Documentation

MEDIATION IN THE EU: LANGUAGE, LAW & PRACTICE

- LANGUAGE TRAINING FOR JUDGES, LAWYERS AND MEDIATORS
- FOCUS ON FAMILY MEDIATION

118DT102 Sofia, 25-28 September 2018

Co-funded by the Justice Programme 2014-2020 of the European Union.

Background documentation

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 2201/2003

of 27 November 2003

concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Parliament ([2]),

Having regard to the opinion of the European Economic and Social Committee ([3]),

Whereas:

(1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

(3) Council Regulation (EC) No 1347/2000 ([4]) sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. The content of this Regulation was substantially taken over from the Convention of 28 May 1998 on the same subject matter ([5]).

(4) On 3 July 2000 France presented an initiative for a Council Regulation on the mutual enforcement of judgments on rights of access to children ([6]).

(5) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

(6) Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility.

(7) The scope of this Regulation covers civil matters, whatever the nature of the court or tribunal.

(8) As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

(9) As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. (i) the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and (ii) the administration, conservation or disposal of the child's property. In this context, this Regulation should, for instance, apply in cases where the parents are in dispute as regards the administration of the child's property. Measures relating to the child's property which do not concern the protection of the child should continue to be governed by Council Regulation (EC) No 44/2001 of

([1]) OJ C 203 E, 27.8.2002, p. 155.
([2]) Opinion delivered on 20 September 2002 (not yet published in the Official Journal).
([3]) OJ C 61, 14.3.2003, p. 76.
([4]) OJ L 160, 30.6.2000, p. 19.
([5]) At the time of the adoption of Regulation (EC) No 1347/2000 the Council took note of the explanatory report concerning that Convention prepared by Professor Alegria Borras (OJ C 221, 16.7.1998, p. 27).
([6]) OJ C 234, 15.8.2000, p. 7.

22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([1]).

(10) This Regulation is not intended to apply to matters relating to social security, public measures of a general nature in matters of education or health or to decisions on the right of asylum and on immigration. In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons. Moreover, it does not apply to measures taken as a result of criminal offences committed by children.

(11) Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation No 44/2001.

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

(14) This Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities. Where jurisdiction under this Regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.

(15) Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ([2]) should apply to the service of documents in proceedings instituted pursuant to this Regulation.

(16) This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

(18) Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

(19) The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.

(20) The hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters ([3]).

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of

([1]) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 1496/2002 (OJ L 225, 22.8.2002, p. 13).

([2]) OJ L 160, 30.6.2000, p. 37.

([3]) OJ L 174, 27.6.2001, p. 1.

mutual trust and the grounds for non-recognition should be kept to the minimum required.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to 'judgments' for the purpose of the application of the rules on recognition and enforcement.

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be 'automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'. This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

(25) Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters ([1]).

(26) The Commission should make publicly available and update the lists of courts and redress procedures communicated by the Member States.

(27) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([2]).

(28) This Regulation replaces Regulation (EC) No 1347/2000 which is consequently repealed.

([1]) OJ L 174, 27.6.2001, p. 25.
([2]) OJ L 184, 17.7.1999, p. 23.

(29) For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(30) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(31) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.

(32) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THE PRESENT REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

(a) divorce, legal separation or marriage annulment;

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions;

(c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

(d) the placement of the child in a foster family or in institutional care;

(e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

3. This Regulation shall not apply to:

(a) the establishment or contesting of a parent-child relationship;

(b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

(c) the name and forenames of the child;

(d) emancipation;

(e) maintenance obligations;

(f) trusts or succession;

(g) measures taken as a result of criminal offences committed by children.

Article 2

Definitions

For the purposes of this Regulation:

1. the term 'court' shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

2. the term 'judge' shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;

3. the term 'Member State' shall mean all Member States with the exception of Denmark;

4. the term 'judgment' shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

5. the term 'Member State of origin' shall mean the Member State where the judgment to be enforced was issued;

6. the term 'Member State of enforcement' shall mean the Member State where enforcement of the judgment is sought;

7. the term 'parental responsibility' 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;

8. the term 'holder of parental responsibility' shall mean any person having parental responsibility over a child;

9. the term 'rights of custody' shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

10. the term 'rights of access' shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;

11. the term 'wrongful removal or retention' shall mean a child's removal or retention where:

    (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

    and

    (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

CHAPTER II

JURISDICTION

SECTION 1

Divorce, legal separation and marriage annulment

Article 3

General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

— the spouses are habitually resident, or

— the spouses were last habitually resident, insofar as one of them still resides there, or

— the respondent is habitually resident, or

— in the event of a joint application, either of the spouses is habitually resident, or

— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

2. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 4

Counterclaim

The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation.

Article 5

Conversion of legal separation into divorce

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 6

Exclusive nature of jurisdiction under Articles 3, 4 and 5

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Article 7

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

SECTION 2

Parental responsibility

Article 8

General jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 9

Continuing jurisdiction of the child's former habitual residence

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

Article 10

Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

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

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Article 11

Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the

relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 12

Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

Article 13

Jurisdiction based on the child's presence

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.

Article 14

Residual jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.

Article 15

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1. If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.

SECTION 3

Common provisions

Article 16

Seising of a Court

1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Article 17

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 18

Examination as to admissibility

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1348/2000 shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Article 19

***Lis pendens* and dependent actions**

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

Article 20

Provisional, including protective, measures

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

CHAPTER III

RECOGNITION AND ENFORCEMENT

SECTION 1

Recognition

Article 21

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 22

Grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment

A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

(g) if the procedure laid down in Article 56 has not been complied with.

Article 24

Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

Article 25

Differences in applicable law

The recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 26

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 27

Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

SECTION 2

Application for a declaration of enforceability

Article 28

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 29

Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

2. The local jurisdiction shall be determined by reference to the place of habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.

Where neither of the places referred to in the first subparagraph can be found in the Member State of enforcement, the local jurisdiction shall be determined by reference to the place of enforcement.

Article 30

Procedure

1. The procedure for making the application shall be governed by the law of the Member State of enforcement.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the applicant shall appoint a representative *ad litem*.

3. The documents referred to in Articles 37 and 39 shall be attached to the application.

Article 31

Decision of the court

1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 32

Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement.

Article 33

Appeal against the decision

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 18 shall apply.

5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 34

Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68.

Article 35

Stay of proceedings

1. The court with which the appeal is lodged under Articles 33 or 34 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin, or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 36

Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

SECTION 3

Provisions common to Sections 1 and 2

Article 37

Documents

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

and

(b) the certificate referred to in Article 39.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:

(a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document;

or

(b) any document indicating that the defendant has accepted the judgment unequivocally.

Article 38

Absence of documents

1. If the documents specified in Article 37(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 39

Certificate concerning judgments in matrimonial matters and certificate concerning judgments on parental responsibility

The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (judgments in matrimonial matters) or in Annex II (judgments on parental responsibility).

SECTION 4

Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child

Article 40

Scope

1. This Section shall apply to:

(a) rights of access;

and

(b) the return of a child entailed by a judgment given pursuant to Article 11(8).

