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Brazil's Experience with Recognition and Enforcement of Family Agreements in International Child Disputes

Lalisa Froeder Dittrich

Ministry of Justice and Public Security, Brasilia 70064-900, Brazil; lalifroeder@gmail.com

Abstract: Recently, there has been a greater focus on promoting amicable solutions in cross-border family disputes. Alternative dispute resolution methods such as mediation and conciliation have been used in Brazil to avoid lengthy legal proceedings and to resolve cases where concerns about the child's situation after their return arise. Parties involved in child abduction disputes can feel motivated to reach an agreement when they can decide on child support, custody, and visitation rights before the child's return. However, enforcing these agreements can be challenging. This article examines Brazil's experience with international legal cooperation requests under the Convention of 1980 on the Civil Aspects of International Child Abduction (Child Abduction Convention), where the parties faced these issues whilst trying to resolve their conflicts under one or more of the Hague Conventions. The article uses a pragmatic and empirical approach to address difficulties in recognising and enforcing agreements and available alternatives. It concludes with a suggestion for more cooperation between central authorities and with the idea that although adhering to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children could improve the scenario in Brazil, a new international instrument would significantly enhance the resolution of cross-border disputes, especially for non-European states.

Keywords: child abduction; mediation; recognition and enforcement; voluntary agreements; Hague Conventions

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1. Introduction

Family conflicts can be emotionally and legally challenging, especially if children are involved. When a marriage between people of different nationalities or who live in countries other than theirs ends, the family may have to face, in addition to the typical difficulties of separation, the potential complexities involved in cross-border family disputes.

Take the hypothetical—but increasingly common—case of the divorce of a couple formed by a mother (Brazilian) and a father (Portuguese) who reside in the United States, where their child was born. The end of this marriage can lead to one wanting to relocate to her/his country with the child. In extreme cases, the lack of agreement between the parents can even result in one of them travelling with the child without the proper authorisation, which is considered an international child abduction. In any case, the family will need to navigate the legislation of two or more states with which they are somewhat connected to resolve issues such as custody, visitation rights, and child support.

The legal framework to deal with these conflicts is formed by several bilateral and multilateral agreements, with the most geographically comprehensive being the treaties of the Hague Conference on Private International Law ("HCCH") that apply to international family disputes involving children. This collection of conventions comprises the Convention of 1980 on the Civil Aspects of International Child Abduction ("Child Abduction Convention"), the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children ("Protection Convention"), and the Convention of 23 November 2007 on the

International Recovery of Child Support and Other Forms of Family Maintenance ("Child Support Convention") that are supposed to work together and complement each other. Among the standard features between them are the use of central authorities—main focal points designated by states to receive and transmit requests—and the promotion—with different degrees of emphasis—for the amicable resolution of disputes.[1]

Turning back to the hypothetical case, the mother takes the child to Brazil, where she obtains an order for custody and child support. The father opposes the Brazilian court's jurisdiction to decide about custody so as not to consent to the child's relocation to Brazil. A request to return the child to the United States is initiated under the Child Abduction Convention. The dispute escalates. The judge in Brazil suggests mediation. During the sessions, the father reveals that he would consent to the child's relocation to Brazil, conditioned to his free access to his daughter and the right to participate actively in the child's upbringing. They make arrangements that cover relocation, child support, custody, and access rights—including annual visits to Portugal, where the paternal family lives. They want to ensure their agreement will be valid and enforceable in Brazil, Portugal, and the United States.

Whilst it is noticeable that greater emphasis has been placed on promoting amicable solutions in cross-border family cases in recent years, reaching an agreement is just one step towards the resolution when the dispute involves one or more jurisdictions, as the parties need the assurance that they will have more than just the other party's word in case things do not go as planned. In this context, in 2022, the HCCH published the *Practitioners' Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children* ("Practitioner's Tool", HCCH 2022)[2], the result of many years of work of experts from different member states. The publication was presented as a soft law instrument to assist "legal or professional advisers (e.g., mediators) who are helping families with children navigate cross-border issues through a formal agreement." This publication was developed after several meetings and followed the Guide to Good Practice on Child Abduction Convention: Part V—Mediation (HCCH 2012a, 2012b), which also addresses the promotion of amicable resolution of family disputes in which one or more Hague conventions apply.

The *Practitioner's Tool* was the response of the HCCH—the 130-year-old organisation whose mission is to promote the harmonisation of international law, constructing "bridges" between jurisdictions—to the difficult task of bringing more certainty and predictability to families such as the hypothetical one presented as an example. Even though the work did not result in a new treaty—which could, for example, make an agreement enforceable in several states by operation of the law, subject to its meeting determined grounds of jurisdiction, it is expected that this guide will help judges and law practitioners to take into consideration the many issues involved in the construction of realistic and viable agreements, with the help of one or more of the Hague instruments.

Notwithstanding its merits, one of the difficulties with using the new soft law instrument is that it assumes that a state must be a party to all three of the "Hague Children's Conventions" for it to work correctly, which is still not the case for many countries. Its limited scope is understandable, given the mandate of the Experts' Group[3] and the objective of encouraging more states to become members of all the Children's Conventions. Still, it does not resolve all issues in states such as Brazil, where only two of the Conventions—Child Abduction and Child Support—are available so far, and where creative solutions must be

[1] The Child Abduction Convention mentions in Article 7(c) that one of the duties of the Central Authority is to "secure the voluntary return of the child or to facilitate an amicable resolution", and the Child Support Convention explicitly determines in Article 6 that it is the responsibility of Central Authorities to "encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where appropriate through mediation, conciliation or similar processes".

