independent and impartial persons, without decision-making power, who guide the parties concerned through the mediation process.

Article 6 of the EU Mediation Directive covers the matter of enforceability of mediated agreements and calls on Member States to ensure that the content of a written mediated agreement can be made enforceable (see paragraph 78). Which options are actually available in a given State will depend on the law of that State. This means that mediation agreements may be enforced only as shown above.

Family Law

An agreement which covers a number of family law matters, such as matters of parental responsibility, maintenance and other matters is initially only a private "memorandum of understanding" and, like agreements in other matters of civil law, cannot be enforced legally in the event of non-compliance by one of the parties (parents in this case).

In order to render an agreement on family law matters or at least parts of the agreement legally binding and enforceable, different mechanisms can in general be used under German national law (see general overview above).

Firstly, as referred to as "Method A" in the EU Best Practice Tool, the family court can be seized to obtain a court decision embodying the content of an agreement by the way of a court decision, court approved settlement or court documented agreement.

Secondly, Method B, the agreement or –again- parts of it concerning all financial issues can be drawn up as an authentic instrument, either as a document before a notary or if it concerns child maintenance, before the German Youth Welfare Office/ Jugendamt. These type of document would fall under the scope of Art. 48 EU Maintenance Regulation.

No 1 of the above options qualifies as "Method A" as defined by the EU Best Practice Tool. However, it must be noted that rules on local and subject matter jurisdiction can lead to the competency of different courts for different parts of the agreement (see for the details below). Whenever the family agreement deals with matters of parental responsibility, the involvement of a court is necessary to give the agreement binding force: Where a change of custody is sought, a decision of a family judge is always required; where the agreement modifies contact arrangements or the surrender of a child, a court decision in the form of an approval order suffices.

No 2 and 3 of the above options fall under "Method B" as defined by the EU Best Practice Tool. Only those parts of the family agreement can be rendered legally binding and enforceable using Method B that do not relate to matters of parental responsibility; there only option No 1 can be used. Authentic instruments can either be drawn up before a notary or if it concerns child maintenance, before the German Youth Welfare Office/ Jugendamt. These types of documents would fall within the scope of Art. 48 EU Maintenance Regulation.

No 4 and 5 are not covered by Method A or B.

As long as the agreement is used in a purely national context the available options may not be ideal but still offer acceptable solutions. However, when it comes to a package agreement in an international context, rendering the agreement legally binding and enforceable will be more complicated if not impossible as will be shown later.

Detailed information concerning each option and regarding agreements on specific subject matters will follow below.

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Guidance for Situation I: Relocation agreement

103. The relocation agreement in this Best Practice Tool is meant to be understood as an agreement in the situation of an envisaged lawful relocation of a minor child together with one of his / her parents from one country to another. As a result of the lawful relocation, the habitual residence of the child and that of the relocating parent will change. Such cases are not rare in practice. It may be that following the breakdown of the parents' relationship one parent wishes to go back to her / his home country or to leave to another country for professional reasons.

104. In such a situation a parental agreement might contain the following subjects:

a. with whom the child will live;

b. how cross-border contact between the child and the parent remaining in the other State will be organised;

c. how contact with the grand-parents will be organised;

d. what financial payments the child or the parent living with the child will obtain from the other for child related expenses;

e. whether periodic payment will be owed by one spouse (or ex-spouse) to the other; and

f. who will be paying the travel costs for parent-child visits.

105. Additional points might relate to ending the relationship as a couple, agreeing to file for divorce, regulating property issues etc.

106. For the purpose of the Best Practice Tool, it is assumed that the parents (nationals from different States) and the child are currently habitually resident in an EU Member State (not Denmark) and that mother and child want to relocate to another EU-Member State except Denmark.

Method A: Embodying the agreement's content in a decision

107. In method A, we use the "shape" of a court decision to make the agreement's content travel cross-border. We therefore have to turn the agreement into a court decision and then to obtain recognition and enforceability of the agreement abroad with the help of the European and international legal frameworks.

Identifying subject matters contained in agreement

108. As the first step, the subject matters dealt with by the agreement have to be analysed to see which legal category they can be affiliated with. In particular, can they be characterised to fall generally under the category of matters of:

- "parental responsibility" - (a.-c.) (f. possibly, see below)
- "child maintenance" - (d.) (f. possibly, see below)
- "spousal maintenance" - (e.)

109. In the above example agreement (see paragraph 103), clearly the terms of the agreement summarised under a. and b., i.e. all questions relating to where and with whom the minor child will live as well as questions relating to parent-child contact can be qualified as matters of parental responsibility. Here, we can assume a common understanding of terminology in national and international family law.

110. When it comes to contact between grandparents and grandchild (c.), not all national laws might understand this as part of "parental responsibility". However, when considering the applicability of European and international legal frameworks regarding international jurisdiction and cross-border recognition, the autonomous understanding of the term "parental responsibility" used by the relevant instruments is decisive. As confirmed by the CJEU (C-335/17 of 31 May 2018), the autonomous concept of "right of access" under the Brussels IIa

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Regulation encompasses also grandparents' rights of access. The same will apply for the new Brussels IIa (recast) Regulation.

111. Who is to pay for travel costs associated with parent-child visits (f.) regularly plays a central role in relocation agreements. Subject to the distance between the two States concerned, the travel costs can be considerable. Depending on the details of the agreement and circumstances of the case, travel costs might be characterised to be part of the "exercise of parental responsibility" or be part of "child maintenance". The former characterisation could be argued where the provision of funds for travelling is considered indispensable for the exercise of contact. The latter might be argued where the payment of extensive travel costs by the parents owing maintenance is taken into consideration as weighing on that parent's financial capacity or counted as part of that parent's contribution to child related expenses. It should be highlighted, however, that there is no relevant case-law of the CJEU on this matter that would assist with the interpretation.

112. The terms of the example agreement summarised under d. can be qualified as "child maintenance", those under e. as "spousal or / ex-spousal maintenance". Under certain condition, an agreement on a lump sum payment between spouses upon their separation could also be characterised to fall under "maintenance", see above "Definitions" at paragraph 3.

Identifying relevant European and international legal framework

113. As the next step, the European and / or international legal instruments relevant to the category of subject matters determined above can be identified:

- "parental responsibility" (a.-c.) – Brussels IIa Regulation[51], 1996 Hague Convention
- "child maintenance" (d.) – Maintenance Regulation, 2007 Hague Convention & other
- "spousal maintenance" (e.) – Maintenance Regulation, 2007 Hague Convention & other

114. When having identified in which States the agreement is intended to be legally binding and enforceable, the geographic scope of the above instruments must be tested, i.e. it must be explored whether the pertinent European or international instruments are in force between these legal systems.

115. In our example case above, the State of habitual residence of the family is an EU Member State (not Denmark)**.** The State of relocation is another EU Member State (not Denmark).

116. For matters of parental responsibility, the Brussels IIa Regulation is the relevant instrument in force between the two States concerned. The Regulation prevails over the provision of the 1996 Hague Convention. However, since the Brussels IIa Regulation only contains rules on international jurisdiction and recognition and enforcement, the 1996 Hague Child Protection Convention remains relevant when it comes to determine the applicable law in EU States (see for further details above paragraphs 33 et seq.).

117. For matters of child and spousal maintenance, the Maintenance Regulation is the applicable instrument in our case. The 2007 Hague Convention and possibly other international instruments for the recovery of maintenance abroad would only come to play, should enforcement outside the EU be required.

51 In the future, the Brussels IIa (recast) Regulation.

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Identifying starting point jurisdiction

118. The rules of international jurisdiction for matters of

- "parental responsibility" (a.-c.) - are contained in Articles 8 et seq. of the Brussels IIa Regulation;
- "child maintenance" (d.) and "spousal maintenance" (e.) – are contained in Article 3 et seq. of the Maintenance Regulation.

119. The ideal starting point jurisdiction in our example constellation is the State of the habitual residence of the child: international jurisdiction for matters of parental responsibility is generally given in that State in accordance with Article 8 of the Brussels IIa Regulation and for matters of maintenance in accordance with Article 3 of the Maintenance Regulation.[52]

120. However, it is of crucial importance to explore whether proceedings in one of the legal matters covered by the agreement are already pending in another State. Should this be the case, it will have to be seen whether international jurisdiction can or should be assumed by the court of that foreign State for all matters covered by the agreement as way forward to turn the agreement into the court decision. Where this is not possible, different options will have to be explored. For example, where divorce proceedings are ongoing in that foreign EU-State, international jurisdiction on parental responsibility and maintenance might (in accordance with Article 3 Maintenance Regulation / Article 12 Brussels IIa Regulation) be assumed and the agreement or the agreements' content be rendered enforceable in the course of these proceedings. Depending on the circumstances of the case and the situation of international jurisdiction, it is also conceivable that the agreement could partially be rendered enforceable by the foreign court and partially by a court in the State of habitual residence of the child. Or the foreign proceedings could be withdrawn etc.

52 In relocation cases it is very common that a parent will only agree to his/her child's cross-border relocation with the other parent when binding contact arrangements are in place. However, it is also conceivable that the parents, in a non-conflictual case, render their agreement binding and enforceable only after the lawful relocation has occurred; then the place of the child's new habitual residence would be the ideal starting point jurisdiction. For the particularities of this constellation see further: "Guidance for Situation II", which deals with cases where the parents have their habitual residence in different States.

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German National Law

Situation I: Relocation agreement (Method A)

GERMANY: Identifying competent authority /-ties in accordance with national law

In Germany, family matters are dealt with by specialized Family Court judges in divisions for family matters at the Local Courts, Section 23a,b GVG (Gerichtsverfassungsgesetz; Act on the Constitution of Courts). A special procedural law exists for family matters: FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit; Act on Proceedings in Family Matters and in Matters of Non- contentious Jurisdiction). This law is complemented in maintenance and most financial matters by provisions of the ZPO (Zivilprozessordnung, Code of Civil Procedure), Section 112, 113 FamFG (Act on Proceedings in Family Matters and in Matters of Non- contentious Jurisdiction). In international family matters where overriding international and European rules exist a number of implementing/transposing laws exist, such as the IntFamRVG (Internationales Familienrechtsverfahrensgesetz; International Family Law Procedure Act) and the AUG (Auslandsunterhaltsgesetz; Foreign Maintenance Act).

GERMANY: Local jurisdiction in general

Provided international jurisdiction lies with the German courts, it has to be examined which court has local jurisdiction to be seized with matters relating to parental responsibility, child maintenance, spousal or ex-spousal maintenance and divorce. Should it be the same court having local jurisdiction for all matters, it will be a court-internal matter of allocation whether there will be a special department handling all cases with an international element.

GERMANY: Parental responsibility

a. *General rule*

Sec 152 (1) (2) FamFG[53] (Act on Proceedings in Family Matters and in Matters of Non- contentious Jurisdiction) is relevant:

(1) During the pendency of a marital matter the court before which the marriage issue is or was pending in the first instance shall have exclusive jurisdiction for parent and child matters among German courts insofar as the matter concerns common children of the spouses[54].

(2) Otherwise the court in the district of which the child has his place of habitual residence shall have jurisdiction.

b. *Particularities for parental responsibility proceedings with an international context*

There exist only a few exceptions concerning local jurisdiction in parental responsibility matters where there is an international context. Germany has enacted an implementation law for executing the Brussels IIa Regulation, the 1980 Hague Abduction Convention, the 1996 Hague Child Protection Convention and the European Custody Convention called IntFamRVG (Internationales Familienrechtsverfahrensgesetz; International Family Law Procedure Act). This Act regulates inter alia the tasks and functioning of the German Central Authority, the participation of the Youth Welfare Office, court jurisdiction and concentration of jurisdiction, court rules, recognition and enforcement.

The rules on concentrated jurisdiction are mainly relevant for return proceedings under the Hague Child Abduction Convention. As a general rule (for more details see below IV) jurisdiction for Hague return proceedings lies with the Family Court in whose district the Higher Regional Court for the district is situated, Sections 11, 12 (1) IntFamRVG[55].

During pendency of a Hague return case or other matters falling under Sections 10 to 12 IntFamRVG the Hague court has also competence for all matters of custody, contact or surrender of the child in the sense of Section 151 No.1-3 FamFG.

Another competence of these specialized family courts is regulated in Section 13 (2) IntFamRVG: Provided that a parent habitually resides in another Member State of the European Union or in another Contracting State to the Hague Child Protection

53 The reproduction of legal texts is done according to the translation on the website https://www.gesetze-im-internet.de/index.html.

54 See also below under Divorce.

55 Accordingly, jurisdiction for these cases in Germany lies with 22 first instance family courts. A link to a detailed list can be found via the website of the German Central Authority www.bundesjutisamt.de/sorgerecht .

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Convention, the Hague Child Abduction Convention or the European Custody Convention an application for custody, contact or surrender of the child (Section 151 No.1-3 FamFG) can also be brought before that Family Court with specialized jurisdiction; and in Section 13(3) 2 IntFamRVG: Upon concurrent application by both parents, other family matters in which they are participants shall be transferred to the court having jurisdiction pursuant to Subsection (1) or Subsection (2).

For most international cases dealing with matters of parental responsibility, where there is no abduction context, concentrated jurisdiction does not exist. The same rules on local jurisdiction apply as in cases without cross- border context. This means that as a general rule the family court at the place of the habitual residence of the child has local jurisdiction. In Germany exist more than 600 Family Courts and out of these only 22 courts with concentrated jurisdiction. A relocation case will be heard by a normal family court as all other custody and contact proceedings.

GERMANY: Child maintenance as a single matter

For matters of maintenance the local competency of courts depends on whether the case is an international case falling under the EU Maintenance Regulation or not.

a. Child maintenance in national cases

For purely national cases (all participants habitually resident in Germany) Section 232 FamFG regulates:

(1) Exclusive jurisdiction shall lie:

1. in matters concerning maintenance as to a support obligation for a common child of the spouses, [...] during the pendency of a marital matter with the court before which the marital matter was or is pending in the first instance;

2. in matters concerning maintenance as to a support obligation for a minor child or a child that qualifies as such in accordance with Section 1603 (2) sentence 2 of the Civil Code, with the court in the district in which the child or the parent with the authority to act on behalf of the child has his place of usual[56] residence; this shall not apply when the child or the parent has his place of usual residence outside of Germany.

(2) Jurisdiction pursuant to Subsection (1) shall have priority over the exclusive jurisdiction of another court.

(3) To the extent there is no jurisdiction under the provisions in Subsection (1), jurisdiction shall be determined in accordance with the rules of the Code of Civil Procedure with the provision that in the provisions concerning general jurisdiction "residence" (Wohnsitz) shall be replaced by "place of habitual residence" (gewöhnlicher Aufenthalt). At the choice of the applicant jurisdiction shall also lie:

1. as to an application by a parent against the other parent based upon a claim concerning a statutory maintenance obligation based on the marriage or based upon a claim pursuant to Section 1615l of the Civil Code, with the court before which the proceedings concerning child maintenance is pending in the first instance;

2. as to an application by a child through which the claim for fulfilment of the support obligation of both parents is asserted, with the court that has jurisdiction over the application against one parent;

3. with the court in the district of which the applicant has his place of usual residence when there is no domestic jurisdiction over the respondent.

b. Child maintenance in cross- border cases

If there is an international aspect in the matter and the EU Maintenance Regulation (Regulation (EC) No. 4/2009) is applicable for international jurisdiction in Germany, the AUG (Act on the Recovery of Maintenance in Relations with Foreign States - Foreign Maintenance Act) is applicable as national law. Local jurisdiction is regulated in Section 26-28 AUG:

Section 28 AUG sets up a general rule for applications falling under Art. 3a) and b) EU Maintenance Regulation and creates concentrated jurisdiction.