2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.

Article 41

Rights of access

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard;

and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The certificate shall be completed in the language of the judgment.

3. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.

Article 42

Return of the child

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

Article 43

Rectification of the certificate

1. The law of the Member State of origin shall be applicable to any rectification of the certificate.

2. No appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).

Article 44

Effects of the certificate

The certificate shall take effect only within the limits of the enforceability of the judgment.

Article 45

Documents

1. A party seeking enforcement of a judgment shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

and

(b) the certificate referred to in Article 41(1) or Article 42(1).

2. For the purposes of this Article,

— the certificate referred to in Article 41(1) shall be accompanied by a translation of point 12 relating to the arrangements for exercising right of access,

— the certificate referred to in Article 42(1) shall be accompanied by a translation of its point 14 relating to the arrangements for implementing the measures taken to ensure the child's return.

The translation shall be into the official language or one of the official languages of the Member State of enforcement or any other language that the Member State of enforcement expressly accepts. The translation shall be certified by a person qualified to do so in one of the Member States.

SECTION 5

Authentic instruments and agreements

Article 46

Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.

SECTION 6

Other provisions

Article 47

Enforcement procedure

1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.

Article 48

Practical arrangements for the exercise of rights of access

1. The courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected.

2. The practical arrangements made pursuant to paragraph 1 shall cease to apply pursuant to a later judgment by the courts of the Member State having jurisdiction as to the substance of the matter.

Article 49

Costs

The provisions of this Chapter, with the exception of Section 4, shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.

Article 50

Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement.

Article 51

Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for

enforcement of a judgment given in another Member State on the following grounds:

(a) that he or she is not habitually resident in the Member State in which enforcement is sought; or

(b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her 'domicile' in either of those Member States.

Article 52

Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 37, 38 and 45 or in respect of a document appointing a representative ad litem.

CHAPTER IV

COOPERATION BETWEEN CENTRAL AUTHORITIES IN MATTERS OF PARENTAL RESPONSIBILITY

Article 53

Designation

Each Member State shall designate one or more central authorities to assist with the application of this Regulation and shall specify the geographical or functional jurisdiction of each. Where a Member State has designated more than one central authority, communications shall normally be sent direct to the relevant central authority with jurisdiction. Where a communication is sent to a central authority without jurisdiction, the latter shall be responsible for forwarding it to the central authority with jurisdiction and informing the sender accordingly.

Article 54

General functions

The central authorities shall communicate information on national laws and procedures and take measures to improve the application of this Regulation and strengthening their cooperation. For this purpose the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC shall be used.

Article 55

Cooperation on cases specific to parental responsibility

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on any procedures under way; or

(iii) on decisions taken concerning the child;

(b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;

(c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;

(d) provide such information and assistance as is needed by courts to apply Article 56; and

(e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Article 56

Placement of a child in another Member State

1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.

2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.

3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

Article 57

Working method

1. Any holder of parental responsibility may submit, to the central authority of the Member State of his or her habitual residence or to the central authority of the Member State where the child is habitually resident or present, a request for assistance as mentioned in Article 55. In general, the request shall include all available information of relevance to its enforcement. Where the request for assistance concerns the recognition or enforcement of a judgment on parental responsibility that falls within the scope of this Regulation, the holder of parental responsibility shall attach the relevant certificates provided for in Articles 39, 41(1) or 42(1).

2. Member States shall communicate to the Commission the official language or languages of the Community institutions other than their own in which communications to the central authorities can be accepted.

3. The assistance provided by the central authorities pursuant to Article 55 shall be free of charge.

4. Each central authority shall bear its own costs.

Article 58

Meetings

1. In order to facilitate the application of this Regulation, central authorities shall meet regularly.

2. These meetings shall be convened in compliance with Decision No 2001/470/EC establishing a European Judicial Network in civil and commercial matters.

CHAPTER V

RELATIONS WITH OTHER INSTRUMENTS

Article 59

Relation with other instruments

1. Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

2. (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the *Official Journal of the European Union*. They may be withdrawn, in whole or in part, at any moment by the said Member States.

(b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.

(c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.

(d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II of this Regulation, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III of this Regulation.

3. Member States shall send to the Commission:

(a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraph 2(a) and (c);

(b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 60

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;

(b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;

(c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;

(d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;

and

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Article 61

Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State;

(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

Article 62

Scope of effects

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.

Article 63

Treaties with the Holy See

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III, Section 1.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:

(a) 'Concordato lateranense' of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;

(b) Agreement between the Holy See and Spain on legal affairs of 3 January 1979.

4. Recognition of the decisions provided for in paragraph 2 may, in Italy or in Spain, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3.

5. Member States shall send to the Commission:

(a) a copy of the Treaties referred to in paragraphs 1 and 3;

(b) any denunciations of or amendments to those Treaties.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 64

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII

FINAL PROVISIONS

Article 65

Review

No later than 1 January 2012, and every five years thereafter, the Commission shall present to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Regulation on the basis of information supplied by the Member States. The report shall be accompanied if need be by proposals for adaptations.

Article 66

Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;

(b) any reference to nationality, or in the case of the United Kingdom 'domicile', shall refer to the territorial unit designated by the law of that State;

(c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;

(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

Article 67

Information on central authorities and languages accepted

The Member States shall communicate to the Commission within three months following the entry into force of this Regulation:

(a) the names, addresses and means of communication for the central authorities designated pursuant to Article 53;

(b) the languages accepted for communications to central authorities pursuant to Article 57(2);

and

(c) the languages accepted for the certificate concerning rights of access pursuant to Article 45(2).

The Member States shall communicate to the Commission any changes to this information.

The Commission shall make this information publicly available.

Article 68

Information relating to courts and redress procedures

The Member States shall notify to the Commission the lists of courts and redress procedures referred to in Articles 21, 29, 33 and 34 and any amendments thereto.

The Commission shall update this information and make it publicly available through the publication in the *Official Journal of the European Union* and any other appropriate means.

Article 69

Amendments to the Annexes

Any amendments to the standard forms in Annexes I to IV shall be adopted in accordance with the consultative procedure set out in Article 70(2).

Article 70

Committee

1. The Commission shall be assisted by a committee (committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The committee shall adopt its rules of procedure.

Article 71

Repeal of Regulation (EC) No 1347/2000

1. Regulation (EC) No 1347/2000 shall be repealed as from the date of application of this Regulation.

2. Any reference to Regulation (EC) No 1347/2000 shall be construed as a reference to this Regulation according to the comparative table in Annex V.

Article 72

Entry into force

This Regulation shall enter into force on 1 August 2004.

The Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 November 2003.