[2] The *Practitioners' Tool* (HCCH 2022) is available at https://assets.hcch.net/docs/c7696f38-9469-4f18-a897-e9b0e1f6505a.pdf (accessed on 1 July 2023).

[3] For a detailed account of the work of the Experts' Group, see Beaumont and Rubaja (2022).

explored to promote agreements and, in some cases, to guarantee that undertakings will be respected in other states.

The main point of this article, thus, is to explore how alternative dispute resolution methods are used in cross-border disputes, focusing on the challenges presented by the recognition in other jurisdictions of family agreements obtained in Brazil. Departing from a brief explanation of how two of the family Hague Conventions in force in Brazil—the Child Abduction Convention and the newer Child Support Convention—work, four real cases will be presented to explain how the available legal framework has been used to secure voluntary agreements in the context of international legal cooperation requests handled by the Brazilian Central Authority (BCA), the Ministry of Justice and Public Security of Brazil. To this end, the methodology chosen was a literature review of the two Conventions and, more specifically, of the difficulties to recognise and enforce agreements made in the context of child abduction disputes. Except where the dispute has been widely publicised, none of the details that could lead to the identification of the parties will be disclosed.

2. The Hague Children's Conventions of 1980 and 2007 in Brazil

Implementing the Hague Conventions played an essential role in the evolution of Brazil's international legal cooperation system, especially regarding establishing central authorities and developing mutual assistance. These two concepts were recently incorporated into the newly reformed Brazilian Code of Civil Procedure (Brazil 2015a), in an example of how the work of the HCCH has been shaping and influencing domestic law in the country.[4]

Since 2000, Brazil has adhered to three of four HCCH conventions related to children: the Hague Convention Relating to the Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993 ("Adoption Convention"), in force in Brazil since 1999; the Child Abduction Convention of 1980, in force in Brazil since 2001; and the Child Support Convention of 2007, in force in Brazil since 2017. The adhesion to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children of 1996 ("Child Protection Convention") is still the object of discussion, as some changes in domestic legislation may be necessary for the incorporation of this treaty in Brazil.

Among these, the Child Abduction Convention, considered one of the most successful of the HCCH's conventions, with the participation of 103 member states as of June 2023—undoubtedly is the one that stirred more controversy in Brazil, having attracted much criticism since it became more broadly known in the country[5]. Its implementation in Brazil occurred at a time when some of its fundaments were already the object of debates in other countries, and, 20 years on, its application in Brazil is challenged by controversies involving the profile of abductors—which follows the same patterns observed worldwide, mothers and primary caretakers (Lowe 2018)[6]—allegations of domestic violence and, to a lesser extent, the need to include the child's voice in the context of family disputes.

2.1. The 1980 Hague Child Abduction Convention

The Convention of 1980 on the Civil Aspects of International Child Abduction is a treaty that seeks a) to ensure the immediate return of a child who was unlawfully removed

[4] Although Brazil is a member of several other Inter-American conventions, including those related to the protection of children, the argument remains, as those treaties were "clearly inspired by some of the Hague Conventions", according to Boggiano (1992).

[5] The turning point for the treaty to gain wider recognition (and to attract criticism) in the country was Sean Goldman's case, which gained significant attention from the press and the public in 2008. The "Goldman Case" involved politicians and even had an intervention of the then USA President, Obama, who met with Brazil's President, Lula. The case divided public opinion and sparked passionate debates in Brazil, where the HC80 Convention was largely unknown. Sean returned to the United States in December 2009. "Goldman v Goldman" (case 2009.51.01.018422-0, Justiça Federal do Rio de Janeiro).

[6] In 2015, 73% of the persons taking children were their mothers and 91% of this total amount were the child's primary caregivers. Overall, 80% of the persons taking children in 2015 were the primary or joint-primary carers of the children involved (Lowe 2018).

or retained in a contracting state other than the one where she/he has its habitual residence and b) to guarantee the respect for visitation rights in all contracting states. In a broader scope, it aims to prevent child abductions and discourage forum shopping; that is, the search for a more favourable jurisdiction by one of the parties.

The Convention on Child Abduction is highly praised for its simplicity and innovative mechanism of administrative cooperation between central authorities; according to Elrod (2023), it "marked a new era of global cooperation over issues relating to children".

Under this treaty, habitual residence is the connecting factor for establishing jurisdiction for conflicts involving fundamental issues in a child's life because it is easier to obtain evidence and elements to support a decision where the child has his/her school, family, home, and friends. Thus, a child abduction occurs when a child is wrongfully removed from her/his place of habitual residence, in breach of another person's custody rights—custody being an autonomous concept whose meaning must adjust to the corresponding idea in the domestic legislation pertinent to the concrete case.

Therefore, custody must be understood as corresponding to the right to decide on the most relevant issues of the child's life, including, necessarily, in this list, the right to determine, unilaterally or not, the place of her/his residence (Pérez-Vera 1982). With the choice of habitual residence as its connecting factor,

> *"(. . .) the Convention avoided the seemingly unresolvable issue of recognition of custody orders by shifting the focus from enforcement to cooperation. Instead of a focus on enforcing existing orders, the Convention attempts to ensure that any litigation over child custody occurs in the place in which the child has been habitually resident before the wrongful removal or retention". (Elrod 2023)*

The Child Abduction Convention entered into force in Brazil in 2001, marking the country's return to the HCCH[7]. However, only at the end of 2002 was the Brazilian Central Authority adequately established, and the first requests were filed before the Brazilian Courts (Dittrich 2015). Under Brazilian law, custody rights for the means of the Child Abduction Convention are held by parents who have not been deprived of family power over their children, even if they do not share custody. This is what can be inferred, for example, from the legal requirement (Brazil 1990).[8] for the express authorisation of both father and mother for a child to have a passport and to leave the country unaccompanied or in the company of only one of the parents. This authorisation does not allow a parent to change the child's residence to another state Thus, whoever removes a child from Brazil without judicial or express authorisation from the person exercising family power will be committing an illegal removal.