Section 28
Concentration of jurisdiction; empowerment to issue ordinances

(1) If a party concerned does not have his or her ha-

56 The German term "gewöhnlicher Aufenthalt" should be translated more correctly as "habitual residence" not "usual residence"

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bitual residence in Germany, the Local Court shall rule on applications in maintenance cases in cases falling under Article 3 letters a and b of Regulation (EC) No. 4/2009 which has jurisdiction for the seat of the Higher Regional Court in the district of which the opponent or the person entitled has his or her habitual residence. For the district of the Berlin Higher Regional Court the decision shall lie with Pankow/ Weißensee Local Court.

(2) The governments of the Länder[57] shall be authorised to assign this jurisdiction, by statutory Instrument, to another Local Court in the Higher Regional Court district or, where there is more than one Higher Regional Court established in a Land (German Federal State), to a Local Court for the districts of all Higher Regional Courts or a number of Higher Regional Courts. The Land (German Federal State) governments may transfer this authorisation by statutory instrument to the Land administrations of justice

Section 26 AUG regulates cases of annex jurisdiction under Art. 3c) of the EU Maintenance Regulation; Section 27 determines territorial jurisdiction for subsidiary jurisdiction and forum necessitates under the Regulation.

GERMANY: Spousal maintenance as a single matter

In spousal maintenance cases without parallel divorce proceedings in general the same provisions apply as in (international) child maintenance cases. Some differences exist for national cases with no international element.

GERMANY: Divorce

Local jurisdiction in marital matters is regulated in Section 122 FamFG. It contains a cascade granting importance to the place of habitual residence of common minor children together with one parent:

The exclusive jurisdiction of a court shall take priority as follows:

1. the court in the district of which one of the spouses has his place of habitual residence with all of the common minor children;

2. the court in the district of which one of the spouses has his place of habitual residence with some of the common minor children, to the extent that none of the common minor children have their place of habitual residence with the other spouse;

3. the court in the district of which the spouses together most recently had their place of habitual residence when one of the spouses had his place of usual residence in the district of this court at the time of the commencement of the legal proceedings;

4. the court in the district of which the respondent has his place of habitual residence;

5. the court in the district of which the applicant has his place of habitual residence;

6. the Schöneberg Local Court in Berlin.

GERMANY: Additional remarks

In the event that the same court is locally competent to deal with all or some of the above matters, the competence in most courts will lie with the **same department / judge inside the court structure** in accordance with the internal court plan for allocating responsibilities. But it will depend on the organisational chart of the specific court, and especially where there is an international element, the competence may be split. This applies especially for proceedings under the Maintenance Regulation. Here the internal competence often lies – in bigger Family Courts- with only one or two judges.

A judge seized with divorce has jurisdiction also for all so called ancillary proceedings, Section 137 FamFG, such as parental responsibility matters and/or all maintenance matters. The judge therefore can assume jurisdiction over all these subject matters and thus turn a package agreement on these matters into a court decision (provided international jurisdiction for all matters lies with the German authorities/courts). Representation by lawyers of both spouses is mandatory here for all family dispute matters (Section 137 FamFG). Problems may occur concerning parental responsibility matters in cases where the child is of sufficient age and has to be interviewed by the judge. This must be ensured.

A judge seized only with a single parental responsibility matter will also be competent for a settlement concluded before her/him concerning other matters- except the divorce itself- including maintenance, if both parents are represented by lawyers.

A judge seized with child, spousal or ex-spousal main-

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tenance can in general also assume competence for an agreement on parental responsibility- if the court is locally competent. At this point it must be ensured that the child is heard, see also further paragraphs.

This same judge, who has jurisdiction over the above mentioned subject matters will issue the certificate in accordance with Article 39 Brussels IIa Regulation concerning rights of parental responsibility, the certificate in accordance with Article 41 Brussels IIa Regulation regarding rights of access and will fill in the Annex I Form of the EU-Maintenance Regulation.

GERMANY: Important information on the proceedings

As stated above, in Germany there is no straight forward way to render a package agreement on family matters (such as custody, contact and maintenance) legally binding and enforceable in front of a court.

In the following, the seizure of the court and procedural requirements, which can differ depending on the subject matter will be explored, at first in a purely national context, it is necessary to differentiate by content of the agreement.

Germany: Procedural requirements in accordance with national law

GERMANY: Parental responsibility

In principle all court proceedings in family law involving children and concerning parental responsibility in a broad sense require an application or a suggestion of a parent, a relative, the Youth Welfare Office (Jugendamt), a so called Verfahrensbeistand (guardian ad litem)[58] or a third person who claims that the court has to take steps to ensure the best interests of the child, Section 23, 24 FamFG (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction). The family judge can also start proceedings ex officio where this is deemed necessary in order to safeguard the best interest of the child.

Representation by a lawyer is not necessary- as long as it does not concern a financial matter/ family dispute proceeding in the meaning of Section 113 FamFG.

It has to be highlighted that giving legal force to an agreement on matters of parental responsibility necessarily requires the involvement of the court: Commencing parental responsibility procedures however normally requires that there is a dispute between the parties that cannot be solved without the intervention of the court.

An agreement regarding **contact** with the child needs to be approved by the court, Section 156 (2) FamFG. It cannot become legally binding without that approval[59]. Although seizing the court in contact matters normally requires the existence of a dispute, it is conceivable that an application for approval of a contact agreement may be brought to the court with the objective of recording the agreement in order to render the agreement binding and enforceable. . The parents would have to insist that they require the court's intervention, even though there is currently no dispute about the settlement reached. Although in practice such applications are unusual so far, it can be assumed that the family court will comply with the wishes of the parents, record their agreement and render a decision approving the contact arrangement to make it legally binding. An agreement recorded by the court as a settlement becomes in general legally binding and enforceable, Section 36 FamFG.

Agreements concerning **custody** can only be rendered legally binding by a decision of the family court on the merits (with an exception concerning a declaration of parental responsibility where the parents are not married[60]). On the other hand, a court cannot give a decision if parents who have shared parental responsibility do not want to change this; an exception to this are situations where the best interest of the child is at risk. An agreement determining where a child shall have his or her habitual residence or stating whether the child will reside mainly with the father or mother or on which days the child will live with whom does normally not require a court decision under German law - as long as no application for the change of (parts of) custody is made and the agreement will not be deemed a contact arrangement. In so far it is not possible for the judge to render a decision. If such matters are agreed together with other matters within a court recorded settlement, the agreement on the former matters may not be enforceable.

A special matter is contact with grandparents. At this point it is important to point out the concept of who

58 The guardian ad litem for minors shall determine the interests of the child and shall assert these in the court proceedings. He or she shall inform the child of the object, course, and potential result of the proceedings in a suitable manner. As additional duty she or he shall help facilitating an agreed settlement, Section 158(4) FamFG.

59 See BGH, decision of 10 July 2019, XII ZB 507/18, No.12 et seq.

60 In case the parents have not yet joint parental responsibility, it is possible to draw up an authentic instrument with declaration of joint parental responsibility before the Youth Welfare Office/ Jugendamt or a notary, Section 1626d BGB (Civil Code).

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may or may not be a "party" to proceedings under German law. In German family law "parties" are in general referred to as "participants", so this term shall be used normally in this document. Section 7 FamFG (1), (2) states that in proceedings initiated upon application the applicant shall be a participant. Furthermore, persons whose rights would be directly affected by the proceedings are to be included as a participant. When parents want to include the right of the grandparents to maintain personal contact with their grandchild, this includes concurrently an obligation of the grandparents to do so. To render contact obligations concerning grandparents legally binding and enforceable the grandparents would therefore have to take part in the family court proceedings. Otherwise it would simply stay a declaration of intent.

GERMANY: Maintenance

Maintenance (child/ spousal/ ex- spousal maintenance) proceedings have to be initiated by the applicant; and can be initiated only as adversary proceedings. Such family dispute matters are very formal proceedings. A fee for the court has to be paid in advance or a request for legal aid has to be made and approved by the judge before the application will be served. Representation by a lawyer for each party is required, Section 114 (1) FamFG. If the Youth Welfare Office (Jugendamt) is representing a participant, representation by a lawyer is not required, Section 114 (4) 2 FamFG. Where the parties have come to an agreement about maintenance outside court, the court cannot be seized by the parties. In this event, the correct way forward would be to go to a notary public for notarisation/ the drawing up of an authentic instrument. Theoretically, parties could pretend to have a dispute and then end court proceedings with a court documented settlement. However, when it becomes apparent that the parties were in agreement before seizing the court and when no other matters such as custody or contact are included in the agreement, the court might reject the application for lack of a need for legal relief and refer the parties to a notary public. The judge will have some discretionally power although technically the court can record only an agreement, which the parties have obtained in the course of proceedings. The agreement becomes legally binding and enforceable by the act of documentation before a family court, Section 794 ZPO (Code of Civil Procedure).

GERMANY: Divorce

Under German law, divorce can only be granted by a judge. In addition, parties may record an agreement before the judge, normally and often done during divorce proceedings concerning matrimonial property, child and spousal maintenance, parental responsibility or other family matters without prior contentious proceedings regarding these topics, Section 36 FamFG, Section 794 ZPO. In this situation representation of both spouses by lawyers is mandatory. Parties will have to apply for recording an agreement before the judge in case of divorce, Section 36 FamFG, 794 ZPO. That means, the agreement and the court decision concerning parental responsibility will normally only become legally binding when the divorce is final. There is existing discretion for the judge to record the agreement. When contact arrangements are made which have to be approved by the court to make them legally binding and enforceable a decision in so far has to be rendered. The same applies when a court decision concerning custody is necessary[61]. When important matters of parental responsibility are settled, and the child is of sufficient age - in Germany beginning with the age of 3 years - the judge will have to talk to the child in advance (see also below "Hearing of Child").

GERMANY: Other matters

Parties may settle all pending family court proceedings by recording the agreement before the judge. It is possible to include arrangements that concern matters beyond the pending case. Representation of lawyers is required in family dispute matters. A separate court decision is not given in these cases (only when the settlement is about contact or surrender of the child the court would have to approve the agreement, see above).

GERMANY: International impact

For the above said on procedural law in Germany, it does not matter in which country the agreement has been drafted as long as it is brought to a competent German Court. The agreement might be the result of a mediation or similar alternative dispute resolution mechanisms having been conducted in another country or cross-border.

The agreement which shall be made legally binding and is meant to be concluded as a court approved settlement should be drafted in German as this is the official language of the German courts, Section 184 GVG (Act on the Courts Constitution). For the oral hearing of the parties an interpreter will be called if persons are

61 Some more variations are existing, which shall not be described in detail.

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participating who do not have sufficient command of the German language, Section 185 GVG. The result of the hearing, all protocols and court decisions have to be drawn up in German. Should the court be presented with a bilingual agreement it is highly questionable how the non-German version of the agreement would be dealt with. It would be in the discretion of the judge to possibly include the foreign language version in addition to the German one in the court protocol. The competent court may reject the foreign language version when she or he has no competence in the foreign language or when there are doubts about the translation. In any case, the foreign language version would not obtain force of law in German courts. However, it should be noted that where the agreement on custody/contact or maintenance becomes part of a German court decision the EU-forms of the Brussels IIa Regulation and the Maintenance Regulation will require translation of the content into the foreign language for the circulation in EU States.

GERMANY: Content test of agreement

GERMANY: Applicable law

When it comes to a possible content test of international family agreements, the applicable law must be determined. It should be noted that the German courts determine the applicable law ex officio and also apply foreign law ex officio.

For custody and contact matters, the applicable law will be determined by the court in accordance with Art. 15 of the 1996 Hague Child Protection Convention, which will principally lead to the applicability of the law of the forum but may also lead to the applicability of foreign law (Art. 15 (2) and (3) of the Convention).

For any form of maintenance, the applicable law will be determined by the court in accordance with Art. 15 of the EU Maintenance Regulation in connection with the 2007 Hague Protocol.

GERMANY: Party autonomy

For the event that German national law is applicable, it has to be determined to what extent German law grants or limits the parents' party autonomy to conclude binding family agreements. Again, it depends on the subject matter

GERMANY: Parental responsibility

For agreements on parental responsibility the family court would apply, ex officio, a content test before including the agreement's content in a court decision or court settlement. Concerning parental responsibility, the best interests of the child are the overarching principle, sec. 1697a BGB (Civil Code). See also Section 1626 (3), 1627, 1671, 1684, 1685 BGB. When a content test shows that there are doubts whether the best interests of the child will be safeguarded by the agreement, the court will try to negotiate with the parents - and possibly a guardian ad litem and the Youth Welfare Office - to modify the agreement respecting best interests of the child. In detail:

GERMANY: Custody

Only the family court can grant or withdraw custody completely or parts of it to or from a parent, when parents live apart from each other, Section 1671 BGB or in the case of endangerment of the best interests of the child, Section 1666 BGB. This can be done on application of one parent or ex officio in cases where the best interests of the child are at risk. An exception is the declaration of joint parental custody that unmarried parents can issue at the date of the birth of the child under Section 1626a BGB.

If parents live apart not only temporarily and have had shared parental responsibility up to the time of making the application each parent may apply before the family court to transfer parental custody or part thereof to him or her alone. The application is to be granted to the extent that the other parent consents, unless the child has reached the age of 14 and objects to the transfer or it is to be expected that the termination of joint custody and the transfer to the applicant is most conducive to the best interests of the child, Section 1671 (1) BGB. Similar rules are applicable when up to the time of the application the mother has had sole parental responsibility, Section 1671 (2) BGB. Thus parents can agree about changes on custody, but unless the family court has not ruled on this, the agreement will not be effective.

Parents are free to make agreements about the exercise of their parental responsibility as long as this does not affect their rights to custody. For example: Parents can decide that a child will stay only with one of the parents or make shuttle-custody agreements, where the child's residence alternates between mother and father (e.g. one week with mother, the other week with

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father). However, despite the fact that parents have wide party autonomy here, such arrangements, which are from a legal point of view contact arrangements as well as exercise of parental custody, can be made binding and enforceable only as agreement on the rights of access with approval of the court (which will apply a best interests of the child test).

GERMANY: Contact

As concerns matters of contact, parents have in general full party autonomy to conclude an agreement as long as it does not conflict with the best interests of the child. For enforceability a court decision is necessary (see above under the heading "Germany-Procedural requirements in accordance with national law" – "Parental responsibility"). Where the court doubts whether the best interests of the child are sufficiently secured by the agreement, the court will try to negotiate with the parents (and perhaps a guardian ad litem and the Youth Welfare Office) to find arrangements that are compatible with the best interests of the child. Contact with grandparents is a right of both, i.e. the child and the grandparents, if this serves the best interests of the child. The same applies to contact with persons to whom the child is closely related if these persons have or have had actual responsibility for the child (social and family relationship), Section 1685 BGB.

GERMANY: Child maintenance

Under German law it is not possible to waive future child maintenance, Section 1614 (1) BGB.

A minor child may demand from a parent with whom he/she does not live in one household a certain amount of money as so called minimum maintenance, Section 1612a BGB which presently (status November 2019) stands as follows: after set-off of ½ of the child benefit: 257 € for a child under 6 years of age, 309 € for a child of 6-11 years of age, 379 € for a child of 12-17 years of age. Higher maintenance may be demanded depending on the income of the debtor[62]. Beyond that agreements are possible.

Normally a best interests of the child test will be applied in a very broad sense to maintenance agreements. Where there are indications that the agreement's content is in conflict with the law, rendering its terms binding and enforceable will be refused. Any further action of the court will require an application of one of the parties, although some judges may try to bring about a modification of the agreement with the parties.

In case parents agree about child maintenance, which is lower than the so called minimum maintenance, they will have to give their good reasons and explain in the document/ agreement as detailed as possible the income of both parents and other circumstances which have led them to agree this amount.

GERMANY: Spousal /ex-spousal maintenance

It is not possible to waive future spousal maintenance completely as long as the parties are married. Beyond that agreements are possible. Courts may reject agreements if they see a serious infringement against the principles of morality, Section 138 BGB, or when an ex-spouse who wants to waive his or her right for spousal maintenance would as a result require social benefits payments.