For the Council

The President

R. CASTELLI

ANNEX I

CERTIFICATE REFERRED TO IN ARTICLE 39 CONCERNING JUDGMENTS IN MATRIMONIAL MATTERS ([1])

1. Member State of origin

2. Court or authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./fax/e-mail

3. Marriage

   3.1. Wife

      3.1.1. Full name

      3.1.2. Address

      3.1.3. Country and place of birth

      3.1.4. Date of birth

   3.2. Husband

      3.2.1. Full name

      3.2.2. Address

      3.2.3. Country and place of birth

      3.2.4. Date of birth

   3.3. Country, place (where available) and date of marriage

      3.3.1. Country of marriage

      3.3.2. Place of marriage (where available)

      3.3.3. Date of marriage

4. Court which delivered the judgment

   4.1. Name of Court

   4.2. Place of Court

5. Judgment

   5.1. Date

   5.2. Reference number

   5.3. Type of judgment

      5.3.1. Divorce

      5.3.2. Marriage annulment

      5.3.3. Legal separation

([1]) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

5.4. Was the judgment given in default of appearance?

5.4.1. No

5.4.2. Yes [1]

6. Names of parties to whom legal aid has been granted

7. Is the judgment subject to further appeal under the law of the Member State of origin?

7.1. No

7.2. Yes

8. Date of legal effect in the Member State where the judgment was given

8.1. Divorce

8.2. Legal separation

Done at ....., date .....

Signature and/or stamp

[1] Documents referred to in Article 37(2) must be attached.

ANNEX II

CERTIFICATE REFERRED TO IN ARTICLE 39 CONCERNING JUDGMENTS ON PARENTAL RESPONSIBILITY ([1])

1. Member State of origin

2. Court or authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./Fax/e-mail

3. Person(s) with rights of access

   3.1. Full name

   3.2. Address

   3.3. Date and place of birth (where available)

4. Holders of parental responsibility other than those mentioned under 3 ([2])

   4.1.

      4.1.1. Full name

      4.1.2. Address

      4.1.3. Date and place of birth (where available)

   4.2.

      4.2.1. Full Name

      4.2.2. Address

      4.2.3. Date and place of birth (where available)

   4.3.

      4.3.1. Full name

      4.3.2. Address

      4.3.3. Date and place of birth (where available)

5. Court which delivered the judgment

   5.1. Name of Court

   5.2. Place of Court

6. Judgment

   6.1. Date

   6.2. Reference number

   6.3. Was the judgment given in default of appearance?

      6.3.1. No

      6.3.2. Yes ([3])

([1]) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

([2]) In cases of joint custody, a person already mentioned under item 3 may also be mentioned under item 4.

([3]) Documents referred to in Article 37(2) must be attached.

7. Children who are covered by the judgment ([1])

   7.1. Full name and date of birth

   7.2. Full name and date of birth

   7.3. Full name and date of birth

   7.4. Full name and date of birth

8. Names of parties to whom legal aid has been granted

9. Attestation of enforceability and service

   9.1. Is the judgment enforceable according to the law of the Member State of origin?

      9.1.1. Yes

      9.1.2. No

   9.2. Has the judgment been served on the party against whom enforcement is sought?

      9.2.1. Yes

         9.2.1.1. Full name of the party

         9.2.1.2. Address

         9.2.1.3. Date of service

      9.2.2. No

10. Specific information on judgments on rights of access where 'exequatur' is requested under Article 28. This possibility is foreseen in Article 40(2).

   10.1. Practical arrangements for exercise of rights of access (to the extent stated in the judgment)

      10.1.1. Date and time

         10.1.1.1. Start

         10.1.1.2. End

      10.1.2. Place

      10.1.3. Specific obligations on holders of parental responsibility

      10.1.4. Specific obligations on the person with right of access

      10.1.5. Any restrictions attached to the exercise of rights of access

11. Specific information for judgments on the return of the child in cases where the 'exequatur' procedure is requested under Article 28. This possibility is foreseen under Article 40(2).

   11.1. The judgment entails the return of the child

   11.2. Person to whom the child is to be returned (to the extent stated in the judgment)

      11.2.1. Full name

      11.2.2 Address

Done at . . . . . , date . . . . . .

Signature and/or stamp

([1]) If more than four children are covered, use a second form.

ANNEX III

CERTIFICATE REFERRED TO IN ARTICLE 41(1) CONCERNING JUDGMENTS ON RIGHTS OF ACCESS ([1])

1. Member State of origin

2. Court or authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./fax/e-mail

3. Person(s) with rights of access

   3.1. Full name

   3.2. Address

   3.3. Date and place of birth (where available)

4. Holders of parental responsibility other than those mentioned under 3 ([2]) ([3])

   4.1.

      4.1.1. Full name

      4.1.2. Address

      4.1.3. Date and place of birth (where available)

   4.2.

      4.2.1. Full name

      4.2.2. Address

      4.2.3. Date and place of birth (where available)

   4.3. Other

      4.3.1. Full name

      4.3.2. Address

      4.3.3. Date and place of birth (where available)

5. Court which delivered the judgment

   5.1. Name of Court

   5.2. Place of Court

6. Judgment

   6.1. Date

   6.2. Reference number

([1]) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

([2]) In cases of joint custody, a person already mentioned under item 3 may also be mentioned in item 4.

([3]) Please put a cross in the box corresponding to the person against whom the judgment should be enforced.

7. Children who are covered by the judgment ([1])

   7.1. Full name and date of birth

   7.2. Full name and date of birth

   7.3. Full name and date of birth

   7.4. Full name and date of birth

8. Is the judgment enforceable in the Member State of origin?

   8.1. Yes

   8.2. No

9. Where the judgment was given in default of appearance, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence, or the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally

10. All parties concerned were given an opportunity to be heard

11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity

12. Practical arrangements for exercise of rights of access (to the extent stated in the judgment)

   12.1. Date and time

      12.1.1. Start

      12.1.2. End

   12.2. Place

   12.3. Specific obligations on holders of parental responsibility

   12.4. Specific obligations on the person with right of access

   12.5. Any restrictions attached to the exercise of rights of access

13. Names of parties to whom legal aid has been granted

Done at . . . . . , date . . . . . .

Signature and/or stamp

([1]) If more than four children are concerned, use a second form.

ANNEX IV

CERTIFICATE REFERRED TO IN ARTICLE 42(1) CONCERNING THE RETURN OF THE CHILD ([1])

1. Member State of origin

2. Court or authority issuing the certificate

   2.1. Name

   2.2. Address

   2.3. Tel./fax/e-mail

3. Person to whom the child has to be returned (to the extent stated in the judgment)

   3.1. Full name

   3.2. Address

   3.3. Date and place of birth (where available)

4. Holders of parental responsibility ([2])

   4.1. Mother

      4.1.1. Full name

      4.1.2. Address (where available)

      4.1.3. Date and place of birth (where available)

   4.2. Father

      4.2.1. Full name

      4.2.2. Address (where available)

      4.2.3. Date and place of birth (where available)

   4.3. Other

      4.3.1. Full name

      4.3.2. Address (where available)

      4.3.3. Date and place of birth (where available)

5. Respondent (where available)

   5.1. Full name

   5.2. Address (where available)

6. Court which delivered the judgment

   6.1. Name of Court

   6.2. Place of Court

([1]) Council Regulation (EC) No 2201 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.

([2]) This item is optional.