The cooperation mechanism devised by the Child Abduction Convention relies on the work of central authorities. The Brazilian Central Authority for this Convention was first established at the Secretariat of Human Rights. It was then placed within the structure of the Ministry of Justice to concentrate all instruments for legal cooperation in just one governmental body, where civil service officers would then specialise in all matters relating to private international law.[9]

At the BCA, once a return request is received, the team, composed of civil servants from different backgrounds, verifies that the documentation submitted is complete and that the essential criteria for admissibility of the request are fulfilled: whether the child is under 16 years of age, whether there is any document establishing residence in the requesting country, and whether the person requesting return—known as the "left behind parent"—has presented documentation that serves as proof that he or she had custody rights over

[7] Brazil left the HCCH in 1978 and only returned as a member in 2001.

[8] Article 83 of the Child and Adolescent Statute—Law 8069 (Brazil 1990).

[9] The Department of Asset Recovery and International Legal Cooperation (DRCI) is a Ministry of Justice and Public Security Department. Created in 2004, it acts as the Central Authority for international legal cooperation in criminal and civil matters.

the child. Since 2005, a letter has been sent to the person accused of having removed or detained the child in Brazil, with the primary objective of seeking a voluntary return.

In case a voluntary return or an agreement for relocation is not possible, the BCA sends the request to the Office of the Attorney's General (OAG), the public body in charge of representing the Brazilian state before a Federal Court, which is competent to judge requests based on international treaties, by article 109, III, of the 1988 Brazilian Federal Constitution. Brazil receives and sends around 200 requests per year under the Child Abduction Convention and faces, internally, the same challenges reported in other states regarding its appropriateness in responding to allegations of domestic violence and the protection of the child once a return occurs.

2.2. The 2007 Hague Child Support Convention and the Maintenance Protocol

The Child Support Convention aims to provide a framework for effectively enforcing child support obligations across borders. It was adopted in 2007 and has since been ratified by 47 countries. The Convention establishes a system for obtaining, recognising, and enforcing child support orders, ensuring that children and, in some cases, spouses living in different countries can receive financial assistance. This Convention applies to all children, regardless of whether they are born in or out of wedlock, an essential step towards protecting children's rights.

The other innovative aspects of this new Convention are the many kinds of requests available to both creditors and debtors and the introduction of party autonomy in its protocol for applicable law—although excluding the possibility of choice of forum in agreements involving children and vulnerable persons (González Beilfuss 2020). Moreover, whilst existing instruments (such as the 1956 UN Convention on the Recovery Abroad of Maintenance and the previous Hague Convention of 1958) focused on the obligation of states to recognise and enforce support orders, the 2007 Child Support Convention obligates contracting states to actively provide access to procedures with no costs to the parties. Thus, a creditor can, for example, request the obtention of a decision (and the establishment of paternity, if necessary), resourcing to the mechanism of mutual assistance, or ask for the recognition and enforcement of an existing decision obtained in the requesting, requested, or other member state. There is also the possibility of asking for the recognition and enforcement of an agreement if the requested state did not make a reservation to Article 30 under the provisions of Article 62.

The Child Support Convention entered into force in Brazil in October 2017. As mentioned before, under the law, the Ministry of Justice and Public Security is the central authority for three of the Children's Hague Convention and several other bilateral and multilateral treaties. The concentration of treaties in the same government body was an advantage to successfully implementing the new Convention following the challenging first years of the Child Abduction Convention in Brazil.

Since the beginning, inspired by the already established practice of the BCA in promoting amicable agreements in child abduction cases, it was decided that a letter for voluntary payment would be sent to the debtor in all cases received by the BCA. This decision was derived not only from the obligation found in Article 6 but was also based on the good results of contacting the parties before starting judicial proceedings observed in the years of working with the Child Abduction Convention. This may come as a surprise given the reservation made by Brazil to Article 20(1) and 30(8), which provides the recognition and enforcement of agreements.[10]

[10] Reservations made by Brazil: to Article 20(1)(e): Brazil does not recognize or enforce a decision in which an agreement to the jurisdiction has been reached in writing by the parties when the litigation involves obligations to provide maintenance for children or for individuals considered incapacitated adults and elderly persons, categories defined by the Brazilian legislation and which will be specified in accordance with Article 57. To Article 30(8): Brazil does not recognize or enforce a maintenance arrangement containing provisions regarding minors, incapacitated adults, and elderly persons, categories defined by the Brazilian legislation and which will be specified in accordance with Article 57 of the Convention.

In fact, at the time of the reservation, the idea seems to have been avoiding conflict with domestic law, which prescribes that agreements involving children and incapacitated or vulnerable adults can only be recognised and enforced after a revision on the merits by a judge, and after the hearing of the Public Prosecutor's Office. The reservation is derived from paternalistic principles that permeate Brazilian legislation, severely restricting party autonomy in matters involving children (Araujo and Vargas 2014). However, the changes made in the Brazilian Code of Civil Procedure[11] and the implementation of the new Law on Mediation[12] in the country, just two years before the Convention on Child Support entered into force in Brazil, as well as the emphasis from the Judiciary and the Executive branches on public policies to promote negotiated agreements, conflict with the excessive caution taken by the negotiators at the time of the reservation.