GERMANY: Divorce

No party autonomy exists concerning the divorce itself. Only a court can divorce spouses, Section 1564 BGB; the requirements of Section 1565 et seq. must be respected.

Party autonomy exists in general concerning the ancillary matters such as equalisation of pension rights, maintenance, marital home and household objects, marital property or matters of parental responsibility (see above).

Spouses have to inform the court whether they have reached an agreement in respect of custody, visitation, support concerning the common minor children, statutory spousal maintenance arising based on the establishment of the marriage, the legal status concerning the marital home and household property, Section 133 (1) 2 FamFG. It is not necessary that the parties have in fact agreed on this ; informing the court whether they have done so is sufficient.

Connected with the divorce the court has ex officio only to give a decision on equalisation of pension rights as long as the parties have not made a valid agreement about that. Either of the spouses can apply for a decision in ancillary proceedings (see above under heading "Germany - Local jurisdiction in general"- "Additional remarks"). Under these circumstances the

62 See for more details the so called Düsseldorfer Tabelle http://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_Tabelle/Tabelle-2019/Duesseldorfer-Tabelle-2019.pdf (last consulted 1 May 2020).

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decision of the court will normally be given together with the divorce judgement[63], Section 137 FamFG.

Legal separation is not known in German national law.

GERMANY: Hearing the child

In all parental responsibility family court proceedings, the child generally has to be heard by the judge before a court decision is rendered. Section 159 (1) FamFG requires all children from the age of 14 to be heard (except where solely the child's property is concerned). However, children are usually heard by judges as of the age of three years in line with established jurisprudence[64] based on Section 159 (2) FamFG, which regulates the hearing children younger than 14 years of age "when the preferences, relationships, or the desires of the child are significant to the decision or when an in-person hearing is otherwise indicated". German family courts have a long tradition in hearing children as of very young age, provide a child adapted setting of the hearing and special training to family judges for hearing children. The aim of the hearing is both to get an impression of the child -in general and concerning the concrete situation-, his/ her age-appropriate development and maturity, his/ her wishes, and - depending on age and maturity - to inform her/ him about the ongoing of the proceedings.

The judge will talk to the child often in advance of the court hearing, only in the presence of the Verfahrensbeistand (guardian ad litem), if appointed. Other participants are informed later about the child's views and the judge's impression.

Where the child rejects to talk to the judge – a situation that rarely occurs in practice - the guardian ad litem or / and a person from the Youth Welfare Office will talk to the child. If the child does not agree with the parental agreement the judge will justify very concrete, reasonable and clear his or her decision to nonetheless uphold the content of the agreement or to reject it.

The judge will summarize and evaluate the hearing of the child, either in the court decision or in the records of the hearing.

63 In fact a divorce decision is called "Beschluss" , literally to be translated as "Order", not "Judgement" under German law.

64 BVerfG, Beschluss vom 26. September 2006 – 1 BvR 1827/06; BGH, Beschluss vom 31. Oktober 2018 – XII ZB 411/18.

GERMANY: Costs incurred

The costs incurred to render an agreement legally binding and enforceable by obtaining a court decision or settlement are not easy to summarise because, as outlined above, there is no easy and direct mechanism for this. It depends very much on the way forward the parties have chosen.

In accordance with German procedural law, the basis for calculating fees for courts and lawyers is a value to be fixed by the court and based on the law about costs in family proceedings, FamGKG (Law concerning Costs in Family Proceedings).

Legal aid is possible, a means and merits test is required in accordance with German national law; in international cases, particular rules can apply in accordance with predominant EU or international law.

The costs incurred also include necessary fees for a lawyer and other stakeholders, which in Germany mainly will be a guardian ad Litem (Verfahrensbeistand) for the child, should their participation be obligatory, and no legal aid be granted.

GERMANY: Cost occurring for a single matter

GERMANY: Parental responsibility

For a dispute on parental responsibility matters, by way of example, the *value* for court proceedings (without lawyer and without guardian ad litem, whose participation is not mandatory) would be 3000€ for each, custody and access, Section 45 FamGKG: This is only the basis for calculating fees, not an amount of money to be paid.

a) Custody: Court fee 54 €, Section 28 (1) 3 FamGKG, KV Nr. 1310, (Kostenverzeichnis gemäß Anlage 2 FamGKG).

There is no difference if one or more children are concerned. In the event a guardian ad litem has been be appointed a fee of 550 € is charged per child. Furthermore, costs for interpretation during the hearing may occur, these are approximately 75€ per hour incl. the time the interpreter needs to travel to and from the court

b) Contact: Again, the court fee is 54 €, Section 45 FamGKG, KV Nr. 1310, Anlage 2 FamGKG.

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In case a guardian ad litem will be appointed 550 € are charged per child (KV-Nr. 2013). Furthermore, costs for interpreting during the hearing may occur, approximately 75 € per hour

Possible interpretation costs will have to be paid by the participants as they are court related costs.

When the parents are represented by a lawyer – which is not required – additional fees will have to be paid.

Therefore the costs will be 54 € x 2= **108 €**. They may rise up to 658 € if a guardian ad litem is appointed, up to 1208 €, if there are two children and a guardian ad litem has been appointed and up to 1000 € if interpreting is necessary.

Child / spousal maintenance

The basis is again the value to be fixed by the court. Relevant for the value on which all fees depend is the amount of maintenance paid in the first year after the application, Section 51 FamGKG; in case of 200 € per month= 2400 €/ year. The value will be higher when there are arrears.

Representation by a lawyer is mandatory in maintenance proceedings. Theoretically, the child can be represented by a Youth Welfare Officer, which is for free[65]. The legal basis for the fees for lawyers is the value to be fixed by the court, for the concrete calculation of the amount of money to be paid the RVG (Rechtsanwältevergütungsgesetz; Act on the remuneration of Attorneys) and the VV (Vergütungsverzeichnis; Remuneration scheduleincl. Annex 1 Remuneration schedule).

Court fees : In the event a final decision has to be given by the court, KV Nr. 1220 : 3 x 108 = 324 €. Where the proceedings are concluded by a documented agreement the fee is only **108 €** (KV. Nr. 1221).

Fees for two lawyers in case of ending the proceedings by a documented agreement: 860,97 € x 2= **1721,94 €**[66]**.**

GERMANY: Cost incurred for turning the example family agreement summarised below into an enforceable court decision

The child (age: 10 years) will live in the household of the mother; father and child will have contact every second weekend and during school holidays; the father will pay a monthly child maintenance of 200 EUR to the mother.

As explained above, it will not be possible in Germany to turn this example family agreement easily into an enforceable court decision. Often different proceedings have to be started, at least contact proceedings and maintenance proceedings. For the calculation of costs two variations are differentiated:

- Contact and maintenance proceedings are started at the same time, see Variation 1;
- Only contact proceedings are started and later the court documented agreement involves also matters of maintenance – Variation 2.

Variation 1: Contact and maintenance proceedings are started

The legal basis for the fees for lawyers is the RVG (Rechtsanwältevergütungsgesetz; Act on the remuneration of Attorneys) and the VV (Vergütungsverzeichnis; Remuneration schedule incl. Annex 1 Remuneration schedule).

Parental responsibility proceedings (value set by the court 6000€ because of access and custody matters

Court fee: either 82,50 € (no lawyer required); in case the court will lead the proceedings in two different files, which may occur, the court fee will be on the basis of values of 3000€ for each proceeding 2 x 54 € = 108 €

Extra maintenance proceedings (value set by the court 2400 €)

Court fee: 108 €, for each lawyer (obligatory): 860,97 € = (1721,94 € + 108 €) 1829,94 €,

Total 1829,94 € (maintenance) + 108 € (custody and contact) = **1938,94 €**.

Costs may be higher, if interpretation during the oral hearing is necessary or when a guardian ad litem is appointed. In this case total costs will be between 2200€ and 2600€ and can/ will be more when there are more

65 This is unlikely where a mediation has been taken place beforehand.
66 In detail in German: 3,5 Gebühren: 1,3 Verfahrensgebühr VV Nr. 1300 (Vergütungsverzeichnis) , 1,2 Terminsgebühr VV Nr. 3104, 1,0 gerichtliche Vergleichsgebühr VV Nr. 1000, 1003, 1004 zzgl. Auslagen und Umsatzsteuer).

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children in the family, because the guardian ad litem is paid per child (350 € or 550 € for each child, depending on the tasks).

Lawyer costs may be higher, where an individual contract between lawyer and parent about the fee has been agreed upon. They will be lower when legal aid is granted.

Variation 2: Only contact proceedings are started

This alternative is presently quite seldom used in practice, but it could possibly be the fastest way to render a family agreement binding and enforceable. As precondition both parents have to be represented by a lawyer. This alternative will lead to quite high costs. From an economical point of view this path should not be recommended.

In this scenario, contact proceedings only are started as adversary court proceedings by the parties. Both parents are represented by their own lawyers. The proceedings are concluded by a court documented agreement not only about access, but also about surrender of the child as a parental responsibility matter, and child maintenance. In this situation the court will probably set a value for the original access proceedings of 3000 € and for the agreement of 8400 € (in detail: 3000 € access, 3000€ for surrender of the child, 2400 € maintenance). The court fee for the originally started proceedings will be 54 €, for the documentation of the agreement 41,25 €, court fee at all 95,25 €.

Each lawyer will charge in this alternative 2080,60 €, calculated on the basis of RVG and VV (Remuneration schedule incl. Annex 1 Remuneration schedule) [67] , for two lawyers this will be 4121,20° €. Adding the court fee of 95,25 € there are total costs of **4.216, 45 €** plus possible costs for interpretation or a guardian ad litem. Again, lawyer costs may be higher, when an individual contract between lawyer and parent about the fee has been drawn up. They will be lower when legal aid is granted.

67 1,3 Verfahrensgebühr nach einem Wert von 3000€: § 13 RVG, 3100 VV= 245, 70 €
+ 0, 8 Gebühr für Mehrvergleich nach § 13 RVG, 30101 Nr. 2 und 3100, da nach §15 RVG eine Obergrenze zu beachten ist = 270,40 €
+ Terminsgebühr nach einem Wert von 8400€: 1,2 Gebühr § 13 RVG, VV 3104 = 538,80 €
+ Einigungsgebühr nach 3000€, § 13 RVG Nr. 1003, 1000 = 189 €
+ außergerichtliche Einigungsgebühr nach einem Wert von 5400€, § 13 RVG 1000 VV: 1,5 Gebühr =484,50°€ (hier ist die Obergrenze nach § 15 RVG schon berücksichtigt)
+ 20€ Auslagenpauschale nach VV 7002 sind insgesamt 1748,40€
+ 19 % USt. auf alles, Nr. 7008 VV = 332,20 €

As will be shown later a combination between Method A and Method B for rendering a mediated agreement legally binding and enforceable seems to be an option that is less expensive and perhaps speedier.

GERMANY: Time required

It is difficult to predict the approximate time for obtaining an enforceable court decision through the processes outlined above.

Parental responsibility proceedings in general have to be led by the judge very swiftly . Parent and child matters concerning the place of residence of a child, the right of contact, or the surrender of the child, as well as proceedings based upon endangerment to the welfare of the child, shall have priority and the proceedings should be handled in an expedited manner, Section 155 (1) FamFG, and should be heard within one month, Section 155 (2) FamFG. Assuming that the parents have started adversary parental responsibility proceedings and have come to an agreement during the court proceedings – or have pretended to have done this while the case was pending before the family court- it may be possible to obtain a court order within ca. 1 – 2 months.

In maintenance proceedings the court fee has to be paid before the application is served on the defendant. The court fee has to be paid by the applicant. It can be paid at the same time the application is brought to court - which in practice is not done very often. It seems nearly impossible to obtain a decision in a maintenance case before one month after the application. On average 3-4 months may be realistic, but it may easily take nine months.

The time required depends very much on the workload of the judge in question or the family court in general.

GERMANY: Enforceability

The question as to when one or more court decisions which finally render an agreement (or parts thereof) legally binding take effect and whether they will be directly enforceable depends again on the subject matter and the way the agreement has been integrated or transformed into a court decision. Most agreements that have been recorded before a judge and when no specific court decision is necessary, become effective in that instant.

Assuming that the parents have started adversarial proceedings and have come to an agreement during the court proceedings:

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Divorce as a single matter: No agreement on divorce is possible in Germany. Divorce has to be decided by the court. Final court decisions in matrimonial matters will become effective when they are final and binding, Section 116 (2) FamFG. If an agreement was concluded during divorce proceedings with a view to settling all ancillary matters, the agreement will only be legally binding and enforceable when the divorce becomes final.

Parental responsibility as a single matter: The order shall become effective upon notification to those participants to whom the significant contents are directed, Section 40 (1) FamFG. Either the Judge notifies the parties of the order by reading in their presence the operative provisions or the parties will be notified by sending via mail, Section 41 FamFG. The order shall be enforceable upon becoming effective, Section 86 (2) FamFG. An enforcement clause is required when the enforcement is not carried out by the court that had issued the order.

Child or spousal maintenance as a single matter: The rules differ from those regulating enforceability of parental responsibility matters. Maintenance matters become effective when they are final and binding, Section 116 (2) 1 FamFG. But for obligations to pay maintenance the court must order that the decision will have immediate effect, Section 116 (2) 3 FamFG. Compulsory enforcement will be pursued based on an execution copy of the judgement / order furnished with the court certificate of enforceability (enforceable execution copy), Sections 113 (1) FamFG, 724 (1) ZPO.

GERMANY: Summary

Returning to the example relocation agreement drawn up above and using Method A:

a. Parents would have to start parental responsibility proceedings and with a second application proceedings concerning the contact with the grandparents (because the grandparents are not parties to the aforementioned proceedings, see above under the heading "Germany - Procedural requirements in accordance with national law", "Parental responsibility") and thirdly extra maintenance proceedings. This takes time and will be quite expensive as regards maintenance proceedings where representation by lawyers is mandatory; or

b. Parents could just try to start parental responsibility proceedings only and settle these with a package agreement as a court documented settlement following the approval of the court concerning access. This way should be faster, but it is even more expensive and makes nonetheless further proceedings concerning the contact with the grandparents necessary.

In summary: The options of how to render an agreement that has been achieved out of court legally binding an enforceable in Germany will be quite difficult, unclear, expensive, time consuming and without legal representation and advice nearly not feasible. This conclusion applies for quite a simple relocation agreement where only contact and maintenance issues are dealt with. For a more comprehensive agreement this is even more difficult, expensive and time consuming.

GERMANY: Identifying additional steps to secure cross-border enforcement under the European / international legal framework (and assuming that Germany is the State of enforcement)

GERMANY: Declaration of enforceability / enforcement

Starting point jurisdiction in this constellation is again the (now foreign) State of habitual residence of the child, where the relocation agreement has been embodied in a court decision.

A court decision stemming from a foreign European Union State on matters of parental responsibility and maintenance will be recognised in Germany without the need for a special procedure under the Maintenance Regulation and the Brussels IIa Regulation. In addition, with the certificate in accordance with Article 41 Brussels IIa Regulation in relation to rights of access and the Annex I form of the Maintenance Regulation in relation to maintenance, no declaration of enforceability will be needed. Where a declaration of enforceability is required under the Brussels IIa Regulation, the competent authorities can be found on the e-justice portal of the EU, where States' notifications of competent authorities in line with the obligation under the Regulation are published. The information for Germany is also available on the website of the German Central Authority[68].

68 https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Gerichte/Gerichte_node.html (last consulted 1 May 2020).

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Also, the competent authorities for the actual enforcement under the Regulations are displayed on the e-justice portal.

It must be highlighted that both under the Brussels IIa Regulation and the EU Maintenance Regulation Central Authorities are set up that assist applicants with the cross-border enforcement of decision falling within the scope of the Regulations.