7. Judgment

   7.1. Date

   7.2. Reference number

8. Children who are covered by the judgment ([1])

   8.1. Full name and date of birth

   8.2. Full name and date of birth

   8.3. Full name and date of birth

   8.4. Full name and date of birth

9. The judgment entails the return of the child

10. Is the judgment enforceable in the Member State of origin?

    10.1. Yes

    10.2. No

11. The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity

12. The parties were given an opportunity to be heard

13. The judgment entails the return of the children and the court has taken into account in issuing its judgment the reasons for and evidence underlying the decision issued pursuant to Article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

14. Where applicable, details of measures taken by courts or authorities to ensure the protection of the child after its return to the Member State of habitual residence

15. Names of parties to whom legal aid has been granted

Done at . . . . . , date . . . . . .

Signature and/or stamp

([1]) If more than four children are covered, use a second form.

ANNEX V

COMPARATIVE TABLE WITH REGULATION (EC) No 1347/2000

Articles repealed	Corresponding Articles of new text
1	1, 2
2	3
3	12
4	
5	4
6	5
7	6
8	7
9	17
10	18
11	16, 19
12	20
13	2, 49, 46
14	21
15	22, 23
16	
17	24
18	25
19	26
20	27
21	28
22	21, 29
23	30
24	31

Articles repealed	Corresponding Articles of new text
25	32
26	33
27	34
28	35
29	36
30	50
31	51
32	37
33	39
34	38
35	52
36	59
37	60, 61
38	62
39	
40	63
41	66
42	64
43	65
44	68, 69
45	70
46	72
Annex I	68
Annex II	68
Annex III	68
Annex IV	Annex I
Annex V	Annex II

ANNEX VI

Declarations by Sweden and Finland pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

Declaration by Sweden:

Pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Sweden hereby declares that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply in full in relations between Sweden and Finland, in place of the rules of the Regulation.

Declaration by Finland:

Pursuant to Article 59(2)(a) of the Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Finland hereby declares that the Convention of 6 February 1931 between Finland, Denmark, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply in full in relations between Finland and Sweden, in place of the rules of the Regulation.

DIRECTIVES

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 May 2008

on certain aspects of mediation in civil and commercial matters

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.

(3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

(6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

(9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.

[1] OJ C 286, 17.11.2005, p. 1.

[2] Opinion of the European Parliament of 29 March 2007 (OJ C 27 E, 31.1.2008, p. 129). Council Common Position of 28 February 2008 (not yet published in the Official Journal) and Position of the European Parliament of 23 April 2008 (not yet published in the Official Journal).

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

(11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.

(12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. This Directive should not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seised requests assistance or advice from a competent person.

(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

(14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.

(15) In order to provide legal certainty, this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.

(16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.

(17) Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.

(18) In the field of consumer protection, the Commission has adopted a Recommendation [1] establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation.

(19) 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. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

[1] Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

(20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1] or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2].

(21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, 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.

(22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.

(23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.

(24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive.

(25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

(26) In accordance with point 34 of the Interinstitutional agreement on better law-making [3], Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(27) This Directive seeks to promote the fundamental rights, and takes into account the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.

(28) Since the objective of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Directive.

(30) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

[1] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

[2] OJ L 338, 23.12.2003, p. 1. Regulation as amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1).

[3] OJ C 321, 31.12.2003, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is ordered by a court;

(c) an obligation to use mediation arises under national law; or

(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Article 3

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Article 4

Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Article 5

Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Article 6

Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an 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.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Article 7

Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

Article 8

Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

Article 9

Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Article 10

Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

Article 11

Review

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

Article 12

Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 May 2008.

For the European Parliament	*For the Council*
The President	*The President*
H.-G. PÖTTERING	J. LENARČIČ

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their

own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy

throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute

a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any

amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

(Concluded 25 October 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

---

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Child Abduction Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
b) where available, the date of birth of the child;
c) the grounds on which the applicant's claim for return of the child is based;
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;
f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –
a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.
Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

34. CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN[1]

(Concluded 19 October 1996)

The States signatory to the present Convention,
Considering the need to improve the protection of children in international situations,
Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,
Recalling the importance of international co-operation for the protection of children,
Confirming that the best interests of the child are to be a primary consideration,
Noting that the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors* is in need of revision,
Desiring to establish common provisions to this effect, taking into account the *United Nations Convention on the Rights of the Child* of 20 November 1989,
Have agreed on the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

(1) The objects of the present Convention are –
- *a)* to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
- *b)* to determine which law is to be applied by such authorities in exercising their jurisdiction;
- *c)* to determine the law applicable to parental responsibility;
- *d)* to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- *e)* to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

(2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions". For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children* (615 pp.).

Article 3

The measures referred to in Article 1 may deal in particular with –

a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;

b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

c) guardianship, curatorship and analogous institutions;

d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;

f) the supervision by a public authority of the care of a child by any person having charge of the child;

g) the administration, conservation or disposal of the child's property.

Article 4

The Convention does not apply to –

a) the establishment or contesting of a parent-child relationship;

b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

c) the name and forenames of the child;

d) emancipation;

e) maintenance obligations;

f) trusts or succession;

g) social security;

h) public measures of a general nature in matters of education or health;

i) measures taken as a result of penal offences committed by children;

j) decisions on the right of asylum and on immigration.

CHAPTER II – JURISDICTION

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

(1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.

(2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Article 7

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

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

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

(2) The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

– request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or

– suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a) a State of which the child is a national,

b) a State in which property of the child is located,

c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

– request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or

– invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

(2) The authorities concerned may proceed to an exchange of views.

(3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Article 10

(1) Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if
   a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and
   b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

(2) The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

Article 11

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12

(1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 13

(1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

(2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

Article 14

The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III – APPLICABLE LAW

Article 15

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.
(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Article 16

(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.
(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.
(4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

Article 17

The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Article 18

The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Article 19

(1) The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.
(2) The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 20

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 21

(1) In this Chapter the term "law" means the law in force in a State other than its choice of law rules.
(2) However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

CHAPTER IV – RECOGNITION AND ENFORCEMENT

Article 23

(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
(2) Recognition may however be refused –
a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
f) if the procedure provided in Article 33 has not been complied with.

Article 24

Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 25

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 26

(1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
(2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
(3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Article 27

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 28

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

CHAPTER V – CO-OPERATION

Article 29

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 30

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.
(2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Article 31

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –

a) facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;
b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;
c) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.

Article 32

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,

a) provide a report on the situation of the child;

b) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

Article 33

(1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

(2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Article 34

(1) Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.

(2) A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Article 35

(1) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.

(2) The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.

(3) An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.

(4) Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Article 36

In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 37

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

Article 38

(1) Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.
(2) Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 39

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI – GENERAL PROVISIONS

Article 40

(1) The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.
(2) The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.
(3) Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 41

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 42

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 43

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 44

Each Contracting State may designate the authorities to which requests under Articles 8, 9 and 33 are to be addressed.

Article 45

(1) The designations referred to in Articles 29 and 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law.
(2) The declaration referred to in Article 34, paragraph 2, shall be made to the depositary of the Convention.