Under current legislation, an arrangement that involves non-disposable rights (i.e., rights one cannot surrender, transfer, or dispose of) but can be the object of an agreement is not enforceable unless it is validated by a judge.[13] That means that, although a parent cannot decide whether a child has the right to receive child support, an arrangement regarding the amount and frequency of payments is acceptable and enforceable after a judge's review.

In practice, since the Child Support Convention initiated its operation in Brazil, arrangements that a court of another member state approved—and, thus, that became a court order—have been accepted for recognition and enforcement by Brazilian authorities under Article 10 (1a), based on the understanding that if the agreement is enforceable in the other state as a court order, it can be recognised in Brazil as a foreign decision. It is a reasonable approach considering that the basis for the recent modernisation of Brazilian law is that negotiated solutions are preferred and prioritised by the Judiciary, especially in family law.

Therefore, although the reservation has not been an obstacle to accepting a request for recognition and enforcement received by Brazil to date, there are discussions in place regarding the possibility and convenience of removing the reservation made in 2017, as practice—as well as a review of country profiles—has shown that contracting states mainly share the same principles regarding the protection of children and other weaker parties when it comes to approving and enforcing agreements.

In the same direction, the BCA, as mentioned before, has been encouraging agreements since the beginning of the implementation of the Child Support Convention. Once a letter is sent to the debtor, the BCA will help the parties to exchange proposals for the voluntary payment of the debt and, in some cases, to establish paternity. Only when a voluntary agreement is impossible the request is sent to the Public Defender's Office (DPU), a public body whose mission is to guarantee access to justice for those who cannot afford to pay attorneys. The Public Defenders will also work with the parties to obtain an amicable agreement at any point in the proceedings, and the judge will make another attempt in most cases, as prescribed by law (Brazil 2015a).[14]

In contact with the parties, it was noticeable, from the start, that many requests for the obtention of a decision or recognition and enforcement of a child support order involved parties that were either left-behind parents or abducting parents in previous or current cases handled by the BCA. Unsurprisingly, the same complaints and accusations were brought back to the dispute: lack of contact, resentments about the abduction, disagreement with the relocation, and non-compliance with child support orders obtained in one or more

[11] (Brazil 2015a). Law 13.105/15. Available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm (accessed on 1 July 2023).

[12] (Brazil 2015b). Law 13.140/15. Available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm (accessed on 1 July 2023).

[13] Law 13140/2015, Article 2, Paragraph 2: *The consensus of the parties involving undisposable but negotiable rights must be ratified in court, requiring the hearing of the Public Prosecutor's Office.*

[14] The Brazilian Code of Civil Procedure (2015) states in Article 3. (...)*Paragraph 2. The State shall promote, whenever possible, the consensual resolution of conflicts.Paragraph 3. Conciliation, mediation, and other methods of consensual dispute resolution shall be encouraged by judges, lawyers, public defenders, and members of the Public Prosecutor's Office, including during the course of judicial proceedings.*

jurisdictions.[15] The need for these disputes to be addressed as a set of complex and intertwined issues, which in cross-border cases is more realistic with the use of mediation, became visible in practice.

3. Mediation in Cross-Border Family Disputes

Just as it happened in European countries and the United States in the 1970s and, more recently, in Latin American countries, where the promotion of alternative dispute resolution methods emerged as a response to excessive litigation (Melo Filho 2003), the interest in the use of consensual methods by the HCCH coincides with the yearly increase in the number of requests for international legal cooperation involving children (Vigers 2011). The enthusiasm for using mediation in international family disputes also derived from successful experiences and studies demonstrating that this method could lead to more favourable outcomes for the parties, particularly children (Roberts 2008).

Mediation, in this context, arises not only as an alternative to the slowness of the justice system but as a process that values the autonomy of the parties and has as its main advantage the potential to improve communication between parents, who, because their children bind them, will be required to maintain an ongoing relationship that does not end with the conclusion of the judicial process (Mnookin and Kornhauser 1979).

Some advantages of mediation in family cases are (a) decreased animosity; (b) a sense of greater control for the parties over the process; (c) greater adherence to and respect for the agreed-upon terms (Roberts and Palmer 2008); (d) increased possibility that the agreement will serve the best interests of the child; (e) the ability to address various aspects of the conflict in the agreement, even those that are not the subject of the legal action or international legal cooperation request; (f) improved cost–benefit ratio, as mediation tends to be shorter in duration and involve fewer financial resources (Coester-Waltjen 2000).

In cases of international child abduction, expanding the aspects discussed in mediation seems to play an important role, meaning the difference between a quick voluntary return and a costly and lengthy judicial process, which may potentially harm the child's well-being[16]. Furthermore, an agreement between the parties tends to prevent future abductions (Mosten 1993). Practical experience in Brazil showed that negotiating an agreement for a voluntary return was easier when there was the possibility of addressing other aspects of the family relationship, such as visitation rights, custody, and child support (Dittrich 2015).

However, mediating international child abduction disputes presents some challenges, as mediation must be adapted to meet the contingencies imposed by distance and time. Projects underway in Europe, such as in England, Germany, and The Netherlands[17], indicate that the ideal mediation, in these cases, would involve the presence of two mediators, respectively, of the gender and nationality of each party. The language used should be the common language of the couple. Still, a translator may also be necessary since the parties cannot always express intense emotions in a language other than their mother tongue (Paul and Kiesewetter 2014).