Where the declaration of enforceability for a court decision on parental responsibility and maintenance is required under the Brussels IIa Regulation and the Maintenance Regulation, it may be that different local authorities have competency.

An important issue for German courts dealing with recognition and enforcement issues under the Brussels IIa Regulation will always be whether and how the child has been heard in the foreign State. When this is not done properly there may be a risk for non- recognition and enforcement difficulties.

Furthermore, it must be highlighted that severe differences exist between legal systems as concerns the requirements for the precision of a contact or maintenance order for it to have an "enforceable content". In Germany, contact arrangements must regulate in detail all modalities of the contact: the time and place of contact / overnight-visits must be regulated in detail as must be the modalities of holiday visits (a contact arrangement granting a father contact rights every second weekend would not have an enforceable content in Germany). Equally maintenance decisions must be very detailed.

GERMANY: Specialised jurisdiction for declaration of enforceability / enforcement

Germany has specialised jurisdiction for declaration of enforceability under the EU Maintenance and the Brussels IIa Regulations, but different courts or departments may be competent. Competency is regulated in special laws and depending on the matter. This works parallel with the competence for Hague abduction cases and Maintenance applications under the EU Maintenance Regulation (also above).

GERMANY: Parental responsibility / Brussels IIa Regulation:

Applicable here are Sections 10-12 IntFamRVG (Act to Implement Certain Legal Instruments in the Field of International Family Law).

In proceedings concerning the declaration of enforceability pursuant to Article 28 of Regulation (EC) No. 2201/2003, the decision lies with the Family Court in whose district a Higher Regional Court has its seat for the district of such Higher Regional Court. For the district covered by the Higher Regional Court in Berlin (Kammergericht), decisions are taken by the Local Court of Pankow-Weißensee.

Exclusive local jurisdiction lies with the Family Court in whose area of jurisdiction at the time the application is made

1. the person against whom the application is directed, or the child to which the decision relates, habitually resides, or

2. in the absence of jurisdiction pursuant to number 1, the interest arises in respect of the finding or the need for care exists,

3. otherwise, in the district of Berlin Higher Regional Court, with the court that has been appointed to decide.

Competency lies with 22 first instance family courts and for appeal decisions with 22 courts of appeal. A link to a detailed list can be found via the website of the German Central Authority[69]The same courts will have competency if in a cross- border access situation the foreign decision has to be adapted under Art. 48 Brussels IIa Regulation.

When it comes to actually enforcing the foreign court decision on parental responsibility falling within the scope of the Brussels IIa Regulation, the competent authorities for enforcing the foreign court decision on parental responsibility under the **Brussels IIa Regulation** are determined in accordance with the IntFamRVG. Decisive is the point in time when the application for enforcement is brought to court, Section 44, 10- 12 IntFamRVG. When the same specialised Family Court is competent for enforcement as has been for declaration of enforceability the application will usually be handled by the same department.
Parental responsibility matters are enforced by the family judge, in case of the handover of the child po-

69 Bundesjustizamt.de/sorgerecht, see footnote 57.

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tentially with help of a bailiff, in general the same judge/department as before. On infringement of a title to be enforced in Germany pursuant to Chapter III of the Brussels IIa Regulation the court should impose a coercive fine, and in the event of such fine not being recoverable, the court should order coercive detention. Where the imposition of a coercive fine offers no prospect of success, the court should order coercive detention at once.
A decision about surrender of the child (as custody matter, not for access) will be enforced by the court ex officio, Section 44 (3) IntFamRVG.
Competence for enforcement rests with the Higher Regional Court in so far as the order has been declared enforceable, made or confirmed by that court.

GERMANY: Maintenance/ Maintenance Regulation:

Maintenance decisions rendered in proceedings after 18 June 2011 in EU States other than Denmark and the UK do generally no longer require a declaration of enforceability. Where such a declaration of enforceability is required it will be taken in Germany pursuant to Article 27 of Regulation (EC) No 4/2009 by the family division of the Local Court in the locality where a Higher Regional Court (Oberlandesgericht), in whose district the person against whom the application is made is habitually resident or in whose district enforcement is sought, is situated (concentration of jurisdiction). For the district covered by the Higher Regional Court in Berlin (Kammergericht), decisions are taken by the Local Court of Pankow-Weißensee, Section 35 (1) (2) AUG (Auslandsunterhaltsgesetz; Foreign Maintenance Act).

As general information and to put it simply, it can be said that the competent Courts for applications for declarations of enforceability are nearly always the same in parental responsibility matters and maintenance. It is normally the local Family Court in whose district lies a Higher Regional court. These are at all 24 Family Courts in Germany. An exception applies in the Bundesland Niedersachsen, where at all three courts have concentrated jurisdiction under the Maintenance Regulation, but only one court -in Celle-, for recognition and enforcement matters under the Brussels IIa Regulation have jurisdiction it will be at least the same court.

The actual enforcement of foreign maintenance decisions has to be done with the help of a bailiff, depending on the habitual residence of the debtor. If in special situations a decision of a judge would be necessary, it would be the same judge/ the same department that would have had competency for a declaration of enforceability.

GERMANY: Matters falling under the Marital Property Regime Regulation

In Germany, the Marital Property Regime Regulation is applicable to decisions, court settlements etc. within the scope of the Regulation originating from EU-States bound by the Regulation. They may be declared enforceable, Art. 60, 42, 44 ff of the Regulation, by specialised German courts, determined in Section 4 IntGüRVG (Internationales Güterrechtsverfahrensgesetz; Act to Implement Certain Legal Instruments in the Field of Matrimonial Property). As in the implementation acts IntFamRVG and AUG the decision shall lie with the Family Court in whose district a Higher Regional Court has its seat and in whose district the debtor is habitually resident or in whose district enforcement is sought.

GERMANY: Matters falling not under a certain EU Regulation

Where no predominant EU or international rules on enforcement and declaration and therefore none of the lex specialis implementing acts are applicable German national Family Law , Sections 108-110 FamFG, are applicable. General competence rules apply, no specialised jurisdiction exists. This may lead to the competency of another court than the one which is competent for declarations of enforcement under Brussels IIa or the Maintenance Regulation.

In summary we can note that it may come to the situation that the same local court and the same department/ judge is competent for a declaration of enforceability or the enforcement of different matters. But it is also possible that two or three different courts and judges have to deal with matters of recognition and enforcement, depending on the different subject matters of the foreign decision. According to different national (implementation) acts, jurisdiction sometimes rests with a specialised Family Court or the Family Court that has competency in cases where no recognition and enforcement provisions of a EU Regulation or Hague Convention are involved, and will depend either on the habitual residence of the child or the habitual residence of the person against whom the application is made or the debtor etc.
The organisation within the competent court may also lead to the competence of two different departments and Judges even concerning the two main Regulations Brussels IIa and the Maintenance Regulation.

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GERMANY: Additional remarks concerning "package agreements"

Regarding the enforcement of so-called **"package agreements"** (i.e. agreements that relate to a number of different subject matters, such as maintenance & parental responsibility & others) originating from another European Union State the current legal situation in Germany is not satisfactory, similarly to the purely national situation when an agreement shall be rendered legally binding and enforceable within Germany.

Parents wish for the entire package to be valid, binding and enforceable. Now they have to realize a situation where they – sometimes again, as already in the State of origin of the agreement- have to start different applications. Without legal knowledge and even expertise in international and international private law it seems nearly impossible to handle this.

This document has not dealt with other topics as for example: agreements about the family home when this does not belong to either of the parents, or when the parents are an unmarried couple, matrimonial property if the new Matrimonial Property Regulation is not applicable, costs of contact, visitation rights for other relatives, details of education as language courses, religious matters, ban on the approach of somebody. These single matters often depend on the conclusion of the entire package and the result is well-balanced between the parents. When it comes to recognition and enforcement issues sometimes a family court with specialized jurisdiction will be competent. Often, however, the "normal" family court (because for these other matters that do not fall under international legal framework concentrated and specialised jurisdiction does not exist) will be competent. That court may even see no legal relief for recognition or declaration of enforceability issues as long as the problems in this field are not obvious. This may lead to a situation where different courts have to be appealed if an agreement concluded and rendered into a court decision in a foreign State is to be made enforceable and -partially- enforced in Germany.

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Situation I: Relocation agreement (Method B)

Method B: Making the agreement travel as such

121. In Method B, we make the relocation agreement travel cross-border in form of an authentic instrument or as enforceable agreement. To obtain an authentic instrument, it is necessary to either draw up the agreement as authentic instrument or register it as such (see for the definition of an authentic instrument above paragraph 6). Whether and under which conditions such an authentic instrument can be obtained depends on the relevant domestic law. The domestic law might also offer the possibility to render it enforceable through a different process.

Identifying subject matters contained in agreement

122. As under Method A, we need to start with identifying the subject matters dealt with by the agreement and to determine the legal category they can be affiliated with. In particular, whether they can be characterised to fall generally under the category of matters of:

- "parental responsibility" (a.-c.) (f. possibly, see paragraph 110)
- "child maintenance" (d.) (f. possibly, see paragraph 110)
- "spousal maintenance" (e.)

Identifying relevant European and international legal framework

123. In accordance with the category of subject matters determined above, the European and / or international legal instruments relevant to these matters can be identified:

- "parental responsibility" (a.-c.) - Brussels IIa Regulation, 1996 Hague Convention
- "child maintenance" (d.) – Maintenance Regulation, 2007 Hague Convention & other
- "spousal maintenance" (e.) – Maintenance Regulation, 2007 Hague Convention & other

124. When having identified in which States the agreement should be rendered binding and enforceable, it must be explored whether the pertinent European or international instruments are in force between these legal systems.

125. In our sample case above, the State of habitual residence of the family is an EU Member State (not Denmark). The State of relocation is another EU Member State (not Denmark).

Identifying starting point jurisdiction

126. As stated above, it may be argued that neither the Brussels IIa Regulation nor the Maintenance regulation make recognition and enforcement of authentic instruments dependent on the respect of the Regulations' rules on international jurisdiction. The same applies for enforceable agreements drawn up in front of an authority. Following this reasoning, the starting point jurisdiction is not necessarily depending on the rules of international jurisdiction of these instruments. However, in view of existing doubt, particularly regarding the permission to leave aside the international jurisdiction rules of the Brussels IIa Regulation, and also in view of facilitating a possible required recognition and enforcement outside the EU at a later stage[70], the Best Practice Tool recommends considering the rules of international jurisdiction in order to obtain a sustainable result.

127. The "ideal starting point jurisdiction" is the State of habitual residence of the child.[71]

128. Therefore in our constellation the State of the habitual residence of the child shall be chosen as starting point jurisdiction.

70 When wanting to have the agreements concluded in front of an authority travel cross-border as "child protection measure" under the 1996 Hague Convention the Convention's rules on international jurisdiction have to be respected, see Article 23(2)a) of the Convention.

71 As stated above under "Guidance for situation I", Method A, it is also conceivable that the parents, in a non-conflictual relocation case, render their agreement binding and enforceable only after the lawful relocation has occurred; then the place of the child's new habitual residence would be the ideal starting point jurisdiction. For the particularities of this constellation see further: "Guidance for Situation II", which deals with cases where the parents have their habitual residence in different States.

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Situation I: Relocation agreement (Method B)

GERMANY: Available options to set up an authentic instrument in Germany / obtain an enforceable agreement

It is not possible to render a package agreement in its entirety legally binding and enforceable by setting up an authentic instrument. Formally drawing up an agreement as authentic instrument should be seen in the light of Art. 46 Brussels IIa Regulation and Art. 48 EU Maintenance Regulation. As written above, in Germany agreements concerning parental responsibility have to be ordered or approved by an order of the court. Therefore, setting up an authentic instrument may be used in Germany mainly for financial matters.

For a family agreement about child maintenance only, two types of authentic instruments can be considered in general. These are authentic instruments set up before a notary and authentic instruments set up before the Youth Welfare Office (Jugendamt).

A family agreement concerning spousal support can only be drawn up before a notary as an authentic instrument. The same applies for other financial matters as for example agreements on marital property. A package agreement, i. e. a family agreement that consists of different and multiple subject matters, can theoretically be drawn up before a notary public as an authentic instrument. But: Any content concerning parental responsibility can only be of a declaratory nature. Parental responsibility decisions can only be made enforceable by transforming them into a family court decision.

GERMANY: Important information on the process in Germany

GERMANY: Notarisation - Authentic instrument set up before a notary

Documentation before a German notary is regulated in the BNotO (Bundesnotarordnung; Regulation for German Notaries) and the BeurkG (Beurkundungsgesetz; Authentication Act), the latter is applicable with the exception of Section 5 (2) for all other permitted authentication.

Precondition for any authentication is that authentication is “required” under the BNotO in the actual situation, Section 15 (1) BNotO. This applies to all maintenance claims or agreements in order to make them legally binding and enforceable. It can be questioned for contact and custody agreements, because they will not be enforceable. Making a parental responsibility agreement legally binding and enforceable, requires involving the family court; an authenticated agreement with such content is not an enforcement title in the sense of Section 86 (1) FamFG (Act on Proceedings in Family Matters). An agreement about contact or surrender of the child has to be approved by the court by a judicial order, Section 156 (2) FamFG, a decision about custody has to be rendered in form of a family court order; an agreement in so far will be not efficient.

An exception is admitted only in the event that the parents have not yet joint parental responsibility. Then it is possible to draw up an authentic instrument with a declaration of joint parental responsibility before a notary, Section 1626d BGB (Civil Code).

Notaries are often involved in setting up marriage contracts or divorce settlements for parents before going to court or during pendency of divorce proceedings. In this situation the notary may also record Sections concerning children matters such as contact arrangements or the declaration of the wish to act also in future jointly in all custody issues, but normally this will only be of a declaratory nature. A notary shall inform and advise the parties about the legal consequences, make sure that there is no ambiguity and indicate possible limits, Section 17 (1) BeurkG (Authentication Act). I.e. the notary would have to inform the parents that only the courts can decide about parental responsibility or that an agreement concerning access may not be legally binding without approval of the court. Therefore parties may go to a notary public for obtaining the authentication of package agreements, but mainly in respect of financial issues. Parental responsibility issues can be recorded together with maintenance arrangements, but an agreement drawn up as result of e.g. mediation and dealing not only with spousal and child support but also access or custody issues cannot be made legally binding and enforceable in its entirety in this way.

Using this avenue can be quite risky for parents. Parents may underestimate the legal consequences when the agreement is only partially enforceable. And notaries are not always family law specialists which perhaps is not obvious to the parents. Even if the notary is famil-

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iar with family law issues, the cross- border component is a further challenge.

GERMANY: Authentic instrument set up before the German Youth Welfare Office (Jugendamt)

There is very limited scope for drawing up an agreement as an authentic instrument before the Youth Welfare Office (Jugendamt). This is mainly available for child support[72], Sections 59 (1) 3, 60 SGB VIII (Code of Social Law Volume VIII). A specially trained Youth Welfare Officer can authenticate the obligation of a parent to pay maintenance for his/ her child including his/her declaration allowing immediate enforcement by this document. Normally this can be done by appointment in advance in the Youth Welfare Office where the child or the debtor is registered.

In case the parents have not yet joint parental responsibility, it is possible to draw up an authentic instrument with declaration of joint parental responsibility before the Youth Welfare Office or a notary, Section 1626d BGB (Civil Code), Section 59 (1) 8 SGB VIII.

GERMANY: Requirements in accordance with national law

Parents who want to set up an authentic instrument before the notary, will have to focus on the financial issues of the family agreement, however, have more or less easy and fast access to this method. They will have to fix a date with the notary for authentication. Special local competence does not exist.

The local competence of the Youth Welfare Office follows the place where the child is registered (not habitually resident!).