Article 46

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 47

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

(1) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
(2) any reference to the presence of the child in that State shall be construed as referring to presence in a territorial unit;
(3) any reference to the location of property of the child in that State shall be construed as referring to location of property of the child in a territorial unit;
(4) any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection;
(5) any reference to the State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, shall be construed as referring to the territorial unit whose authorities are seised of such application;
(6) any reference to the State with which the child has a substantial connection shall be construed as referring to the territorial unit with which the child has such connection;
(7) any reference to the State to which the child has been removed or in which he or she has been retained shall be construed as referring to the relevant territorial unit to which the child has been removed or in which he or she has been retained;
(8) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit;
(9) any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure or authority of the territorial unit in which such measure was taken;
(10) any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought.

Article 48

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;
b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 47 applies.

Article 49

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply –

a) if there are rules in force in such a State identifying which among such laws applies, that law applies;

b) in the absence of such rules, the law of the system or the set of rules of law with which the child has the closest connection applies.

Article 50

This Convention shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 51

In relations between the Contracting States this Convention replaces the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, and the *Convention governing the guardianship of minors*, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

Article 52

(1) This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
(2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
(3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
(4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 53

(1) The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.
(2) The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

Article 54

(1) Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.
(2) However, a Contracting State may, by making a reservation in accordance with Article 60, object to the use of either French or English, but not both.

Article 55

(1) A Contracting State may, in accordance with Article 60,
    a) reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory;
    b) reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.
(2) The reservation may be restricted to certain categories of property.

Article 56

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES

Article 57

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session.
(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 58

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 61, paragraph 1.
(2) The instrument of accession shall be deposited with the depositary.
(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b* of Article 63. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 60

(1) Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 59, make one or both of the reservations provided for in Articles 54, paragraph 2, and 55. No other reservation shall be permitted.
(2) Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.
(3) The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 61

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.
(2) Thereafter the Convention shall enter into force –
    a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 58, paragraph 3;

c) for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 62

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 63

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 58 of the following –

a) the signatures, ratifications, acceptances and approvals referred to in Article 57;

b) the accessions and objections raised to accessions referred to in Article 58;

c) the date on which the Convention enters into force in accordance with Article 61;

d) the declarations referred to in Articles 34, paragraph 2, and 59;

e) the agreements referred to in Article 39;

f) the reservations referred to in Articles 54, paragraph 2, and 55 and the withdrawals referred to in Article 60, paragraph 2;

g) the denunciations referred to in Article 62.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 19th day of October 1996, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Eighteenth Session.

EUROPEAN CODE OF CONDUCT FOR MEDIATORS

This code of conduct sets out a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility. It may be used by mediators involved in all kinds of mediation in civil and commercial matters.

Organisations providing mediation services may also make such a commitment by asking mediators acting under the auspices of their organisation to respect the code of conduct. Organisations may make available information on the measures, such as training, evaluation and monitoring, they are taking to support the respect of the code by individual mediators.

For the purposes of the code of conduct, mediation means any structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person – hereinafter "the mediator".

Adherence to the code of conduct is without prejudice to national legislation or rules regulating individual professions.

Organisations providing mediation services may wish to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as to specific areas such as family mediation or consumer mediation.

European Code of Conduct for Mediators

1. COMPETENCE, APPOINTMENT AND FEES OF MEDIATORS AND PROMOTION OF THEIR SERVICES

1.1. Competence

Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2. Appointment

Mediators must confer with the parties regarding suitable dates on which the mediation may take place. Mediators must verify that they have the appropriate background and competence to conduct mediation in a given case before accepting the appointment. Upon request, they must disclose information concerning their background and experience to the parties.

1.3. Fees

Where not already provided, mediators must always supply the parties with complete information as to the mode of remuneration which they intend to apply. They must not agree to act in a mediation before the principles of their remuneration have been accepted by all parties concerned.

1.4. Promotion of mediators' services

Mediators may promote their practice provided that they do so in a professional, truthful and dignified way.

2. INDEPENDENCE AND IMPARTIALITY

2.1. Independence

If there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act.

Such circumstances include:

– any personal or business relationship with one or more of the parties;

– any financial or other interest, direct or indirect, in the outcome of the mediation;

– the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties.

In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent.

The duty to disclose is a continuing obligation throughout the process of mediation.

2.2. Impartiality

Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

3. THE MEDIATION AGREEMENT, PROCESS AND SETTLEMENT

3.1. Procedure

The mediator must ensure that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator must in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement may, upon request of the parties, be drawn up in writing.

The mediator must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute. The parties may agree with the mediator on the manner in which the mediation is to be conducted, by reference to a set of rules or otherwise.

The mediator may hear the parties separately, if he deems it useful.

3.2. Fairness of the process

The mediator must ensure that all parties have adequate opportunities to be involved in the process.

The mediator must inform the parties, and may terminate the mediation, if:

– a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or

– the mediator considers that continuing the mediation is unlikely to result in a settlement.

3.3. The end of the process

The mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator must, upon request of the parties and within the limits of his competence, inform the parties as to how they may formalise the agreement and the possibilities for making the agreement enforceable.

4. CONFIDENTIALITY

The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.

Guide to Good Practice
under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Mediation

HccH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

Guide to Good Practice
under the Hague Convention
of 25 October 1980 on
the Civil Aspects of
International Child Abduction

Mediation

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

Published by
The Hague Conference on Private International Law
Permanent Bureau
6, Scheveningseweg
2517 KT The Hague
The Netherlands

Telephone: +31 70 363 3303
Fax: +31 70 360 4867
E-mail: secretariat@hcch.net
Website: www.hcch.net

ISBN 978-94-90265-04-5

Printed in The Hague, The Netherlands

Outline

Table of contents

Terminology

The following terms are presented by thematic content rather than in alphabetic order.

Mediation

For the purposes of this Guide it is important to distinguish between 'mediation' and similar methods of facilitating an agreed resolution of disputes.

The definitions of 'mediation' that can be found in legal texts and publications vary significantly and often reflect certain minimum requirements regarding the mediation process and the person of the mediator in the relevant jurisdictions. Drawing together the common features in these various definitions, mediation can be defined as a voluntary, structured process whereby a 'mediator'[1] facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.[2] This Guide refers to 'mediation' in this broad sense, without prejudice to the model and method applied. Other commonly required but not uniformly applied principles that are sometimes incorporated in the definition of mediation, such as confidentiality, neutrality or impartiality, will be dealt with in Chapter 6 of the Guide.

Mediator

Many definitions of the term 'mediator' in national or regional instruments mirror the necessary (legal) requirements a person has to fulfil to be a 'mediator' and the manner in which mediation has to be conducted. Concentrating again on the common features, a 'mediator' will be understood in this Guide as an impartial third party, who is conducting the mediation. The term is used, unless mentioned otherwise, without prejudice to the professional background of the mediator and specific requirements a person may have to fulfil to be able to call him- or herself 'mediator' in a given legal system.

The term 'mediator' is used in this Guide without prejudice to whether mediation is conducted as co-mediation or as single mediation, *i.e.*, unless stated otherwise, any use in this Guide of the term 'mediator' in the singular is also meant to refer to mediation conducted by more then one mediator.

