

# Introduction to mediation & starting the mediation process

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# General remarks

- All appropriate steps should be taken to encourage the parties to a cross-border family dispute concerning children to find an agreed solution to their dispute. Agreed solutions are more sustainable since they are likely to be adhered to by the parties; they are more satisfactory for the parties and just as avoids the perception of “winning” and “losing” party, avoids psychological suffering of children; facilitates communication between the parties, empowers the parties to face future conflicts in a more constructive way. Mediation is flexible and can adapt the needs of the specific case.
- Limits – in high conflict cases, not willing to mediate parties, in cases with indications of domestic violence, drug and alcohol abuse. In some systems agreements on parental responsibility may have no legal effect unless approved by the court. In cross-border family disputes the legal situation is complex as the interplay of two or more legal systems needs to be taken into account.

## **Mediation in international child abduction cases**

- Has to be dealt with expeditiously;
- Should not lead to delays in Hague return proceedings;
- The parties should be informed about the availability of mediation as early as possible;
- The suitability of mediation should be assessed in the particular case
- Mediation services need to provide for the scheduling of mediation sessions on short notice;
- Initiating return proceedings before commencing mediation should be considered;
- Mediators and bodies offering mediation should cooperate closely with the Central authorities and courts ;
- Parties need to have access to relevant legal information;
- Mediation shall take consideration of the possibly different cultural and religious background of the parties, language difficulties /interpretation/, geographical distance, visa and emigration issues, possible criminal proceedings initiated against the taking parent in the country from which the child is abducted;
- Specific training for mediation in international child abduction cases, mediators lists;
- Central authorities shall provide information about mediation services, costs, legislation.

# The principles of mediation – International standards

- Voluntariness
- Confidentiality
- Impartiality
- Self-empowered
- Conflict of interests
- Competence/ Preparation



# Voluntary nature of mediation

- Mediation is a voluntary process. This principle is not contrary to the requirement in some jurisdictions of mandatory information meetings on mediation as the parties are not forced to actually settle their dispute in mediation
- The commencement of Hague return proceedings should not depend upon attendance at mediation or at the mediation information session , especially, if as a result taking parent would be given the possibility to delay unilaterally the proceedings. Furthermore the mechanisms used in national family law disputes to promote the use of mediation are not always appropriate for international child abduction cases
- The willingness or lack to enter into mediation should not influence Hague return proceedings

# Confidentiality

- All communications in the course of the mediation should, subject to applicable law, be confidential, unless otherwise agreed by the parties – exceptions (art.7a of MD, criminal law rules, depends on the applicable law);
- Helps to create the atmosphere of trust to have open discussion on a whole range of possible solutions to the dispute. Parties should not fear that their proposals may be taken as a concession and held against them in legal proceedings;
- In international family mediation the parties need to be fully informed about the rules applicable to confidentiality in the different jurisdictions concerned. If the mediator has no knowledge of the other jurisdictions` confidentiality rules, s/he needs to draw the parties attention to the fact that these rules may be different and that the communications in the course of the mediation might not be considered confidential in the other jurisdiction. Encourage inquiries with a specialist, or check the Countries profile under the 1980 HC;
- Contracts concluded between the mediator and the parties before commencing mediation often include rules on confidentiality. The contract may include terms that forbid the parties to subpoena the mediator and even may include a provision whereby a party that subpoena the mediator needs to cover the mediator`s attorneys` fees.

# Impartiality

- Mediation should be neutral to the outcome of the process
- Mediator needs to be independent to the way in which s/he conducts mediation; needs to be impartial towards parties. The mediator should not offer opinions on issues of merit, rather encourage the parties to equip themselves with all expert support they believe they will need to solve the conflict. Two kinds of mediators – facilitators and evaluators.
- Mediation must be conducted fairly – the parties need to be given equal opportunity to participate in the mediation process (to use mother tongue for example).

- **Self-Empowered**

The parties are in the “driving seat” when it comes to finding solutions. This element distinguishes mediation from litigation. Mediators do not give advice or propose solutions to parents. The role of the mediator is to foster dialogue and facilitate a voluntary resolution of a dispute, to facilitate the free exchange of ideas and never impose an agreement.

- **Conflict of interest**

The mediator should not have an interest in the outcome, not even in a peaceful solution. If the mediator believes there is a conflict of interest (knowing, favoring one party, etc.) s/he should recuse him/herself.

- **Competence/Preparation**

Training and experience are key in mediation. It takes substantial training, practice and experience to gain accreditation and credibility. Subject matter expertise and adequate process skills.

# Stages of mediation process

- Mediation session is private and confidential. It is normally held in a private office or meeting room and no public record is made of the proceedings. If no settlement is reached, any statements during the proceedings are inadmissible as evidence in any subsequent litigation. If children are present, they wait outside.



- **Stage 1: Introduction and Setting the stage:** the parties are taken through the agreement to mediate which they receive prior to the first session. The mediators explain the mediation process – the format, discusses the confidential and non-binding nature of the proceedings, and set out any ground rules - define protocol, set the time frame for the process. The agreement is signed by the parties and the mediators.
- **Stage 2: Identifying the issues.** The parties are each given the opportunity to tell their story, i.e. to explain their positions. If attorneys are present they can confer, but the parties should speak for themselves, parties should not interrupt each other, the mediator will give each party the opportunity to fully share their side of the story. The mediators` role here is to listen actively, try not to interrupt the parties, although the mediator should acknowledge both parties` feelings and concerns and reframe if necessary. The parties agree on the agenda and the mediators list the main issues to be settled in mediation on a flipchart.

- **Stage 3: Defining the issues and interests.** Now that the parties have each set out their prospective the mediators help the parties to explore their needs and interests as well as the needs and interests of their child/ren. The parties are encouraged to speak directly to each other.
- **Stage 4: Examining and Clarifying Option.** Different solutions and options are explored by the parties. The mediators help the parties evaluate and discuss different options which involve compromises and concessions on both sides leading towards reaching a final statement. Following the joint meeting, the mediator may separate the parties and begin meetings with them in private called “caucuses”. In these caucuses the mediator works with each of the parties to analyze their case and develop options for settlement.
- **Stage 5: Drafting the agreement (Memorandum of Understanding).** The mediators helps formulate the agreement which is checked by the parties` respective lawyers before the parties sign it.

# Agreement to mediate

- A written agreement is concluded between the mediator and the parties to ensure the informed consent of the parties to the mediation and to agree on the terms and conditions of the mediation service. The content should be clear and contain the necessary information on the mediation process.
- The contract should explain the mediator`s role as a neutral and impartial third party, that the mediator only assists with communication between the parties and that s/he does not represent the parties or of one of it. The contract in an international family dispute should draw attention to the importance of acquiring relevant legal information /advice regarding parental agreements and their implementation in the different legal systems concerned, while pointing out that the mediator will not give legal advice.
- The contract should highlight the importance of confidentiality of the mediation process and should draw attention to applicable legal provisions. In addition, the contract may include terms obliging the parties not to subpoena the mediator.
- Reference should be made to mediation methods/models and to the scope of mediation, to the mediation costs;
- If no contract is drawn up, the above information should be made available to the parties in writing, for example through information leaflets, a personalized letter or general terms and conditions available on the website to which reference is made before commencing mediation.