Representation by an attorney or other stakeholders is neither obligatory to set up an authentic instrument before the notary nor before the Youth Welfare Office.

For notarisation it does not matter in which country the agreement has been drafted.

The notary is allowed to authenticate in a foreign language, Section 5 (2) BeurkG (Authentication Act), if he has a good command of the relevant language, but he is not obliged to do so, Section 15 (1) BNotO (Regulation for German Notaries). In practice difficulties concerning enforcement may arise when the document is not in German. A bilingual agreement could under these conditions be authenticated in that form; it should make clear which language variation is decisive, especially for enforcement, if interpretation problems arise.

The question of international jurisdiction should be considered ex officio by the notary or the Youth Welfare Officer.

GERMANY: Content test of agreement

The notary public shall inform the parties if foreign law will be applicable or if there are any doubts about that, Section 17 (3) BeurkG (Act on Notarisation). If foreign law has to be applied any test of content of the agreement should be done ex officio under this law, same as under German law.

The same applies for the Youth Welfare Office. But here the officer will perhaps refuse to set up a document when not only an international element seems to be present, but where the application of foreign law could be demanded. There may be not sufficient knowledge concerning international or foreign law.

This may be the case for notary authentication, too. As mentioned above, not all notaries are family law specialists and out of the group of notaries with explicit knowledge of family law there will be several who are not at all familiar with international private law, European, international or foreign law.

Both, the notary as well as the Youth Welfare Office will not draw up a document which appears to contravene public policy. Of particular importance here is the amount of money that is to be paid as child maintenance (see also above under Method A and the heading “Content test of agreement- Party autonomy- Child maintenance”). In Germany a minor child may demand from a parent with whom it does not live together in one household a certain amount of money as so-called minimum maintenance, Section 1612a BGB (Civil Code). At present this is: (status November 2019) after set-off of ½ of the child benefit: 257 € for a child under 6 years of age, 309 € for a child of 6-11 years of age, 379 € for a child from 12- 17 years. Higher maintenance may be demanded depending on the income of the debtor[73].

72 For the sake of completeness: the Youth Welfare Office may also record the maintenance claim of the mother or under certain circumstances the father by reason of the birth, sec. 1615l BGB (Civil Code), 59 (1) 4 SGB VIII.

73 See for more details the so called Düsseldorfer Tabelle http://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_Tabelle/Tabelle-2019/Duessel-

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Therefore, the notary as well as the youth welfare officer will ask for details and reasons when the monthly child support shall be only 200€ and perhaps describe these reasons in the document. Maintenance may not be waived for the future, Section 1614 BGB (Civil Code). No public authority will draw up a document with such content. When the notary or the Youth Welfare Officer find that the agreement is against the law, they will refuse authentication.

GERMANY: Hearing the child

Interviewing the child in maintenance proceedings is not common practice in Germany and not demanded by law. Neither a notary nor the Youth Welfare Officer will do this.

As written above, an authentication of an agreement about parental responsibility matters – with exception of a first declaration of joint parental responsibility, can only be of a declaratory nature and this means it is unlikely that a notary will talk to the child.

GERMANY: Costs incurred

Authentication of child maintenance is free of charge, in front of the Youth Welfare Office as well as in front of the notary, GNotKG (Law concerning costs in Matters of Non-contentious Jurisdiction for Courts and Notaries), Annex 1, Part 2 KV, preliminary note 2 para 3.

The notary may charge expenses for copying and postage.

When other matters , i.e. spousal maintenance, shall be authenticated costs depend on the value to be set by the notary and following this value a fee of 20/10 calculated according to the cost table as annex to the GNotKG , Nr. 21200 (Law concerning costs in Matters of Non-contentious Jurisdiction for Courts and Notaries). These are 90€ if the standard value of 5000 € is fixed, or 150 € if the value is set on 10.000€, each plus 20€ advance charges plus tax. But, depending on the concrete arrangement, the age of the entitled person and the duration of the maintenance obligation, the value which has to be set by the notary according to Section 52 GNotKG can be significantly higher.

GERMANY: Time required

Authentication of an agreement in the office of a notary is probably the fastest and cheapest way to render an agreement concerning financial issues including spousal and child support legally binding and enforceable. The same applies if the agreement is just about child support for the authentication in the Youth Welfare Office. The parents have to fix an appointment, the date can be sooner or later, depending on the flexibility of the participants and the workload of the offices; it may take a few weeks (one to six weeks).

GERMANY: Enforcement

The authentic instrument obtained as a result will be directly enforceable for maintenance and other financial issues, if the debtor has subjected himself in the document to immediate compulsory enforcement of the claim, Section 794 (5) ZPO (Civil Procedure Code), which is common practice.

The notary or the Youth Welfare Office having authenticated the maintenance obligation will have to fill in the Annex III form of the Maintenance Regulation, if required. In practice this seems not to be very well known in Germany.

Neither of them may fill in the Annex forms of the Brussels IIa Regulation.

In summary and back to the example introduced under Situation I, Method A: The child (age: 10 years) will live in the household of the mother; father and child will have contact every second weekend and during school holidays; the father will pay monthly child maintenance of 200 EUR to the mother. This agreement cannot made legally binding and enforceable in its entirety by authentication. Setting up an authentic instrument using Method B to make the agreement travel cross-border is only applicable for financial issues. All parental responsibility issues do not fall under Article 46 of the Brussels IIa Regulation which speaks of “agreements between the parties that are enforceable in the Member State in which they were concluded”. For these matters the family court should be addressed.

dorfer-Tabelle-2019.pdf (last consulted 1 May 2020.

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GERMANY: Identifying necessity of additional steps to secure cross-border recognition and enforcement under the European / international legal framework (Assuming Germany would be the foreign State of enforcement)

Starting point jurisdiction in this constellation is again the (now foreign) State of habitual residence of the child, where the terms of the relocation agreement (or parts of it) have been included in an authentic instrument.

An authentic instrument stemming from a foreign European Union State (except Denmark) falling within the scope of the Brussels IIa Regulation will be recognised in Germany without the need for a procedure and can easily be declared enforceable (where a declaration of enforceability is required) under Article 46 Brussels IIa Regulation, Article 48(1) Maintenance Regulation.

Where the certificate in accordance with Article 41 Brussels IIa Regulation in relation to rights of access and the Annex III form of the Maintenance Regulation can be obtained, no declaration of enforceability will be needed. With regards to the declaration of enforceability, EU-Member States notify the EU of competent authorities; this information is published on the e-justice portal of the EU. The information is also available on the website of the German Central Authority[74]. The competent authorities for enforcement under the Maintenance Regulation are displayed on the e-justice portal, too.

Where the declaration of enforceability for a foreign authentic instrument on parental responsibility and maintenance is required under the Brussels IIa Regulation and/ or the Maintenance Regulation, one has to look in detail which authority would have competency issuing the declaration of enforceability and for the enforcement itself. In so far reference is made to Method A above, under the heading “Declaration of Enforceability/ Enforcement”

Please note: If the proceedings concern the enforceability of a notarial document under the Maintenance Regulation, that document may also be declared enforceable by a notary, Section 35 (3) AUG (Foreign Maintenance Act).

In practice the recognition and enforcement of foreign authentic instruments seems until now to play no role in Germany.

74 https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Gerichte/Gerichte_node.html (last consulted 1 May 2020).

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Guidance for Situation II: Cross-border contact / maintenance case

129. A cross-border contact case and / or cross-border maintenance case is meant to refer to a situation where one parent and the minor child have their habitual residence in a State other than that of the other parent's habitual residence and the parents are in dispute over contact and / or maintenance.

130. For the purpose of the Best Practice Tool, the following example case shall be analysed here: Mother and child are currently habitually resident in an EU Member State and the father is habitually resident in another EU-Member State (not Denmark). To settle a dispute over contact and/or maintenance the parents have concluded an agreement containing roughly the following subjects:

a. how contact between father and child will be organised, i.e. when the father will come to visit the child and when the child will travel abroad for contact visits;

b. how contact with the paternal grand-parents in the other State will be organised;

c. who will be paying the travel costs

and / or

d. what amount of child maintenance will be paid, and

e. what amount of ex-spousal maintenance will be paid.

131. To avoid repetition, only the differences in comparison with Situation I: Relocation Agreements shall be explored in this chapter.

Differences in comparison with Situation I

132. In contrast to Situation I, the parties do not have their habitual residence in the same State. This impacts on the analysis of rules of international jurisdiction for the subject matters covered by the agreement and can thus affect the identification of the "starting point jurisdiction".

133. Situations I and II resemble each other when the parents – among other things – agree on matters of parental responsibility; here the ideal starting point jurisdiction is the place of the habitual residence of the child.[75] Where proceedings are already ongoing between the parties in a different State concerning matters covered by the agreement, the assessment of the ideal stating point jurisdiction may lead to a different result.

134. In our example case, no proceedings are ongoing, hence the "ideal starting point jurisdiction" for an agreement on matters a.-e. would be the State of the child's habitual residence. This would be the State where, when using Method A, the decision embodying the content of the agreement would have to be sought.

135. When wanting to use Method B in Situation II regarding an agreement that referrers to matters of parental responsibly, a further aspect will have to be observed. Article 46 of the Brussels IIa Regulation speaks of "agreements between the parties that are enforceable in the Member State in which they were concluded" and thus pays particular attention to the place where the agreement is concluded. This particularity is re-emphasised in Recital 21 of the Mediation Directive, which in reference to Article 46 Brussels IIa Regulation notes "if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State." Neither of the instruments notes what is meant with the place of the agreements' conclusion but is it conceivable that besides the mere signature of the agreement other factors such as the place of mediation etc. would be determinative. In practice, where mediation in international family disputes might also be con-

75 The restrictions of Article 9 paragraph 1 Brussels IIa Regulation providing for a continuing jurisdiction contact disputes within three months following a lawful relocation would not be of importance here, since the parties can accept the jurisdiction of the courts of the new State of habitual residence on contact matters in accordance with Article 9 paragraph 2 Brussels IIa Regulation.

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ducted cross-border with the assistance of means of long-distance communication it will not always be evident to determine the State in which the agreement was concluded. For our example case, it should be noted that when wanting to respect the rules of international jurisdiction and turning as ideal starting point jurisdiction to the State of habitual residence of the child the agreement should be "concluded" in that State in order to benefit from Article 46 Brussels IIa Regulation.

136. Agreements analysed under Situation II also comprises mere cross-border maintenance cases, other than agreements analysed under Situation I, which as "relocation agreements" inevitably deal with matters of parental responsibility, namely the lawful change of residence of a minor child from one State to another. Where an agreement is purely on matters of maintenance, it is left to the parties' convenience whether they want to first render their agreement enforceable in the State where the parent with the minor child is habitually resident or in the State where the other parent is habitually resident (Article 3 a) and b) Maintenance Regulation).

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German National Law

Guidance for Situation II: Cross-border contact / maintenance case

GERMANY: National law particularities in this situation

Starting point jurisdiction in the above described situation is Germany, because the child is habitually resident in Germany. As also explained above there is no simple and straight forward procedure to render an agreement concerning contact and maintenance legally binding and enforceable, neither by using Avenue A nor by taking Avenue B, see above.

In addition, starting family court proceedings with two or more different applications for parental responsibility matters and for maintenance is quite expensive and time consuming (see above Situation I, under the headings “Costs incurred” and “Time required”). Choosing nevertheless Method A, it has to be observed that for parental responsibility proceedings the standard local court would have jurisdiction, where the child is habitually resident (see above under the heading “Local Jurisdiction”, “parental responsibility”), but for maintenance proceedings under the Maintenance Regulation jurisdiction of the specialised family court would apply (see above under the heading “Local Jurisdiction”, “Maintenance”), which could be at a different place.

The favourable solution taking into consideration the concrete situation under national law seems to be a combination of Method A and B. How contact between father and child and how contact with the paternal grandparents in the other State will be organised could be turned into a family court decision by starting access proceedings with participation of the grandparents. Maybe here travel costs could also be dealt with, if no concrete amount of money but only a general statement is required. It may be that the family court will handle this in two court files, or that the value for the court proceedings is set higher, because contact between child and grandparents and between child and father means different participants. However, representation by lawyers is not obligatory when choosing this option to proceed. The judge should only be asked to set a close date for the hearing and the father and the grandparents will have to travel to Germany for the oral hearing, in order to transpose the agreement into a court decision.

The risk of delays because of service problems abroad can be excluded or at least minimized when the father residing abroad and the grandparents will name an authorized recipient who is a resident of Germany or who has business premises in Germany, Section 184(1) ZPO (Code of Civil Procedure).

All financial matters- child maintenance and ex-spousal support as well as the issues concerning travel costs if the amount of money, the mode and due dates of the payment are fixed, can be documented in an authentic instrument, concluded before a German notary.

Concerning costs: two parental responsibility proceedings – without an attorney- will mean court fees of 2 x 54 € = 104 € (see for details above Situation I, Method A, under the heading “Cost incurred”). For all financial matters the notary may charge roughly 150- 350 €, perhaps more, depending on the value set by the notary, which depends on the amount of maintenance (see also above under Method B “Costs incurred”).

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Rendering Agreements Legally Binding and Enforceable

International Child Abduction Cases

Rendering agreements legally binding and enforceable in the context of international child abduction cases

137. The situations addressed here are those of international wrongful removal or retention of a child in the sense of Article 3 of the 1980 Hague Child Abduction Convention and Article 2 of the Brussels IIa Regulation (or Article 2 of the new Brussels IIa (recast) Regulation respectively).

Particularities of international child abduction cases

138. The factual situation in international child abduction cases differs considerably from that of an envisaged cross-border relocation or a cross-border contact or maintenance case in many ways. Firstly, the dispute is likely to be more conflictual. Often the contact between left-behind parent and child has been interrupted abruptly as a result of the wrongful removal or retention and has not yet been restored. In international child abduction cases time is of the essence: to protect children from the harmful effects of international child abduction, it is imperative to come to a swift dispute resolution. The 1980 Hague Child Abduction Convention, reinforced by the Brussels IIa Regulation, provides for expeditious return proceedings; in accordance with Article 11 (3) of the Brussels IIa Regulation decisions in Hague return proceedings are to be rendered within six weeks after the application is lodged.[76] Any process to bring about an amicable resolution of the dispute has to comply with the tight timeframe.[77] A further challenge in international child abduction cases is possible criminal prosecution in the State of abduction which can complicate the resolution of the dispute.

139. Special rules on international jurisdiction apply for matters of parental responsibility in international child abduction cases in accordance with Article 10 of the Brussels IIa Regulation (and outside its geographical scope of application in accordance with Article 7 of the 1996 Hague Child Protection Convention), see above paragraph 40. These rules preserve the international jurisdiction of the authorities in the State of the child's habitual residence ante abduction. In addition, the 1980 Hague Child Abduction Convention contains in its Article 16 a negative rule of jurisdiction for custody proceedings. As soon as a judicial or administrative authority in the State to which the child has been taken is informed of the wrongful removal or retention, no decision on the merits of custody can be taken until it has been determined that the child is not to be returned or no return application is

76 The new Brussels IIa (recast) Regulation holds up the "six weeks" rule and dispels any interpretational doubts that the six weeks period applies to the first instance and that a further six weeks period applies to the higher instance; Article 24 of the Regulation. This provision will apply to proceedings commenced on or after 1.8.2022.

77 See for the particular challenges for mediation in international child abduction cases Chap. 2 of the Hague Conference Guide to Good Practice on Mediation.

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lodged within a responsible time. This ensemble of rules was drawn up with the intent to protect the children affected by international child abduction. The provisions are premised on the notion that the most appropriate forum to determine the long-term merits of custody is usually the State of the habitual residence of the child and that the child's removal or retention by one parent in breach of the other parent's custody rights should not bring about a change of jurisdiction and provide procedural advantages for the taking parent.