1 Mediation can also be conducted by more than one mediator, see also the definition of the term 'mediator' below as well as section 6.2.2 dealing with co-mediation.

2 For a concise comparative overview of mediation definitions used in different countries, see K.J. Hopt and F. Steffek, *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen*, Mohr Siebeck, Tübingen, 2008, pp. 12 *et seq.*

Conciliation

Mediation and conciliation are sometimes used as synonyms,[3] which may be a cause of confusion. Today, conciliation is generally characterised as a more directive process than that of mediation. Conciliation will therefore be understood for the purposes of this Guide as a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties find an agreed solution to their dispute. Mediation can be proactive, but cannot be directive. For mediation, emphasis has to be placed on the fact that the mediator him- or herself is not in a position to make a decision for the parties, but only assists the parties in finding their own solution. Conversely, the conciliator can direct the parties towards a concrete solution.[4] This can be illustrated by the following example. A judge with mediator training may conduct mediation, but only in a dispute where he / she is not the judge seised and where the judge refrains from influencing the result of the parties' conflict resolution process. A judge seised can, by definition, never 'mediate' in a case before him or her, *i.e.*, where the parties know that the judge is the person rendering the decision if their attempt to find an amicable solution should fail.[5] A process by which the judge in the case before him / her engages in assisting the parties in finding an agreed solution and in bringing about a judicial settlement would rather fall under the meaning of conciliation as understood in this Guide.[6]

Counselling

Mediation has to be distinguished from counselling, a process that can be used to assist couples or families in dealing with relationship problems. In contrast to mediation, counselling does not generally focus on the solution of a specific dispute.

Arbitration

Mediation and conciliation can be distinguished from arbitration in that the former two aim at developing an agreed solution between the parties, whereas in arbitration the impartial third party (arbitrator) solves the dispute by making a decision. While the parties must agree to arbitration and to abide by the outcome, the arbitration process is not geared towards bringing about an agreed outcome.[7]

---

3 See, for example, the UNCITRAL Model Law on International Commercial Conciliation adopted by UNCITRAL in 2002, available at < http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf > (last consulted 16 June 2012), Art. 1(3): 'For the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.'

4 Regarding the differences between mediation and conciliation, see also 'A fair say – A Guide to Managing Differences in Mediation and Conciliation' (August 1999), drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), p. 1, available at < http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/AFairSay.aspx > (last consulted 16 June 2012).

5 This is a widely respected principle; for a comparative overview of mediation definitions used in different countries, see K.J. Hopt and F. Steffek (*op. cit.* note 2), p. 12; see also Art. 3 of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ L 136*, 24.5.2008 (hereinafter, 'European Directive on mediation'), available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:NOT > (last consulted 16 June 2012).

6 But definitions of conciliation differ, see for example the UNCITRAL Model Law on International Commercial Conciliation (*supra* note 3), Art. 1(3).

7 For further details on distinguishing mediation and arbitration, see, *inter alia*, N. Alexander, *International and Comparative Mediation*, Austin – Boston – Chicago – New York – the Netherlands, Wolters Kluwer, 2008, pp. 26, 27.

Early neutral evaluation

In 'early neutral evaluation' the parties receive a non-binding expert evaluation of their legal situation, subsequent to which they are given the opportunity to negotiate an agreed solution.[8]

Collaborative law

In the 'collaborative law' model, the parties are assisted by 'collaborative lawyers' who use interest based problem solving negotiation techniques to resolve the dispute without going to court.[9] Where no agreement is found and the matter has to be solved in judicial proceedings, the collaborative lawyers are disqualified from continuing representation.

Co-operative law

The 'co-operative law' model follows the principles of the 'collaborative law' model, except that the representatives are not disqualified when the matter has to be brought before a court.[10]

Direct or indirect mediation

When using the term 'direct mediation', the Guide refers to mediation in which both parties directly and simultaneously participate in the mediation sessions with the mediator, either in a face-to-face meeting with the mediator or in a long-distance meeting using video / teleconferencing facilities or communication over the Internet.[11]

Conversely, the term 'indirect mediation' refers to mediation in which the parties do not directly meet one another during the mediation but each meet with the mediator separately. The separate meetings with the mediator can be held across two separate States or in the same State with mediation taking place at different times or at the same time but in different rooms.[12]

It is, of course, also possible for a mediation process to include both indirect and direct mediation. For example, a direct mediation can be accompanied or preceded by so-called 'caucus' meetings, where the mediator meets with each party separately.

Court based / court annexed mediation

In this Guide the terms 'court based mediation' or 'court annexed mediation' are used to refer to mediation services that are run by or through the court itself. In these schemes mediation is offered either by mediators working for the court or by judges with mediator training who can, of course, only 'mediate' in cases where they are not the judge seised. The mediation venue is often somewhere in the court building itself.

8 For further details, see, *inter alia,* N. ver Steegh, 'Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process', 42 *Fam. LQ* (2008-2009), 659, at p. 663.

9 *Ibid.*, p. 667.

10 *Ibid.*, p. 668.

11 See 'Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980', drawn up by S. Vigers, former Legal Officer of the Permanent Bureau, Prel. Doc. No 5 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (hereinafter, 'Note on the development of mediation, conciliation and similar means', available on the Hague Conference website at < www.hcch.net > under 'Child Abduction Section'), 4.1, p. 14.

12 See *ibid.*, 4.1, p. 15.

Out of court mediation

The term 'out of court mediation' is used in this Guide to refer to mediation operated by a body not directly linked to the court. It may involve State run or State approved bodies and mediation services provided by individuals as well as private mediation organisations.[13]

Mediated agreement

This Guide uses the term 'mediated agreement' when referring to the outcome of mediation, *i.e.*, the agreed solution reached by the parties in mediation. It should be noted that in some jurisdictions the term 'memorandum of understanding' is preferred to refer to the immediate outcome of mediation, to avoid any assumption as to the legal nature of the mediated result. (See Chapter 12 below for more details.)

To avoid confusion, it should be noted that the Guide also uses the term 'contract to mediate' which relates to a contract between the mediator and the parties in dispute prior to mediation, by which the specifics of the mediation process as well as costs and other issues may be defined.[14]

Parental responsibility

As defined in the 1996 Hague Child Protection Convention, the term 'parental responsibility' refers to 'parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child'.[15] In other words, 'parental responsibility' includes all legal rights and duties a parent, a guardian or other legal representatives have in respect of a child with a view to raising the child and ensuring the child's development. The concept of 'parental responsibility' encompasses 'rights of custody' as well as 'rights of contact', but is much broader than these two. Where parental rights and duties are referred to as a whole, many legal systems as well as regional and international instruments today refer to the term 'parental responsibility'. This is to overcome the terminological focus in this area of law on the parents' rights and to acknowledge the equal importance of parental duties and children's rights and welfare.

As concerns the term 'rights of access', the Guide gives preference to the term 'rights of contact' which reflects a child-centred approach in line with the modern concept of 'parental responsibility'.[16] The term 'contact' is used in a broad sense to include the various ways in which a non-custodial parent (and sometimes another relative or established friend of the child) maintains personal relations with the child, whether through periodic visitation or access, by distance communication or by other means.[17] The Guide uses the term 'rights of custody' in accordance with the terminology of the 1980 Hague Child Abduction Convention.