Another challenging task when it comes to elaborating on an agreement that involves different jurisdictions is the "reality test"—is what is being agreed realistic? Is it feasible in financial and logistical terms? Will it be adequate in one or two years, or should it be reviewed in a pre-determined timeframe? More fundamentally, will it be valid in both (or

[15] In 2023, there were 18 open cases at the BCA in which the child for whom maintenance is requested is involved at some point in disputes under the Child Abduction Convention. Unpublished data are available under request to the author.

[16] That seems to also be the case in South Africa. Ferreira (2019) argues that *"the reality is that a court-imposed outcome is seldom a good fit in family matters. The issues are just too personal and require a level of detailed attention that overburdened courts in South Africa cannot provide. Alternative dispute resolution, or dispute resolution by agreement, provides an alternative to court procedures, and it is a quicker, non-confrontational, conciliatory approach to resolving matters"*.

[17] From 2019 to 2020, the European Justice Program funded the AMICABLE project to promote a court model mediation into international child abduction proceedings in the EU. See: https://www.amicable-eu.org/ (accessed on 1 July 2023).

more) jurisdictions? The need for certainty and predictability is a significant factor for the parties to agree on the return or relocation of a child, and the HCCH acknowledged the need to respond to these demands with the creation of a working group to explore the convenience of elaborating on new binding or non-binding instruments to uniformise rules among member states.

Recognition and Enforcement of Agreements in Cross-border Family Disputes Involving Children

The primary objective of the Child Abduction Convention is the immediate return of the child, explicitly limiting the jurisdiction of the judge in the country to which the child has been taken or is being retained solely to determine whether the child's removal or retention was wrongful. Custody decisions, which should be made in the child's habitual residence state, are not allowed. In other words, discussions about custody should only take place after the child's return to the state of habitual residence, and any eventual agreement could only be approved by the judge of the requested state regarding the issue of the child's return.

When the parties are not allowed to discuss the real issues that led to the child's abduction in the first place, it is unlikely that the mediation will result in a genuinely consensual agreement. Baroness Hale (2023) rightly stated that although the apparent answer to child abductions is to bring the child back as soon as possible to restore stability, *"human life is not so simple"*, and there may be many reasons for an abduction that may impend the return. *"What about poverty? A parent may have been abandoned without resources in a country with little or no welfare benefit provision. What about inequality of arms? A parent may be vulnerable to losing her children to the other parent if he has money for lawyers and she does not)".*[18]

For Grammaticaki-Alexiou (2020), the idea that the status quo ante will be restored with the return is not a given fact, as another dispute will probably begin in the state of habitual residence, *"which may result in the change of the custodial parent, or a significant change in the everyday life of the child, often to the worse"*.[19] In this sense, it might be in the child's best interest to have an arrangement if the parents are willing to negotiate a solution to their dispute. This is only possible, however, with the knowledge that an agreement will be respected and there will be a way to enforce it in case of non-compliance, as otherwise, one of the parties would be left with only trust in the other's good faith. Unfortunately, trust between the parties involved in such cases can be compromised after an international abduction.[20]

The main challenge regarding the recognition and enforcement of "package agreements" in child abduction disputes is the lack of jurisdiction of the judge in the requested state, derived from the Child Abduction Convention, which expressly prohibits a court in the requested state from deciding on the merits of custody until there is a decision for the non-return of the child Article 16), and to refuse a return order based on the existence of a custody order in the requested state (Article 17). In the case of non-return, it should be easier to determine the shift in the child's habitual residence, but there is still controversy about the moment this occurs. Nonetheless, it seems logical that when both parents agree with the non-return of the child, they agree to change her/his residence to the requested

[18] Hale (2023). "Foreword". In *Research Handbook on International Child Abduction*. Cheltenham, UK: Edward Elgar Publishing, p. 1.

[19] Grammaticaki-Alexiou (2020). "Best Interests of the Child in Private International Law (Volume 412)". Collected Courses of the Hague Academy of International Law. Brill Reference Online. Retrieved 10 Aug. 2023 from https://referenceworks-brillonline-com.peacepalace.idm.oclc.org/media/pplrdc/1875-8096_412-02.pdf?id=the-hague-academy-collected-courses/best-interests-of-the-child-in-private-international-law-volume-412-A9789004448995_02#pagemode=bookmarks&page=1 (accessed on 1 July 2023).

[20] For Treichl "*it goes without saying that consensus between the parties is a prerequisite of any settlement agreement. As a result, one would assume the recognition of settlement agreements, and eventually their enforcement, become questions of lesser importance. (. . .) However, enhancing the enforcement of settlement agreements beyond the status of a mere contract is likely to provide parties with a perhaps decisive incentive to settle. This is especially so in international contexts because parties are all the more disinclined to initiate litigation for breach of a settlement agreement if they are forced to do so abroad and could be required to re-litigate a merits phase*" (Treichl 2020).

state. It would make no sense to ask them to first present a case to the court in the requested state—where, in many cases, there are no pending proceedings—before being able to recognise an agreement in the new state of habitual residence. A pragmatic approach should prevail in these cases as time and money can be saved when a decision can be made regarding the non-return and all other issues agreed upon by the parents simultaneously. However, the question of how to recognise the agreement in the other state remains.

It is also debatable if an agreement that includes more than just the decision about return or non-return could be incorporated in a court order to be enforced in another jurisdiction. The question is even more complicated regarding an arrangement for the voluntary return, as the agreement may not be accepted in the state of habitual residence, leading to a new dispute to rediscuss its terms.

Therefore, when an agreement is being elaborated on, the parties must know the rules of jurisdictions regarding custody, child support, access rights, parental rights, and any other matter affecting their arrangement. In the absence of uniform rules at the international level guaranteeing that an agreement will not be "just a piece of paper"[21] or an empty promise, legal practitioners must be creative in providing some predictability to the parties.

