AMICABLE

EU GENERAL 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

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Best Practice Tool for the Recognition and Enforcement of Family Law Agreements involving Children within the European Union

Juliane Hirsch, 2020
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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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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 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,[1] European[2] 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.[3] 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[4] how a family agreement can be rendered enforceable under national law. They will set out the options available under national law, address questions of local juris-

1 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.

2 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).

3 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".

4 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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diction, 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[5] 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[6] 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:

5 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).

6 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 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"

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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SECTION I

European and International Legal Framework - Overview

Matters of Parental Responsibility, of Maintenance and Other Matters

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. (next p.)

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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	/

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)	/

→ continued

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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
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	
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

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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.

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 trans-

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fer 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[7]).

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.[8]

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 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

7 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."

8 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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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 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).

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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[9].

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[10]. 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 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

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

10 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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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).[11] 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 opposed in special procedures set forth in Article 40 in connection with Articles 59- 62 Brussels IIa (recast) Regulation.

11 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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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.[12] 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.

12 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**[13] and the **Council of Europe Recommendation Rec (2002)10 on Mediation in Civil Matters;**[14] furthermore, the "**European Code of Conduct for Mediators"**[15] 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**[16] 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**.[17]

13 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).

14 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).

15 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).

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

17 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

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[18], using this well paved avenue for the recognition of what was agreed upon between the

18 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.[19]

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[20] 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[21] 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 authorities have international jurisdiction under the

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

20 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."

21 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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relevant international and European instrument regarding the subject matters at stake has to be identified.[22] 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.[23] 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. 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.

22 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.

23 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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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 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.[24]

102. Finally, as is true for Method A, when using Method B, a detailed analysis of the legal situation

24 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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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.

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.

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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 104), 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 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[25], 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 in-

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

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struments 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.

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.[26]

26 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.

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.

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

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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 111)
- "child maintenance" (d.) (f. possibly, see paragraph 111)
- "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[27], 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.[28]

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

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;

27 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.

28 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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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.[29] 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 conducted 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).

29 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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SECTION III

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.[30] Any process to bring about an amicable resolution of the dispute has to comply with the tight timeframe.[31] 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

30 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.

31 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.[32] 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[33] 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.

32 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.

33 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.[34] 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. Terminating 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.

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

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

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

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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[36]). 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.[37] 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.

36 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.

37 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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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.[38] 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.)

38 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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169. In the above example agreement (see paragraph 165), the terms of the agreement summarised 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[39], 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.

39 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.[40] 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.

40 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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SECTION IV

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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