---

13 For further details on court annexed and out of court mediation, see also 'Feasibility Study on Cross-Border Mediation in Family Matters', drawn up by the Permanent Bureau, Prel. Doc. No 20 of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), section 2.4, p. 6.

14 See section 3.5 below.

15 Art. 1(2) of the 1996 Convention.

16 This is in line with the terminology used by the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (Jordan Publishing, 2008), hereinafter, 'Guide to Good Practice on Transfrontier Contact' (also available on the Hague Conference website at < www.hcch.net > under 'Child Abduction Section' then 'Guides to Good Practice'), see at p. xxvi.

17 This is in line with the terminology used by the Guide to Good Practice on Transfrontier Contact (*ibid.*).

Left-behind parent and taking parent

The parent who claims that his / her custody rights were breached by a wrongful removal or retention is referred to in this Guide as the 'left-behind parent'. In accordance with Article 3 of the 1980 Hague Child Abduction Convention, a removal or retention is considered wrongful where it is in breach of actually exercised custody rights attributed to a person, an institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. In a small number of cases within the scope of the 1980 Convention it is a person other than the parent (a grandparent a step-parent or any other related or unrelated person) or an institution or other body whose custody rights are breached by a wrongful removal or retention of the child. To avoid lengthy descriptions throughout the Guide, unless otherwise stated, the term 'left-behind parent' will be meant to include any other person or body[18] whose custody rights are allegedly breached by a wrongful removal or retention.

The parent who is alleged to have wrongfully removed a child from his / her place of habitual residence to another State or to have wrongfully retained a child in another State will be referred to in this Guide as the 'taking parent'. In parallel to the use of the term 'left-behind parent', unless otherwise stated, reference in this Guide to the term 'taking parent' will be meant to include any person, institution or other body[19] who is alleged to have wrongfully removed or retained a child.

Domestic violence and child abuse

The term 'domestic violence' may, depending on the definition used, encompass many different facets of abuse within the family. The abuse may be physical or psychological; it may be directed towards the child ('child abuse') and / or towards the partner (sometimes referred to as 'spousal abuse') and / or other family members.

This Guide uses the term 'domestic violence', unless stated otherwise, in the broad sense outlined above. Regarding domestic violence against a child, the Guide will distinguish between indirect and direct violence. The first is domestic violence towards a parent or other members of the household, which affects the child, and the second is domestic violence towards the child. Only the latter will be referred to as 'child abuse' in this Guide.[20]

18 Of course, if an institution or other body is concerned, the question of mediation may not arise, or may differ immensely to mediation between natural persons if it arises.

19 Of course, if an institution or other body is concerned, the question of mediation may not arise, or may differ immensely to mediation between natural persons if it arises.

20 See Chapter 10 on domestic violence.

Objectives and scope

This Guide promotes good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, 'the 1980 Hague Child Abduction Convention' or 'the 1980 Convention'). In line with other modern Hague Family Conventions, the 1980 Hague Child Abduction Convention encourages the amicable resolution of family disputes. Article 7 of the 1980 Convention states that Central Authorities 'shall take all appropriate measures (...) to secure the voluntary return of the child or to bring about an amicable resolution of the issues'. The more recent of the modern Hague Family Conventions explicitly mention the use of mediation, conciliation and similar methods.[21]

Among the different means of amicable dispute resolution, this Guide primarily addresses 'mediation' as one of the most widely promoted methods of alternative dispute resolution in family law. This Guide, however, also refers to good practices with regard to other processes to facilitate agreed solutions, such as conciliation. A separate chapter[22] is dedicated to these other methods and due consideration is given to their specific nature. However, some of the mediation good practices promoted in this Guide are applicable or adaptable to a number of these other processes.

While highlighting the particularities of amicable dispute resolution in the context of child abductions and disputes over access / contact under the 1980 Hague Child Abduction Convention, this Guide outlines principles and good practices which, it is hoped, will be valuable in the use of mediation and similar processes in cross-border family disputes in general. As such, the Guide is meant to be of assistance to States Parties to the 1980 Convention, but also to States Parties to other Hague Conventions that promote the use of mediation, conciliation or similar means to facilitate agreed solutions in international family disputes. These Conventions include the *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* (hereinafter, 'the 1996 Hague Child Protection Convention' or 'the 1996 Convention'), the *Hague Convention of 13 January 2000 on the International Protection of Adults* and the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. In addition, this Guide is intended to assist States that are not Parties to these Hague Conventions, but that are considering how best to develop effective structures to promote cross-border mediation in international family disputes. The Guide is addressed to governments and Central Authorities appointed under the 1980 Convention and under other relevant Hague Conventions, as well as judges, lawyers, mediators, parties to cross-border family disputes and other interested individuals.

21 See Art. 31 *b)* of the *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*; Art. 31 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*; and Arts 6(2) *d)*, 34(2) *i)* of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

22 Chapter 15.

This Guide is the fifth Guide to Good Practice developed to support the practical operation of the 1980 Hague Child Abduction Convention. The four previously published Guides are: *Part I – Central Authority Practice; Part II – Implementing Measures; Part III – Preventive Measures*; and *Part IV – Enforcement*.[23]

In addition, the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children*[24] relates to both the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

Nothing in this Guide may be construed as binding on States Parties to the 1980 Hague Child Abduction Convention or other Hague Family Conventions. The general principles set forth in this Guide are purely advisory in nature.

All States Parties, and in particular Central Authorities designated under the 1980 Hague Child Abduction Convention, are encouraged to review their own practices and, where appropriate and feasible, to improve them. For both established and developing Central Authorities, implementation of the 1980 Convention should be seen as a continuing, progressive or incremental process constantly tending towards improvement.

•••••

The Permanent Bureau would like to thank the many experts including experts from non-governmental organisations, whose accumulated wisdom and experience have contributed to the Guide.[25] Particular thanks are due to Juliane Hirsch, former Senior Legal Officer with the Permanent Bureau, who carried out the principal work on this Guide and to Sarah Vigers, former Legal Officer with the Permanent Bureau, who in 2006 prepared a comparative study on the development of mediation, conciliation and similar means in the context of the 1980 Hague Child Abduction Convention which informed the drafting of this Guide.

23 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (Jordan Publishing, 2003), hereinafter, 'Guide to Good Practice on Central Authority Practice'; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2005), hereinafter, 'Guide to Good Practice on Preventive Measures'; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (Jordan Publishing, 2010), hereinafter, 'Guide to Good Practice on Enforcement'. The Guides to Good Practice are also available on the Hague Conference website at < www.hcch.net > under 'Child Abduction Section' then 'Guides to Good Practice'.

24 *Op. cit.* note 16.