In this regard, the most expected instrument to help shed light on this complicated issue was the 2022 HCCH *Practitioner's Tool*. This document explores different scenarios based on the intersection between three of the Children's Hague Convention (Abduction, Protection and Child Support). Although helpful as a tool to understand which elements must be considered in elaborating an agreement (habitual residence being the common connecting factor to all three Conventions), the guide is of limited use for states where one or two of the Conventions are not in force. It is particularly challenging for states where the 1996 Protection Convention, a treaty that provides a framework to incorporate protection measures into return orders and set rules for the temporary transfer of jurisdiction between states, somewhat supplementing the other two Conventions, is not in force. In this sense, the *Practitioner's Tool* also aims to engage more states in joining all three Conventions whilst still encouraging close cooperation between central authorities and judges' networks to fill eventual gaps in the law for states that cannot rely on the use of all these treaties.

As the 1996 Protection Convention—considered by some to be the stitch of the other Conventions (Estin 2010)—is not in force in Brazil, the *Practitioner's Tool* is not yet a helpful instrument to solve some of the cases that involve the need for undertakings as a condition for a voluntary return, for example, or the recognition of a custody arrangement obtained in Brazil after the return of a child is denied under one of the exceptions for non-return. Nonetheless, it may help accelerate the country's adhesion to the Protection Convention. This demand is even more urgent in the context of the limitations of regional agreements within Latin America dealing with these matters—contrary to what happens in the European Union, where there is the Brussels IIb Regulation providing mechanisms to facilitate the recognition of agreements[22]—and the fact that most cases of child abduction in Brazil involve a European country or the United States of America.[23] Meanwhile, the need for close cooperation between the BCA and other central authorities will be essential to circumvent the limitations imposed by the lack of an international instrument for the recognition and enforcement of agreements made in Brazil, where the use of mediation and conciliation has been increasingly promoted as the basis of a public policy to reduce litigation in the country, as it is going to be discussed in the following part of this article.

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[21] That is also true regarding undertakings negotiated by judges, as reported by Freeman (2006) on the results of a Reunite scheme research study: *'one abducting parent described how the left-behind parent referred to the undertakings he had given to the English court as "toilet paper'*.

[22] EC Regulation 2019/1111 or Brussels IIb Recast Regulation replaced the Brussels IIa Regulation in August 2022. This binding regulation facilitates the recognition and enforcement of judgments in matrimonial and parental responsibility matters within EU Member States.

[23] Data from the Brazilian Central Authority show that more than half the cases of child abduction involve the United States, Portugal, Spain, Italy, Germany, and France. Argentina comes in the fourth position. Regarding child support requests, half the cases involve Portugal and the United States of America.

4. Cross-Border Family Disputes in Brazil: Case Studies

In Brazil, the use of consensual methods for resolving disputes was mainly motivated by the massive backlog of the courts (Melo Filho 2003). In 2019, the Council of National Justice revealed that, at the end of that year, there were 77.1 million cases pending resolution (Conselho Nacional de Justiça 2022).

Since 2016, the practice of mediation and conciliation has been regulated by the Code of Civil Procedure ("CPC"—Law 13.105/2015)[24] and by the Law on Mediation (Law 13.140/2015). These two instruments establish that private agreements have the status of extrajudicial enforceable documents. In cases involving children, however, arrangements must be judicially approved to have the status of an enforceable decision, which means that agreements that define custody, visitation, and child support must be submitted to the scrutiny of a judge, after which they hold the value of a court judgment[25]. The Law on Mediation and the changes made in the CPC have been slowly changing the judicial scenario in the country. In 2019, 12.5% of the cases were resolved with a judgment homologating an amicable agreement (Conselho Nacional de Justiça 2022).

Regarding international child abduction disputes, in 2018, around 23% of the requests handled by the Brazilian Central Authority (BCA) were resolved with voluntary returns, and 7% ended with the child's relocation to Brazil. There are no consolidated statistics on the use of consensual methods in child support cases, as the implementation of the Child Support Convention is still recent. The BCA, however, registered a few cases that ended in agreement after the debtor received and responded to the voluntary payment letter and others that ended in agreement during court proceedings[26]. The Child Support Convention greatly facilitated the recognition of these agreements for the voluntary payment of child support. However, when the dispute involved visitation rights or other issues, there were several limitations and challenges for central authorities and parties involved.

In the last part of this article, some of the issues involving voluntary methods in resolving cross-border disputes in Brazil will be explored and illustrated by four cases that the BCA handled between 2016 and 2019.

Case 1. *Agreement for temporary relocation from Brazil to Scotland.*[27]

The case involves two Brazilian nationals who had a child in Brazil and separated soon after. They shared custody of their child and had an amicable relationship. The mother decided to move to Scotland, and the father agreed to let the child go with the condition that she would return to Brazil after two years. To this end, the couple signed an agreement before a notary in Brazil, in which they both stated the child's habitual residence was in Brazil and the move would be temporary. The agreement was not considered enforceable in Brazil, as all agreements involving children must be reviewed by a judge to have the force of a judicial decision.

After two years, the child did not return, and the mother alleged that it was the child's wish to stay in Scotland, where she made friends and adapted to a new school. A request for the child's return was sent to Scotland under the argument that the father disagreed with the permanent change of residence of the child. A social worker heard the child before judicial proceedings were initiated. Based on the report of this professional, who considered that the child was habituated to her new place and did not want to return, the case was not considered strong enough to be presented to a court and the father was left with the option to negotiate visitation rights with the help of an appointed lawyer.