140. Inadvertently, these special rules on jurisdiction may pose certain difficulties when it comes to rendering parental agreements binding in an abduction situation. Transposing a parental agreement on where and with which parent the child shall live as well as on contact arrangements – all typical ingredients of return and non-return agreements – into a decision requires international jurisdiction on matters of parental responsibility. Unless international jurisdiction has shifted to the State in which the Hague return proceedings are taking place, the judge seized with such proceedings is lacking international jurisdiction to include the parental agreement on the above matters into a decision.[78] This means the parents would have to turn to the State from which the child was taken (i.e., the State of habitual residence of the child immediately before the wrongful removal or retention) to render the agreement on custody and contact legally binding and enforceable.

141. However, this solution is for a number of reasons not the most convenient. First of all, the competent court in that State of the child's habitual residence at the time of the abduction is - in contrast to the court seised with the Hague return proceedings - not under an obligation to deal with the case expeditiously and the proceedings may be too lengthy to keep the Hague return proceedings in the other State pending. As a result, the parents are likely to end up with a partially binding agreement: The agreed return or non-return will have binding force of law with the Hague judge ending the Hague proceedings while the connected agreement on custody and contact is pending approval. This is an unsatisfactory and risky situation for the parents having agreed on return or non-return under very clear conditions. A further inconvenient of the solution of having to address the authorities of the State of the child's habitual residence at time of the abduction is that the taking parent might not want to travel there fearing criminal prosecution but that the competent court might require the presence of both parties in order to transpose the agreement into a custody decision. Furthermore, the court may be in need of hearing[79] the child.

142. The below guidance for return and for non-return agreements will shed light on how the judge seized with Hague return proceedings can assist in rendering the agreements legally binding and enforceable. It will be explained under which conditions a shift of international jurisdiction can be assumed. The National Best Practice Tools will detail the implications of national procedural law.

143. It should be noted that the new Brussels IIa (recast) Regulation seems equipped to remedy the above described inadvertent dilemma caused by the special rules of jurisdiction: In cases of wrongful removal or retention the international jurisdiction can be prorogated in line with Article 10 of the New Regulation, see Article 9 of the Brussels IIa (recast) Regulation. In its Recital 22 the new Regulation furthermore encourages Member States with concentrated jurisdiction to "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 and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child."

144. The way forward proposed by Recital 22 is most promising, however, quite some questions are left unanswered by the new Brussels IIa (recast) Regulation. For example, the Regulation is silent on the conflict of jurisdiction that would occur where custody proceedings are ongoing in the State from which the child was abducted at the same time as Hague return proceedings in the other State. The custody proceedings would surely have to be ended (or jurisdiction be referred the Hague court) before the Hague court could assume jurisdiction based on prorogation to avoid a situation of lis pendens.

78 In case there has been a shift of international jurisdiction on matters of parental responsibility to the State where Hague return proceedings are taking place it will of course depend on the relevant national procedural law whether the Hague judge would have local jurisdiction / subject matter competence to include the agreement on the merits of custody into a decision.

79 Of course an interview could also take place via video-link.

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Guidance for Situation III: International child abduction - return agreement

145. The situation addressed here is one of international wrongful removal or retention of a child where the left behind parent and the taking parent have come to conclude a "return agreement" in the course of pending Hague return proceedings under the 1980 Hague Convention in a EU Member State (not Denmark). I.e. the parents agreed that the child will (either with or without the taking parent) return to the State in which the child was habitually resident before the wrongful removal or retention. In such agreements parents regularly not only agree on the modalities of return but also on arrangements of care and contact following the return and sometimes even on matters of maintenance. The latter often occurs where the taking parent returning with the child is dependent on the payment of maintenance from the other parent.

146. Thus a "return agreement" might contain the following topics:

a. the modalities of return of the child;

b. with whom the child will live immediately upon arrival and how contact with the other parent will be organised;

c. with whom the child will live in the long run and how contact will be organised with the other parent;

d. how contact with the grand-parents will be organised, including whether the child will be able to travel for contact visits to the State to which it had been wrongfully removed / in which it had been wrongfully retained;

e. how and to what extent travel and accommodation costs related to parent-child visits will be shared among the parents;

f. what amount the child or the parent living with the child will obtain from the other for child related expenses; the mode and due dates of the monthly payment;

g. whether periodic payment will be owed by one spouse (or ex-spouse) to the other; the mode and due dates of the monthly payment.

147. For the purpose of the Best Practice Tool, it is assumed that the child has been habitually resident in a EU Member State (not Denmark) before the wrongful removal or retention of the child and the child had been taken to another EU Member State (not Denmark), where return proceedings under the 1980 Hague Convention are currently pending.

Method A or Method B

148. In Method A, we use the "shape" of a court decision to make the agreement's content travel cross-border. We therefore have to turn the agreement into a court decision and then obtain recognition and enforceability of the agreement in the other State with the help of the European / international legal framework. In Method B, we make the return agreement travel cross-border in form of an authentic instrument or as an enforceable agreement.

149. In Situation III, legal proceedings are ongoing at least in one State, namely the Hague return proceedings in the State to which the child has been taken. Furthermore, it is likely that, in parallel, custody proceedings are ongoing in the other State. Embodying the agreement in a decision in front of one of these courts, i.e. using Method A in this case seems a practical solution. However, as is detailed above (paragraphs 138 et seq.), international jurisdiction, internal jurisdiction and time constraints as well as other practical impediments might make it difficult to render the entire agreement legally binding before or simultaneously with ending the Hague proceedings.[80] This can be fatal, since ending the Hague proceedings with a return-decision by consent etc. will render the agreement de facto partially binding, which risks disturbing the balanced accord between the parties and can be misused by the advantaged party. On the other hand, abandoning all legal proceedings and, in particular, prematurely ending the Hague return proceedings for the sake of using Method B to render the entire agreement binding at once can turn out to be a disastrous mistake for the left behind-parent. Termi-

80 As stated above the new Brussels IIa (recast) Regulation proposes a new solution for this dilemma (see paragraph 143).

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nating the Hague return proceedings by withdrawal produces legal facts and deprive the left-behind of a strong position to enforce the return of the child, since there is no equivalent to the powerful return mechanism the Hague return proceedings offer.

150. The following text will therefore explore in detail how and to which extent the return-agreement can speedily be embodied in a court decision and as the favourable solution taking into consideration the concrete situation in national law (in each National Best Practice Tool). Method B can only play a subordinate role here; it can be of assistance with regard to the parental agreement on custody and contact included in the return agreement.

Identifying subject matters contained in agreement

151. The first step when using Method A is to analyse the subject matters dealt with by the agreement in order to characterize them. In particular, they can be characterised to fall generally under the following category of matters:

- "parental responsibility" - (b.-d.)
  (e. possibly)
- "child maintenance" - (f.) (e. possibly)
- "spousal maintenance" - (g.)

152. In the above example agreement (see paragraph 145), the terms of the agreement summarised under b. and c., i.e. all questions relating to where and with whom the minor child will live as well as relating to parent-child contact can be qualified as matters of parental responsibility as can be the terms of the agreement summarised under d. on contact between child and grandparents (see paragraph 109 above). The terms of the example agreement summarised under f. can be qualified as "child maintenance", those under g. as "spousal or / ex-spousal maintenance". For the qualification of travel costs (e.) as part of either part of the "exercise of parental responsibility" or be part of "child maintenance" see above paragraph 111.

Identifying relevant European and international legal framework

153. As the next step, the European and / or international legal instruments relevant to the category of subject matters determined above can be identified:

- "parental responsibility" (b.-d.) – Brussels IIa Regulation[81], 1996 Hague Convention
- "child maintenance" (e.) – Maintenance Regulation, 2007 Hague Convention & other
- "spousal maintenance" (f.) – Maintenance Regulation, 2007 Hague Convention & other.

154. The matter of "return" of the child is - without prejudice to the merits of custody - dealt with in the Hague return proceedings which are proceedings sui generis on the expeditious return of the child under the Hague Child Abduction Convention.

155. When having identified in which States the agreement must be binding and enforceable, the geographic scope of the above instruments must be tested, i.e. it must be explored whether the pertinent European or international instruments are in force between these legal systems.

156. In our example case above, the State of habitual residence of the child before the wrongful removal is an EU Member State (not Denmark). The State to which the child has been taken and in which Hague return proceedings are pending is another EU Member State (not Denmark).

157. For matters relating to the "merits of custody", the Brussels IIa Regulation is the relevant instrument regulating international jurisdiction in EU States (except Denmark). The Regulation prevails over the provision of the 1996 Hague Convention. However, since the Brussels IIa Regulation only contains rules on international jurisdiction and recognition and enforcement, the 1996 Hague Child Protection Convention remains relevant to determine the applicable law in EU States (see for further details above paragraphs 23 et seq.).

158. For matters of child and spousal maintenance, the Maintenance Regulation is the applicable instrument in our case. The 2007 Hague Convention and possibly other international instruments for

81 In the future, the Brussels IIa (recast) Regulation.

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the recovery of maintenance abroad would only come to play, should enforcement outside the EU be required.

Identifying starting point jurisdiction

159. The rules of international jurisdiction for matters of

- "parental responsibility" (a.-c.) - are contained in Articles 8 et seq. of the Brussels IIa Regulation with special rules of international jurisdiction in child abduction cases contained in Article 10 of the Brussels IIa Regulation;
- "child maintenance" (d.) and "spousal maintenance" (e.) – are contained in Article 3 et seq. of the Maintenance Regulation.

160. Given the jurisdictional particularities of international child abduction cases (see paragraphs 139 et seq.) the "ideal" starting point jurisdiction in our example constellation is the State of the habitual residence of the child before the wrongful removal or retention. Jurisdiction on matters of parental responsibility is retained in that State in accordance with Article 10 Brussels IIa Regulation; in the situation of a return agreement no shift of jurisdiction can be envisaged. The authorities in the State of return also have international jurisdiction on matters of maintenance in accordance with Article 3 of the Maintenance Regulation.

161. However, as detailed above (paragraphs 139 et seq.), in practice it is much more convenient to render the return agreement legally binding and enforceable simultaneously with ending the Hague return proceedings - a fact recognised by the new Brussels IIa (recast) Regulation, which offers – for proceedings commenced on or after 1.8.2022 – the option to prorogate jurisdiction on matters of parental responsibility and encourages States to provide the Hague judge with the appropriate competency under national procedural law.

162. Since the current legal situation under Article 10 Brussels IIa Regulation does not allow for a shift of international jurisdiction on matters of parental responsibility in the situation of a return agreement, it needs to be explored how the Hague judge can nonetheless best assist with rendering the agreement legally binding and enforceable. From a European and international law point of view, the Hague judge will be able to include following agreed matters into a decision: a. the modalities of return (as part of the return decision in line with Article 12 of the Hague Child Abduction Convention); e. and f. the provisions on child and spousal support (in line with the Maintenance Regulation[82]). However, it is a question of national procedural law whether the Hague judge can indeed include matters other than those related to the return of the child in the decision.

163. To assist the parties in this complex situation, the use of direct judicial communications is highly recommended.[83] In using direct judicial communications the Hague judge can assist in securing that the agreement is rendered legally binding in the State of return in a speedy way.

82 International jurisdiction on maintenance matters under the EU Maintenance Regulation could (where no habitual residence of the creditor would be given in the State of the Hague return proceedings) arguably be based on Article 5 of the Maintenance Regulation.

83 See for further details on direct judicial communications: Permanent Bureau of the Hague Conference on Private International Law, Brochure on Direct Judicial Communications, The Hague, 2013, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" and "Draft document to inform lawyers and judges about direct judicial communications, in specific cases, within the context of the International Hague Network of Judges", Preliminary Document for the attention of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention – October 2017, available at the website of the Hague Conference < www.hcch.net > under "Conventions", then 1980 Hague Child Abduction Convention, then "Special Commission meetings".

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German National Law

Guidance for Situation III: International child abduction - return agreement

GERMANY: Options available where Germany is the State of Hague return proceedings

GERMANY: Internal Jurisdiction for Hague abduction proceedings

In Germany the above mentioned IntFamRVG (International Family Law Procedure Act) (see for details: Situation I, under the heading "Parental responsibility"- "particularities for parental responsibility proceedings with an international context") is the implementation law for executing inter alia the Brussels IIa Regulation and the 1980 Hague Abduction Convention. This act regulates amongst others the concentration of jurisdiction for Hague return proceedings. Instead of the 638 Family Courts in Germany only 22 courts, namely the Family Court in whose district the Higher Regional Court for the district is situated, are competent for return proceedings under the 1980 Hague Abduction Convention. Locally, this in turn depends on where the child was residing upon receipt of the return application at the Central Authority, or where the need for care exists, Section 11, 12 (1) IntFamRVG. Appeal decisions are dealt with by 22 courts of appeal[84]. A link to a detailed list can be found via the website of the German Central Authority[85].

In most of those courts of concentrated jurisdiction only a limited number of judges are foreseen to deal with Hague abduction cases in accordance with the plan allocating responsibilities. Every court has its own responsibility for deciding how many judges have responsibility for those cases, but during the last decade nearly all courts decided to concentrate jurisdiction in one, two or three departments and this means judges.

All judges dealing with cases under the 1980 HC are specialised family judges and moreover regularly trained in Hague abduction cases. In general, they are staying in this position long enough to be able to acquire good knowledge and experience. Judges in German family courts, who are appointed as judges for lifetime are under no obligation to change position / fields of responsibility periodically, but this may be different in a concrete situation or from court to court.

During pendency of a Hague return case or other matters falling under Sections 10 to 12 IntFamRVG the Hague court has also competence for all matters of custody, contact or surrender of the child in the sense of Sections 151 No.1-3 FamFG.

Another competence of these specialized family courts is regulated in Section 13 (2) IntFamRVG: Provided that a parent habitually resides in another Member State of the European Union or in another Contracting State to the Hague Child Protection Convention, the Hague Child Abduction Convention or the European Custody Convention, an application for custody, contact or surrender of the child (Section 151 No.1-3 FamFG) can also be brought before that Family Court with specialized jurisdiction.

Furthermore, in Section 13(3) 2 IntFamRVG is regulated: "Upon concurrent application by both parents, other family matters in which they are participants shall be transferred to the court having jurisdiction pursuant to Subsection (1) or Subsection (2)".

During Hague return proceedings the court normally appoints a guardian ad litem for the child and the Youth Welfare Office (Jugendamt) has to be heard.

GERMANY: Rendering the agreement or at least part of it enforceable

Parents may come to conclude a package agreement during the Hague return proceedings concerning not only the return of the child to the State of habitual residence, but also arrangements of care and contact following the return, the place of living of the parent returning with the child, child maintenance and sometimes even on matters of spousal or partner maintenance.

The return of the child itself and all modalities of return – the exact date, the means of travel, who is accompanying the child, who is buying and paying for flight or train tickets, are lying in the competence of the Hague court. When the return itself is not fulfilled usually the court agreement will be repealed by the applicant, the court will have to render a decision about the return and enforce it.

84 In Germany exist at all 24 courts of appeal, but in the Bundesland Niedersachen is determined that the Local Court in Celle is competent for the districts of all 3 courts of appeal.

85 Bundesjustizamt.de/sorgerecht.

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German National Law

Some issues can facilitate the cross-border travel of the agreement. International jurisdiction should be given for further matters agreed upon. If it does not lie per se with German courts- as the safe return of the child itself-, it should at least be admissible to agree about jurisdiction in so far. The content of the agreement should be legally valid under German law and should of course not be manifestly incompatible with the law of the State of return. Moreover, the content should be enforceable in the understanding of the State of return where enforcement might be sought later. If at this stage problems concerning the foreign law are arising, the help of Network Judges either in the Hague Network of Judges or the European Judicial Network may be sought. This information can normally be obtained very fast and informal by use of telephone and e-mail. The German Network Judge can be contacted by the judge competent for the Hague return proceedings and will forward any questions concerning foreign law to her/ his counterpart in the State of habitual residence of the child. The Network Judges can also liaise direct judicial communication between the judges in both States involved, if parental responsibility proceedings are already pending in the foreign State. In this situation it may be helpful to find out by which means or how fast any agreement could be rendered binding in the original "starting point jurisdiction" which would be the State of habitual residence of the child before the abduction.