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[24] Brazilian Code of Civil Procedure (2015). Article 3. No threat or violation of rights shall be excluded from judicial review.*Paragraph 2. The State shall promote, whenever possible, the consensual resolution of conflicts.Paragraph 3. Conciliation, mediation, and other methods of consensual dispute resolution shall be encouraged by judges, lawyers, public defenders, and members of the Public Prosecutor's Office, including during the course of judicial proceedings.*

[25] Article 2, Paragraph 2: *The consensus of the parties involving unavailable but negotiable rights must be ratified in court, requiring the hearing of the Public Prosecutor's Office.* Law 13140/2015.

[26] Ministry of Justice and Public Security (2018). Statistics. Brasilia, DF. Unpublished.

[27] Child abduction case handled by the Brazilian Central Authority in 2018. Unpublished.

In this case, three things show the difficulties involving cross-border family agreements:

(a) The definition of habitual residence—is it possible to decide on the child's habitual residence to be in a state where she is not living, and for how long? In these cases, there is always the likely possibility that the child will become attached to her new residence, and a return after a long time could not be in her best interest, as it was the conclusion of the authorities in Scotland. Party autonomy to decide on the habitual residence, therefore, is restricted.

(b) That leads to the other crucial point in these situations: the child's opinion. Should the agreement prevail over the wishes of a child considered mature enough to be heard? Suppose one is to consider the provisions of the United Nations Convention on the Rights of the Child (UNCRC). In that case, it is hard to argue that the force of a contract establishing "legal" habitual residence could have more weight, even if the agreement were indeed enforceable. The child's interests prevailed over the parents' intention at the time of the agreement.

(c) Finally, in this case, the fact that the agreement was not enforceable in its state of origin and was not "mirrored" in Scotland made it almost impossible for the father to return her child to Brazil, which shows the importance of having at least a parenting plan in place in both states before the relocation. At the time, the child support convention was not in force in Brazil, and no other international instruments were available to the parents.

Case 2. *Voluntary return from Brazil to Germany.*[28]

In this case, the BCA received a request to return a child born in Germany, where she lived with her German father and her Brazilian mother. The couple separated, and the mother, who had no income or extended family in Germany, started talking about moving to Brazil with the child. Afraid of having the child removed from the country, the father went to court and obtained a temporary order for sole custody of the child in Germany. Fearing losing child custody, the mother flew to Brazil at the end of 2016.

With the help of the BCA and the German Central Authority, before court proceedings were initiated, the parents agreed that the child should return to Germany, where she would live with her mother. It was revealed during negotiations that the father considered her ex-partner a good mother and did not oppose his daughter living with her mother as long as they shared custody over the child. The mother revealed that she wanted to live in Germany but feared she would not have the means to support herself and that her poor financial conditions meant she would never be granted custody of her daughter. The couple agreed on place of residence, maintenance, custody, and visitation rights, and a voluntary return of the child seemed easy to guarantee.

However, the mother wanted to ensure the agreement would be enforceable in Germany before the return. The German legislation did not allow for a decision for custody to be issued whilst the child was not back in Germany, even though the German court had jurisdiction over custody matters under the Child Abduction Convention and the Child Protection Convention, which was in force only in Germany.

The solution was signing a document before a notary in Germany with the promise of the father to comply with the agreement. This document would not be enforceable in Germany but could be used as evidence in favour of the mother in future custody proceedings. The child returned at the beginning of 2018, and further contact with the parties revealed that both parents respected the agreement.

This successful case demonstrated two critical factors. Firstly, the collaboration between central authorities led to a creative solution that eased the mother's concerns. She was worried about being unable to support herself in a foreign state due to having a lower income and education than her ex-partner. Secondly, it highlighted the significance of broadening the discussion's scope beyond the child's return. This allowed for effective

[28] Child abduction case from 2016. Unpublished.

communication between the parties, resulting in the father admitting he did not want to be the sole custodian parent. As a result, arrangements were made in the child's best interest.

Even though this resulted in a good solution for the parties, it could have been handled differently if both the Child Protection and the Child Support Convention had been in force between Germany and Brazil at the time. For once, a child support order could be established in Brazil and recognised in Germany under the Child Support Convention, somewhat protecting the mother if the father changed his mind regarding the promise of helping her financially until she found work.

Case 3. *Agreement after a return order from Brazil to the United States of America (US).*[29]

The case involved a child born in the US to Brazilian parents who lived there. The mother came to Brazil with the child in 2009 to visit their extended family and did not return. She asked for a divorce and custody of the child in Brazil. After a failed attempt to obtain a voluntary return, the case was presented to a court in 2010. The child's return was ordered, but the mother reversed the decision with an appeal, which was overturned again in a different court. The parties' attorneys negotiated an agreement to return the mother and child to the US under the condition that a court in the US and Brazil first homologated the agreement.

After the "parenting plan" approval by a US court[30], the agreement was recognised in Brazil, where the law allows for the recognition of foreign decisions if some conditions are met (Brazil 2015a)[31]. After recognising the decision in the US, the mother withdrew her appeal in Brazil and returned with the child[32].

The agreement involved arrangements for visitation rights, custody, child support, religious education, and habitual residence. There were multilateral agreements between the US and Brazil, but none that applied to the case besides the Child Abduction Convention. The US court did not require the child's presence in its territory to homologate an agreement, and Brazil does not require the existence of a treaty or the promise of reciprocity to recognise foreign decisions. However, it took the parties several months to have "mirror" orders in place to allow for the child's return, which occurred in 2018.