Contact details of the German Network Judges are known by all specialised German Hague Judges, but can also be found online[86]. Central Authorities[87] may be able to support, too.

Internal jurisdiction for all parental responsibility matters lies explicitly with the Hague court as long as the proceedings are pending, Section 13 IntFamRVG. This has of course to respect international jurisdiction but shall internally secure the comprehensive competence of the Hague judge. Already pending parental responsibility cases have to be transferred to the Hague court when an application has been filed there, Section 13 (3) IntFamRVG.

In general, it is possible in Hague proceedings as in other family proceedings to make arrangements beyond the pending case and conclude them as court recorded settlement. Representation of lawyers is required in family dispute matters[88], i.e. maintenance; in practice both parents are already represented by lawyers when it comes to Hague return proceedings.

Looking into details of return agreements, all parental responsibility issues are problematic. In absence of international jurisdiction under Art. 8 et seq. Brussels IIa Regulation and Art. 5- 9 1996 Hague Child Protection Convention, the Hague court cannot transform these matters into a court decision. Long term decisions on exercise of parental responsibility and the merits of custody can therefore not be rendered binding and enforceable in the State of refuge.

For short term decisions jurisdiction can be exercised under Art. 20 Brussels IIa Regulation in cases of urgency. The court may take necessary measures , "provisional, including protective measures" (see also paragraph 31, note 27).

The German Hague court including a measure of child protection in the return decision to secure the safe return of the child or rendering it by way of an interim order should include clear reasoning as to why it considers the circumstances of the case indicate a case of urgency and why the child protective measure is necessary. The same applies for agreements concluded before the Hague court to settle the return proceedings.

As to maintenance arrangements -and this may include travel costs, if parents clearly and explicitly assign such costs as part of maintenance matters- parties are free to establish a maintenance arrangement (for international jurisdiction in this situation see paragraph 162, note 53)Thus, parents may conclude parts of the agreement concerning maintenance by recording it before the judge, as long as maintenance proceedings are not pending in the State of return and therefore competence of the Hague Court must be negated. A separate court decision is not rendered in these cases; only a settlement about contact or surrender of the child would have to be approved by the court (see above).

Regarding other subjects not regulated by European, international or binational legislation, e.g. the question who of the parents shall stay in the former family home, parties may conclude their agreement as a court recorded settlement. If it is detailed enough it can become binding and enforceable in Germany. The question whether it will be recognized and enforced in the State of return will to be seen under international

86 available online: https://www.bundesjustizamt.de/DE/Themen/Gerichte_Behoerden/EJNZH/Verbindungsrichter/Kontaktdaten_Verbindungsrichter.html?nn=3620232 (last consulted 13 May 2020).
Another data sheet is existing for the international Hague Network of Judges (IHNJ)
https://assets.hcch.net/docs/665b2d56-6236-4125-9352-c22bb65bc375.pdf (last consulted 13 May 2020).

87 The website of the German Central Authority ca be found here: bundesjustizamt.de/sorgerecht

88 "Family dispute matters" is a procedural concept, see Section112 FamFG.

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private law and national law of that State. Here again Network Judges may be able to help

Certain parts of typical return such as so called "mediation clause" (agreement to go back to mediation should new disputes arise) are likely to not acquire any binding force in the State of return, even though they can in practice still be helpful for the parties.

When it comes to involving the courts/ authorities in the State of habitual residence of the child, which maintain international jurisdiction under the Brussels IIa Regulation matters of parental responsibility as the ideal starting point jurisdiction to render the agreement binding and enforceable there (see paragraphs 139 et seq.) direct judicial communications can be extremely helpful. The contact to the judge in the State of origin can either be initiated by the lawyers of the parties or the Network Judges. Especially the Network Judges may at this point be very helpful by explaining the situation - from judge to judge.

The procedure in the foreign State may require the presence of the abducting parent and the child and this will make it difficult or even impossible to render the entire agreement legally binding in that State of origin before or simultaneously with ending the Hague proceedings. The taking parent will not travel to the former State of habitual residence before the entire agreement is binding; he or she will perhaps also be fearing criminal proceedings on return. The agreement concluded has just redressed the balance between the parties and can be misused by the advantaged party, in case of return of the taking parent and the child before the complete package has been rendered binding as far as possible.

The situation may be different if there is an option in the State of habitual residence to render the agreement binding and enforceable in a fast and informal process, for example, by simply registering it. Here the National Best Practice Tools of the other EU Member States drafted in this project may be of enormous help. Alternatively, again the Network Judges can be involved to find out if there is any possibility to render the entire agreement or parts of it binding in the State of habitual residence of the child before ending the Hague return proceedings.

To summarize, when it is impossible to render at least part of the agreement concerning parental responsibility matters binding in the State of return (i.e. the State of habitual residence of the child before the abduction) speedily, the Hague judge would have to end the return proceedings before full binding force is given to the return agreement. However, the Hague judge could at least record the results of the return agreement. For long term arrangements of parental responsibility international jurisdiction is not given, any arrangement in so far can only be of a declaratory nature at that time and will have to be rendered legally binding and enforceable by the authorities in the State with international jurisdiction. It is recommended to note that the parties are aware that there is no jurisdiction of the Hague court and that they will have to turn to the authorities in the State of return to render this part legally binding if necessary. In the settlement set up in a German Hague court normally a clause will be included, that allows the applicant to repeal the agreement if the return itself is not implemented by the taking parent; only then will the court have to render a decision about the return and enforce it. Following the documentation of the agreement, the Hague court will render a decision approving the content of the agreement in so far as it contains contact arrangements and surrender of the child as short term arrangements securing the safe return of the child and referring to matters for which international jurisdiction could be assumed.

GERMANY: Options available should Germany be the State of return

In contrast to the above situation international jurisdiction lies for all parental responsibility matters with the locally competent German family court where the child has had his/her habitual residence before the wrongful removal or retention. No specialised courts exist for this situation.

As noted earlier there is no way to render the entire agreement legally binding and enforceable in an easy and fast process before one authority. All financial issues can theoretically be rendered binding by drawing up an authentic instrument before the notary (see above Method B). At least this will not be the real problem in this situation.

Parental responsibility decisions can be rendered binding only by the family judge and have to be approved by the family court if contact arrangements or surrender of the child are agreed upon. Therefore, the parents will have to address the competent family court. The procedure in Germany has to be conducted as regular parental responsibility proceedings. It will make things easier if such proceedings are already pending, here at least the court already knows about the situation and

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can be contacted by the lawyers or by the foreign judge, perhaps with help of the Network Judges, for further applications. If until now no family court applications have been filed in Germany the situation is more complicated and the process will probably take too much time to be finished in reasonable time, always depending on how much time is left for the Hague proceedings in the State to which the child was taken.

In any case the family court proceedings in Germany require the presence of the abducting parent who has to be heard by the family court in person, Section 160 FamFG. A hearing of the abducting parent shall only be omitted based upon substantial grounds, Section 160 (2) FamFG. Normally the taking parent will not be willing to travel back to Germany in this situation with Hague proceedings still pending, and in particular he or she will not be ready to bring the child with him/her before the entire agreement is binding. At this point it might be considered to hear the parent via videoconference under the Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. Here again this has to be prepared and will take time (at least 4- 6 weeks), consequently it seems at all not feasible in the narrow timeframe of the Hague proceedings in the foreign State. Under certain circumstances and in discretion of the deciding judge, the mentioned requirements could be modified to that effect that the judge could abstain from the personal presence of both parties when they would be represented by a lawyer who could transmit the wish of his/ her client.

The child has to be interviewed by the judge too, if he/ she is three years or older. A hearing of the child via videoconference does not seem appropriate for this type of hearing. To be heard by a judge is a difficult situation for children, especially when they are very young and in this highly emotional situation of child abduction. When using means of a videoconference the hearing judge cannot influence the circumstances of the hearing, i.e. presence of the abducting parent, location in a court that is not suitable for children, and so on.

All this will make it difficult or even impossible to render the entire agreement legally binding in Germany as State of origin in a speedy way before or simultaneously with ending the Hague proceedings in another EU Member State. It would theoretically be possible, as outlined above, if proceedings are already pending in Germany, the German judge could be convinced to summon the participants for an immediate hearing and the abducting parent to be ready to come to Germany together with the child for that hearing. A judge willing to see the difficulties, to act swiftly and fix a date for a hearing at once could in collaboration with lawyers as willing as the judge do it within 1- 3 weeks. But it may as well need one month or more. If the child has to be heard this will work only if the child is present.

Special urgent procedures are not possible in this situation because this is under German national law a different type of family proceedings which are not suitable for a decision about parental responsibility which shall be not only an interim measure.

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Guidance for Situation IV: International child abduction - non-return agreement

164. The situation addressed here is one of international wrongful removal or retention of a child where the left behind parent and the taking parent have concluded a "non-return agreement" in the course of pending Hague return proceedings under the 1980 Hague Convention in a EU Member State (not Denmark). I.e. the parents agreed that the child will not return to the State of habitual residence at the time of the wrongful removal or retention but will remain in the State to which he or she has been taken. Practice shows, that in non-return agreements parents regularly include provisions on cross-border contact with the child as well as on matters of travel cost and maintenance.

165. Thus the "non-return agreement" might contain the following subjects:

a. that the child will not return to the State of habitual residence ante abduction;

b. with whom the child will live and how contact will be organised with the other parent;

c. how contact with the grand-parents will be organised;

d. what amount the child or the parent living with the child will obtain from the other for child related expenses; the mode and due dates of the monthly payment;

e. whether periodic payment will be owed by one spouse (or ex-spouse) to the other; the mode and due dates of the monthly payment; and

f. who will be paying the travel costs for parent-child visits.

166. For the purpose of the Best Practice Tool, it is assumed that the child has been habitually resident in a EU Member State (not Denmark) before the wrongful removal or retention of the child and the child was taken to another EU Member State, where return proceedings under the 1980 Hague Convention are currently pending.

Method A or Method B

167. Similarly to what was stated above for Situation III (at paragraph 149), the special circumstances of international child abduction clearly favour using Method A in rendering the non-return agreement legally binding and enforceable. In contrast to Situation III, in Situation IV a shift of international jurisdiction under Article 10 of the Brussels IIa Regulation, which might in occur in the situation of a non-return agreement, much facilitates the rendering binding of the entire agreement before the Hague return proceedings end or simultaneously with terminating the proceedings.[89] Where international jurisdiction has not shifted, Method B might assist, as stated for Situation III (see paragraph 150), with rendering the parental agreement on custody and contact included in the non-return agreement legally binding in the State from which the child was taken. Where the international jurisdiction has shifted but the relevant national law does not grant the Hague judge internal competency to render the entire non-return agreement legally binding and enforceable, Method B might assist in speedily obtaining binding force of the agreement alongside the ongoing Hague proceedings.

Identifying subject matters contained in agreement

168. As the first step, the subject matters dealt with by the agreement have to be analysed to see which legal category they can be affiliated with. In particular, can they be characterised to fall generally under the category of matters of:

a. "parental responsibility" - (b., c.(f. possibly, see paragraph 111))

b. "child maintenance" - (d.) (f. possibly, see paragraph 111))

c. "spousal maintenance" - (e.)

169. In the above example agreement (see paragraph 165), the terms of the agreement sum-

89 As stated above, the new Brussels IIa (recast) Regulation provides for the possibility of a prorogation of international jurisdiction in such cases and encourages States to enable the judge seized with Hague return proceedings to approve the non-return agreement (see paragraph 143).

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marised under b. and c. can be qualified as matters of parental responsibility (see paragraph 109 for contact with grandparents).

170. The terms of the example agreement summarised under d. can be qualified as "child maintenance", those under e. as "spousal or / ex-spousal maintenance".

Identifying relevant European and international legal framework

171. As the next step, the European and / or international legal instruments relevant to the category of subject matters determined above can be identified:

a. "parental responsibility" (b.-d.) – Brussels IIa Regulation[90], 1996 Hague Convention
b. "child maintenance" (e.) – Maintenance Regulation, 2007 Hague Convention & other
c. "spousal maintenance" (f.) – Maintenance Regulation, 2007 Hague Convention & other.

172. The matter of "non-return" is de facto implemented as a result of the left-behind parent's agreement to no longer request the return of the child under the 1980 Hague Convention.

173. When having identified in which States the agreement must be binding and enforceable, the geographic scope of the above instruments must be tested, i.e. it must be explored whether the pertinent European or international instruments are in force between these legal systems.

174. In our example case above, the State of habitual residence of the child before the wrongful removal is an EU Member State (not Denmark). The State to which the child has been taken and in which Hague return proceedings are pending is another EU Member State.

175. For matters of parental responsibility, the Brussels IIa Regulation is the relevant instrument in force between the two States concerned. The Regulation prevails over the provision of the 1996 Hague Convention. However, since the Brussels IIa Regulation only contains rules on international jurisdiction and recognition and enforcement, the 1996 Hague Child Protection Convention remains when it comes to determine the applicable law in EU States (see for further details above paragraphs 23 et seq.).

176. For matters of child and spousal maintenance, the Maintenance Regulation is the applicable instrument in our case. The 2007 Hague Convention and possibly other international instruments for the recovery of maintenance abroad would only come into play should enforcement outside the EU be required.

Identifying starting point jurisdiction

177. The rules of international jurisdiction for matters of

a. "parental responsibility" (a.-c.) - are contained in Articles 8 et seq. of the Brussels IIa Regulation with special rules of international jurisdiction in child abduction cases contained in Article 10 of the Brussels IIa Regulation;

b. "child maintenance" (d.) and "spousal maintenance" (e.) – are contained in Article 3 et seq. of the Maintenance Regulation.

178. Given the jurisdictional particularities of international child abduction cases (see paragraphs 139 et seq.) the "ideal" starting point jurisdiction from a legal point of view in our example constellation is the State of the habitual residence of the child before the wrongful removal or retention. Jurisdiction on matters of parental responsibility is retained in that State in accordance with Article 10 Brussels IIa Regulation. The authorities in that State will also have international jurisdiction on matters of maintenance in accordance with Article 3 of the Maintenance Regulation.

179. As detailed above (paragraphs 139 et seq.), in practice it is much more convenient to render the return agreement legally binding and enforceable simultaneously with ending the Hague return proceedings - a fact recognised by the new Brussels IIa (recast) Regulation, which offers – for proceedings commenced on or after 1.8.2022 – the option to prorogate jurisdiction on matters of parental responsibility and encourages States to provide the Hague judge with the appropriate competency under national procedural law.

90 In the future, the Brussels IIa (recast) Regulation.

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180. In contrast to the situation of "return-agreements", the circumstances of cases where parents come to a non-return agreement can allow for a shift of jurisdiction in accordance with Article 10 Brussels IIa Regulation. As soon as the habitual residence has shifted to the State in which Hague proceedings are pending it suffices that the parents (insofar as they are the sole holders of parental responsibility) acquiesce to the child remaining in that State (Article 10(a) Brussels IIa Regulation.[91] In such a case from a European / international law point of view, the Hague judge will have competency to decide on the content of the entire non-return agreement in a decision. Whether the national procedural law grants the judge the relevant local jurisdiction and subject matter competency will be explored in the National Best Practice Tools.