It should be noted that this case took eight years to conclude in Brazil for several reasons, the main one being the fear of the judges separating a small child from her mother, who was also allegedly a victim of domestic violence. It can be hypothesised, therefore, that an agreement was only possible when the "best alternative to a negotiated agreement" (Fisher and Ury 1991) for the mother was not a good one: returning to the US without any undertakings in place. This case also involved allegations of parental alienation, as the father lost contact with the child. The relationship between the parties was worsened after many years of battling in court, and the whole family was traumatised by the experience.

Case 4. *Agreement for relocation to Brazil from the US.*[33]

The final scenario presented involves a boy taken to Brazil by his mother from the US in late 2012.

In this case, the parents were not married, and both lived in the US. The father took legal action to establish paternity and gain shared custody of the child shortly after his birth. Upon receiving notification of these proceedings from the US court, the mother, a

[29] Child abduction case that was finalized in 2010. Unpublished.

[30] In this case, it seems the US court relied on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). According to Estin (2010), under these provisions, "state courts consider foreign countries as if they were states of the United States for jurisdictional purposes".

[31] Under Article 963 of the Brazilian Code of Civil Procedure, the indispensable requirements for the approval of the decision are as follows:*I—To be issued by a competent authority;II—To be preceded by regular citation, even in the case of default;III—To be effective in the country in which it was issued;IV—Not to violate the Brazilian res judicata;V—To be accompanied by an official translation, unless there is a provision in a treaty that exempts it;VI—Not to contain a manifest offense to public order.*

[32] Superior Court of Justice. RESP 1.458.218. Available at: www.stj.jus.br (accessed on 28 June 2023).

[33] Child abduction case finalised in 2013. Unpublished.

Brazilian citizen living undocumented in the US, fearing losing custody, took the child to Brazil.

The BCA received the Hague request for the child's return at the beginning of 2013. Return proceedings were initiated after an unsuccessful attempt to have the child voluntarily returned to the US. The child's mother argued that she would not be permitted entry into the country and could not bear to be separated from her young child. In 2016, during a conciliation hearing before a judge in Brazil, the parties agreed to relocate the child to Brazil until 2022, when he would then move to the US to live with his father. According to the agreement, the parents will share custody of their child. Visitation rights and child support were also objects of the agreement, which was first homologated by the court in the US, where paternity and custody rights were decided. With the relocation, the Brazilian court had jurisdiction over the matters, and the agreement was replicated in Brazil.

Many issues were involved in this case: the possible application of Article 13 (a) of the Child Abduction Convention as an exception for the return since the father did not have custody rights at the time of the removal (although the US court has already retained jurisdiction to establish custody rights); the challenges presented by the immigration status of the mother, which could not be the object of negotiations and that imposed severe difficulties for a voluntary return and future contacts with the child; the young age of the boy, who would allegedly be at risk of losing contact with his mother, who was his primary caretaker since his birth; the shift in jurisdiction after a relocation agreement and the future difficulties to enforce an agreement that established a change in the place of residence of the child seven years later (2022). Both courts (in the US and Brazil) solved the case by retaining jurisdiction and "mirroring" their orders. Straight cooperation between the BCA, the US Central Authority, and the US Embassy in Brazil fundamentally solved this dispute.

5. Conclusions

The Brazilian experience with the Hague Children's Conventions underscores the significance of exploring different solutions to address the difficulties involving recognising and enforcing agreements in cross-border family disputes. Despite potential obstacles and limitations, these conventions provide a framework for international collaboration and assistance to families in an ever-changing world.

In this article, the advantages of using mediation to resolve high-conflict cases were presented, such as the improvement of communication in the family, the possibility of discussing arrangements for the child's future, and the higher adherence to agreements as a result of the parties being more satisfied with the solution construed by themselves. The challenges to the use of consensual methods when more than one jurisdiction is involved, as in cases of child abduction, were also highlighted to raise possible solutions, especially for states that are not members of the European Union, where regional instruments and resolutions, such as the recently reformed Brussels IIb—make it more accessible to obtain a document that can "travel" between jurisdictions without the need for lengthy and costly proceedings.

In child abduction cases, extra care must be taken with time constraints, as mediation cannot jeopardise the primary goal of promoting the child's return. As in all mediations, the agreement must be tested to avoid unrealistic expectations and to comply with legal requirements. In cases in which agreements will need to be in force in more than one jurisdiction, this involves spending more time considering domestic legislation and the international framework available to recognise the final decision in all states involved.

In Brazil, where mediation has recently become incorporated into domestic legislation, promoting voluntary agreements in cross-border disputes proved a valuable alternative to years of litigation before the child's return is finally decided. It has also served to broaden the scope of the matters that can be decided in one jurisdiction, bringing more certainty to families and judges who might not feel comfortable ordering a return in cases where the mother and the child could be left in a vulnerable situation in another state—for example, with no resources to dispute custody rights.

Given the difficulties caused by the lack of an instrument that standardises the practice of recognition and enforcement of family agreements at the international level for states such as Brazil, which is not a party of the Child Protection Convention, practitioners must seek alternatives to provide some legal predictability to the parties. The HCCH *Practitioner's Tool* may help to guide the elaboration of agreements, even though it has limited applicability for states that are not members of all three Children's Conventions.

Finally, although there is a strong argument in favour of more states becoming parties to the Child Protection Convention, there are indications that more is needed to address many dispute complexities. There is undoubtedly a case for elaborating on a new international agreement to facilitate the recognition of family agreements across borders, making them "portable documents". Meanwhile, solutions must be built with cooperation between Central Authorities, judges' networks, and the creative use of other bilateral and multilateral agreements.

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