91 Article 16 of the 1980 Hague Child Abduction Convention is not an obstacle to the Hague judge transposing the parental agreement on custody matters into a decision. Article 16 only prevents the court from deciding "on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention". As pointed out in the Hague Conference Draft Practical Guide at paragraphs 30-31 "it can be argued that in the light of a literal, systematic and teleological interpretation of Article 16 of the 1980 HC, this provision should not be an obstacle to the Hague court's giving effect to the agreement simultaneously with ending the Hague return proceedings. As set out by the Explanatory Report on the 1980 Hague Convention, Article 16 is meant to "promote the realization of the Convention's objects regarding the return of the child" (see paragraph 121 of the 1980 HC Explanatory Report). The Article 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. Where the court seised with the Hague return proceedings ends the proceedings by approving a parental agreement on non-return, this is a correct use of the 1980 Hague Convention and not a circumvention of it. Hence, Article 16 of the 1980 HC should not prevent the court from approving the agreement. Support for this argument can be found in the 1980 HC Explanatory Report which in setting forth the objective of Article 16 notes 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, either because the parties have come to an amicable arrangement or because it is appropriate to consider on the exceptions provided for in articles 13 and 20." (See paragraph 121 of the 1980 HC Explanatory Report). To dispel any doubts with regard to the "lawfulness" of the court's approval of a long-term custody agreement in view of Article 16 of the 1980 HC, the court seised with Hague return proceedings could (if the national procedural law allows) end the Hague return proceedings by implementing the agreement on non-return and immediately open new proceedings to approve the remainder of the agreement."

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Guidance for Situation IV:
International child abduction - non-return agreement

GERMANY: Options available should Germany be the State of Hague return proceedings

GERMANY: Internal Jurisdiction for Hague abduction proceedings

In Germany the above mentioned IntFamRVG (International Family Law Procedure Act) (see for details: Situation I, under the heading "Parental responsibility"- "particularities for parental responsibility proceedings with an international context") is the implementation law for executing inter alia the Brussels IIa Regulation and the 1980 Hague Abduction Convention. This act regulates amongst others the concentration of jurisdiction for Hague return proceedings. Instead of the 638 Family Courts in Germany only 22 courts, namely the Family Court in whose district the Higher Regional Court for the district is situated, are competent for return proceedings under the 1980 Hague Abduction Convention. Locally, this in turn depends on where the child was residing upon receipt of the return application at the Central Authority, or where the need for care exists, Section 11, 12 (1) IntFamRVG. Appeal decisions are dealt with by 22 courts of appeal[92]. A link to a detailed list can be found via the website of the German Central Authority[93].

In most of those courts of concentrated jurisdiction only a limited number of judges are foreseen to deal with Hague abduction cases in accordance with the plan allocating responsibilities. Every court has its own responsibility for deciding how many judges have responsibility for those cases, but during the last decade nearly all courts decided to concentrate jurisdiction in one, two or three departments and this means judges.

All judges dealing with cases under the 1980 HC are specialised family judges and moreover regularly trained in Hague abduction cases. In general, they are staying in this position long enough to be able to acquire good knowledge and experience. Judges in German family courts, who are appointed as judges for lifetime are under no obligation to change position / fields of responsibility periodically, but this may be different in a concrete situation or from court to court.

92 In Germany exist at all 24 courts of appeal, but in the Bundesland Niedersachen is determined that the Local Court in Celle is competent for the districts of all 3 courts of appeal.

93 Bundesjustizamt.de/sorgerecht.

During pendency of a Hague return case or other matters falling under Sections 10 to 12 IntFamRVG the Hague court has also competence for all matters of custody, contact or surrender of the child in the sense of Sections 151 No.1-3 FamFG.

Another competence of these specialized family courts is regulated in Section 13 (2) IntFamRVG: Provided that a parent habitually resides in another Member State of the European Union or in another Contracting State to the Hague Child Protection Convention, the Hague Child Abduction Convention or the European Custody Convention, an application for custody, contact or surrender of the child (Section 151 No.1-3 FamFG) can also be brought before that Family Court with specialized jurisdiction.

Furthermore, in Section 13(3) 2 IntFamRVG is regulated: "Upon concurrent application by both parents, other family matters in which they are participants shall be transferred to the court having jurisdiction pursuant to Subsection (1) or Subsection (2)".

During Hague return proceedings the court normally appoints a guardian ad litem for the child and the Youth Welfare Office (Jugendamt) has to be heard.

GERMANY: How to render the agreement or at least part of it enforceable in Germany

Following the explanations above in Situation III a shift of international jurisdiction on matters of parental responsibility under Article 10 of the Brussels IIa Regulation might occur in the situation of a non-return agreement. Whether a shift of jurisdiction can be accepted has to be considered in the individual case. When it can be answered in the affirmative, it will facilitate the rendering binding of the entire agreement before the Hague return proceedings in Germany end or simultaneously with terminating the proceedings. This will of course require that also regarding the other matters of the agreement international jurisdiction can be assumed and that in particular no proceedings are pending in another State.

The German court seized with Hague proceedings will be able to embody the parties' agreement in an enforceable court decision / court settlement regarding matters of parental responsibility (custody/access),

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child maintenance, spousal maintenance and possibly other matters. The national procedural law grants the Hague judge the relevant local jurisdiction and subject matter competency. The court handling the Hague proceedings has during this pendency explicit local jurisdiction over all family matters, concerning the same child, pursuant to Section 151, number 1 to 3 FamFG (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction) (these are: custody, contact and surrender of the child), , Section 13 (1) IntFamRVG (International Family Law Procedure Act). Of course international jurisdiction has to be respected. In general it is possible in Hague proceedings as in other family proceedings to make arrangements beyond the pending case and conclude them as court recorded settlement. Representation of attorneys is required in family dispute matters as soon as maintenance is concered; then a settlement before the court is possible, Sections 113 FamFG, 794 (1) No.1 ZPO (Civil Procedure Code). In practice both parents are normally represented by lawyers when in Hague return proceedings. All other family matters such as financial and household questions etc. can also be documented as agreement before the family judge.

The court proceedings are concluded by declaration of the parties in the court settlement. A court decision in which the Hague proceedings are formally "terminated" is not required under German law. The court will finally only be left to decide about the costs and where contact or surrender of the child is part of the agreement, a court decision approving this would be necessary.

Difficulties will arise when any proceedings concerning parental responsibility or maintenance are pending in the other State; lis pendens has to be respected. Here again the Network Judges in both States either in the International Hague Network of Judges or in the European Judicial Network may be able to help starting direct judicial communication between the two courts in both States. German judges can contact one of the German Network Judges to liaise contact to the foreign judges. This way it can for example be clarified whether really the same kind of proceedings are pending – sometimes it is only an interim case in the foreign State – or by how proceedings can be closed there or which possibilities exist to render the agreement (partially) binding and enforceable in that State.

Cost implications: The basis is again the value to be fixed by the court. Costs for concluding the agreement before the court depend on the provisions which are documented. The costs will be higher than only for return proceedings, because the value will be higher. Extra costs for the attorneys and for the court will apply. The court fee itself is quite low, for return proceedings it is fixed 240 € (Nr. 1710 Kostenverzeichnis FamGKG), but during Hague proceedings the appointment of a guardian ad litem for the child is standard- these are 550 € for one child which have to be paid by the parties. Moreover, the fee for an interpreter has to be added, normally 75 €/hour, Section 9 (3) JVEG. All these costs are court related costs, which may easily arise onto 1000 €. The fee for both lawyers will be higher and has to be added. Depending on the value to be set by the court for the court agreed settlement each lawyer may charge ca. 2000 € (see for details above). So costs around 5000- 6000 € at all may occur. Fees will be lower when legal aid is granted, proceedings may even be for free at all, depending on the means and merits test. How the costs are to be shared between the parties is to be determined by them in the settlement and depends on all circumstances of the individual case

This solution, using Method A to render the agreement legally binding and enforceable, seems in the situation where mediation takes place after starting return proceedings by application of the left behind parent or when it comes to a settlement by other means of negotiation, the most suitable method. Theoretically it would also be possible to settle all financial matters by drawing up an authentic instrument before a notary, but this may take too much time, having in mind the narrow timeframe of return proceedings. Practice shows that parents often come with an agreement reached during mediation just in the moment of the final court hearing which may be held only a few days before the end of the six-weeks-ftime frame. There will be no time left for drawing up the agreement before a notary. Furthermore, it can be seen as an advantage when the agreement is not split into two parts, but can be concluded in a whole, which is only feasible as a settlement concluded before the family court. This will show better the intention of the parents and how single matters are depending on the others, especially the interaction between financial and parental responsibility issues.

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Problems identified

Problems identified

181. Even though all modern European and international legal instruments expressly aim to promote agreed solutions for international family law disputes and want to enable certain categories of enforceable agreements to travel cross-border, they visibly focus on the cross-border recognition of decisions and are not entirely adapted to accommodate the cross border recognition on family agreements. Most of these instruments do not provide for specific provisions on the recognition and enforcement of agreements but instead refer to the rules on recognition of decisions. The latter provisions are however not adapted for this use. Emblematic is that they refer to the parties as "applicant" and "respondent" or "defendant" despite the fact that the parties to an agreement might not have started with adversary proceedings in the first place.

182. Furthermore, family agreements resulting from mediation or similar alternative dispute resolution mechanisms are likely to touch upon a number of family law matters which would not necessarily fall within the material scope of the same European or international instrument.

183. The analysis of the current legal situation shows that the parties to a family agreement cannot be sure that all parts of their package agreement can be rendered legally binding at once. As a result, they may end up with a partially binding agreement which puts the negotiated balance at risk.

184. The complex legal situation that needs to be taken into consideration when rendering an agreement legally binding and enforceable as well as the required in-depth knowledge on the options available under the relevant national laws make it nearly impossible for the parties and the mediators to know in advance how a concrete mediated agreement can be rendered legally binding and enforceable in the two or more States concerned.

185. In the current situation, in some States parties are forced to pretend that they are in dispute to be allowed to start court proceedings, to make their agreement (forum out of court) legally binding; this is costly and ineffective.

186. Having concluded a package agreement parties may have to go to different courts or/ and start different proceedings to make their agreement binding.

187. Parties may know the costs of mediation, but then costs for rendering the agreement legally binding will add further costs that are difficult to assess.

188. It may take a lot of time to render the agreement legally binding; due to the immense differ-

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ences in national law and practice this cannot be predicted easily.

189. For package family agreements, the existing rules of international jurisdiction in relevant EU law are a particular challenge.

190. This uncertainty on many levels is not helpful in practice and a real impediment to the use of mediation in international family conflicts.

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German National Law

Problems identified

Package agreements without abduction context

Even though in Germany national family procedural law the courts are expressly required to work towards agreement in child custody cases and can even oblige the parents to have a counselling session on mediation, and the courts are furthermore always supposed to work towards an amicable agreement, considerable problems arise if a package agreement reached out of court, for example by way of mediation, is to be made legally binding. This is already the case in a purely national context and is even more difficult in a cross-border context.

There is no easy way in German law to make a package agreement reached outside pending court proceedings legally binding and enforceable. In particular, there is no way to immediately and as a whole give legally binding effect to a family law agreement that covers several positions. Mediation as a means of out-of-court dispute resolution is encouraged in family disputes, yet German procedural law does not provide for the possibility of, for example, going to court or approaching an authority to make the package agreement legally binding or otherwise approve it through a simple registration process or integration into a court decision. Nor does the law grant such competence to other bodies, such as notaries, to give legal effect to a package agreement.

Parents who have made use of mediation and reached an agreement (after separation, before divorce, before relocation, later when problems have arisen in the settlement of a contact agreement...) want to make the whole package legally binding and not just individual points. The existing possibilities to make at least individual parts of the agreement legally binding - matters of custody, access arrangements, child maintenance, spousal maintenance, matrimonial property law matters - are quite difficult, the way is unclear, expensive, time-consuming and not feasible without legal advice or partial legal representation. For all issues of parental responsibility, it is necessary to initiate court proceedings, which is what the parents actually wanted to avoid, and they risk upsetting the carefully balanced outcome of mediation by only partially recognising it.

The situation is not satisfactory and should be improved. It would be desirable to create a possibility in German law to register a family law package agreement in order to give it legal force immediately and as a whole. This could be done by a family court, where there is the possibility to also hear the child if necessary. If the registration procedure resulted in an authentic instrument, an agreement within the meaning of Article 46 of the Brussels IIa Regulation or a court decision, it would at least be recognised and enforceable with regard to the rules on parental responsibility and maintenance under the Brussels IIa Regulation and the EU Maintenance Regulation. Other positions would then be binding and enforceable under national law in any case, which would facilitate cross-border recognition in any case.

As far as return proceedings under the 1980 Hague Child Abduction Convention are concerned, German law generally offers good possibilities to make an agreement legally binding, at least in the case that international jurisdiction has shifted.

When Hague return proceedings are pending and jurisdiction has shifted, German law offers good solutions. The Hague judge has also competence for all matters of custody, contact or surrender of the child. The court will be able to embody the parties' agreement in an enforceable court decision / court settlement regarding matters of parental responsibility (custody/access), child maintenance, spousal maintenance and possibly other matters. The national procedural law grants the Hague judge the relevant local jurisdiction and subject matter competency.

One aspect could become problematic: The Youth Welfare Office has to be heard concerning the parental responsibility matter. An exception could be considered here.

It becomes more difficult when the parents have agreed through mediation to return the child to the State of habitual residence - as happens in the vast majority of proceedings. The obligations arising from the international jurisdiction rules are binding; international jurisdiction for long-term parental responsibility issues lies in the State of former habitual residence. As good practice, it is suggested:

Attempts could be made to render at least parts of the agreement binding in the State of origin before ending the return proceedings; Network Judges and direct judicial communication can help.

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At least for maintenance issues jurisdiction of the Hague Court may be given or chosen.The Hague judge may record the outcome of the return agreement, noting that the parents are aware that in matters of long-term parental responsibility jurisdiction lies with the court of habitual residence. Arrangements in this respect would only be of a declaratory nature.

Germany as State of return

International jurisdiction for long-term questions of parental responsibility lies in Germany as the State of the former habitual residence. The German family court must approve an agreement concluded between the parents abroad on contact or the surrender of the child by means of a court decision or decide on questions of custody. For this purpose, the parents must contact the competent family court. In the court proceedings, the parents must be heard in person. The same applies to the child, at least if it is older than three years.

A good approach could be - at least if parental responsibility proceedings are already pending: the parents' lawyers could explain the situation to the competent German judge, a date for a hearing could be scheduled promptly and the hearing of the parents and the child could take place by video conference. It would then be possible to reach a decision before the Hague proceedings in the foreign State have been finished. However, it seems doubtful whether this is actually feasible in practice.

Declaration of enforceability/ enforcement of a package family agreement from another EU member State in Germany

The current legal situation is similar to the purely national situation: there is no easy way to obtain recognition and/or declaration of enforceability of a foreign agreement covering a number of issues. It may be that different courts have to be seised:

In Germany there is a concentration of jurisdiction for the declaration of enforceability under the EU Maintenance Regulation and the Brussels IIa Regulation, but different courts - in Lower Saxony, where there is a concentration of jurisdiction for proceedings under the Brussels IIa Regulation in Celle, but not for foreign maintenance proceedings - or divisions may have jurisdiction.

Matters not covered by the two EU Regulations must be recognised or declared enforceable by the locally competent (family) court under national law. In the case of a package agreement, this may be the third or fourth court/judge dealing with the case and the third/fourth application to be made by the parents. This court may even doubt the need for legal protection for recognition or enforceability issues as long as problems in this area are not obvious.

Good practice is therefore suggested:

In the specialised courts in Germany, the same department/judge should be responsible for both recognition and enforcement under Brussels IIa and under the Maintenance Regulation. In Lower Saxony, it could be considered that the concentration of jurisdiction for foreign maintenance proceedings should also be located at the Celle Local Court or, in any case, that jurisdiction for proceedings under the IntFamRVG and AUG should be located at the same courts in each case.

Only by amending the legislation can it be achieved to create a special procedure for the recognition of - foreign - package agreements as a whole and specialised courts competent for this.

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