25 The following individuals served on the Experts Group assisting with the preparation of this Guide: Ms Gladys Alvarez (Argentina), the Honourable Judge Peter F. Boshier (New Zealand), Ms Cilgia Caratsch (Switzerland), Mr Eberhard Carl (Germany), Ms Denise Carter (United Kingdom), Ms Sandra Fenn (United Kingdom), Mme Lorraine Filion (Canada), Mme Danièle Ganancia (France), Mme Barbara Gayse (Belgium), Mme Ankeara Kaly (France), Mrs Robine G. de Lange-Tegelaar (Netherlands), Judge Wilney Magno de Azevedo Silva (Brazil), Mrs Lisa Parkinson (United Kingdom), Mr Christoph C. Paul (Germany), Ms Toni Pirani (Australia), Ms Els Prins (Netherlands), Ms Kathleen S. Ruckman (United States of America), Mr Craig T. Schneider (South Africa), Ms Andrea Schulz (Germany), Mr Peretz Segal (Israel), Ms Sarah Vigers (United Kingdom), Ms Lisa Vogel (United States of America) and Ms Jennifer H. Zawid (United States of America).

Introduction

A Background work of the Hague Conference on international mediation in family matters and similar processes to bring about agreed solutions

1 The Hague Conference's work in recent decades reflects the increasing importance of mediation and other methods to bring about agreed solutions in international family law. Most of the modern Hague Family Conventions explicitly encourage mediation and similar processes for finding appropriate solutions to cross-border family disputes. Several of the Guides to Good Practice drafted to support the effective implementation and operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention draw attention to the importance of promoting agreed solutions.[26]

2 At the same time, mediation in cross-border family disputes in general has been discussed for many years as one of the topics of future work for the Hague Conference. In April 2006, the Permanent Bureau of the Hague Conference was mandated by its Member States to:

> 'prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject'.[27]

3 The Feasibility Study on Cross-Border Mediation in Family Matters,[28] which explored possible directions of future work for the Hague Conference in the field of cross-border family mediation, was presented to the Council on General Affairs and Policy of the Conference (hereinafter, 'the Council') in April 2007. The Council decided to invite the Hague Conference Members to:

> 'provide comments, before the end of 2007, on the feasibility study on cross-border mediation in family matters (...) with a view to further discussion of the topic at the spring 2008 meeting of the Council'.[29]

4 In April 2008, the Council:

> 'invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters'.[30]

5 Furthermore, the Permanent Bureau was asked, as a first step, to commence work on:

> 'a Guide to Good Practice on the use of mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (...), to be submitted for consideration at the next meeting of the Special Commission to review the practical operation of that Convention (...) in 2011'.[31]

---

26 See for example the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), Chapter 2, pp. 6 *et seq.*; Guide to Good Practice on Central Authority Practice (*op. cit.* note 23), section 4.12, Voluntary return, pp. 49 *et seq.*; Guide to Good Practice on Preventive Measures (*op. cit.* note 23), section 2.1.1, Voluntary agreement and mediations, pp. 15-16.

27 Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), Recommendation No 3.

28 *Op. cit.* note 13.

29 Recommendations and Conclusions adopted by the Council on General Affairs and Policy of the Conference (2-4 April 2007) (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), Recommendation No 3.

30 Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008) (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), p. 1, 3rd para. (Cross-border mediation in family matters).

31 *Ibid.*

6 In its Conclusions and Recommendations, the 2009 Council meeting confirmed that decision:

> 'The Council reaffirmed its decision taken at the meeting of April 2008 in relation to cross-border mediation in family matters. It approved the proposal of the Permanent Bureau that the Guide to Good Practice for Mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* be submitted for consultation to Members by the beginning of 2010 and then for approval to the Special Commission to review the practical operation of the 1980 Child Abduction Convention and the *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* at its next meeting in 2011.'[32]

7 It should be noted that the discussion regarding the use of mediation and similar means in the context of the 1980 Hague Child Abduction Convention also dates back many years. The topic had been explored at a series of meetings of the Special Commission to review the practical operation of the 1980 Convention. In October 2006, the Permanent Bureau published a comparative study[33] which focused on mediation schemes in the context of the 1980 Convention for discussion at the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the implementation of the 1996 Hague Child Protection Convention (October / November 2006).

8 The 2006 Special Commission meeting reaffirmed Recommendations Nos 1.10 and 1.11 of the 2001 meeting of the Special Commission:

> '1.10 Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7((2)) c) of the (1980) Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised.
>
> 1.11 Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings.'[34]

9 As regards mediation itself, the 2006 Special Commission concluded:

> '1.3.2 The Special Commission welcomes the mediation initiatives and projects which are taking place in Contracting States in the context of the 1980 Hague Convention, many of which are described in Preliminary Document No 5 (Note on the development of mediation, conciliation and similar means).
>
> 1.3.3 The Special Commission invites the Permanent Bureau to continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction. The Special Commission notes that the Permanent Bureau is continuing its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006.'[35]

---

32 Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009) (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), pp. 1-2 (Cross-border mediation in family matters).

33 S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11).

34 See the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001), April 2001, reiterated in the Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *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* (30 October – 9 November 2006), November 2006, at Recommendation No 1.3.1; both texts available at < www.hcch.net > under 'Child Abduction Section'.

35 See Conclusions and Recommendations of the Fifth Meeting of the Special Commission (*ibid.*).

10 Work on the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention commenced in 2009. A group of independent experts[36] from different Contracting States was invited to assist with the preparation of the Guide. A draft Guide[37] was circulated to the Contracting States to the 1980 Convention and the Hague Conference Members in advance of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. The Special Commission 'welcome(d) the draft Guide to Good Practice on Mediation under the 1980 Convention' and requested that the Permanent Bureau 'make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts' and to circulate a revised version to Members and Contracting States for final consultations.[38] A revised version of the Guide to Good Practice was circulated to the Hague Conference Members and Contracting States to the 1980 Convention in May 2012 for last comments, which were implemented subsequently.

11 Following a Recommendation of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, which had in some detail discussed the problem of cross-border enforceability of mediated agreements, the 2012 Council mandated the Hague Conference to

> 'establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention',

indicating that

> '(s)uch work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area'.[39]

12 Furthermore, attention needs to be drawn to the Hague Conference's activity in promoting mediation and the development of mediation structures in cross-border family disputes in the context of the Malta Process.

13 The Malta Process, a dialogue between judges and senior government officials from certain 'Hague Convention States' and certain 'non-Convention States', whose laws are based on or have been influenced by Shariah law, focuses on seeking solutions to cross-border disputes concerning child custody, contact and abduction that are particularly difficult due to the non-applicability of relevant international legal frameworks. Three conferences were held in Malta, in 2004, 2006 and 2009, to make progress on the issue.

14 Following a recommendation from the Third Malta Conference,[40] the 2009 Council mandated, in the context of the Malta Process, the establishment of

> 'a Working Party to promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children. The Working Party would comprise experts from a number of States involved in the Malta Process, including both States Parties to the 1980 Child Abduction Convention and non-States Parties.'[41]

---

36 For the list of members of the group of independent experts assisting with the preparation of the Guide, see note 25 above.

37 'Draft Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part V – Mediation', drawn up by the Permanent Bureau, Prel. Doc. No 5 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (available at < www.hcch.net > under 'Child Abduction Section').

38 See the Conclusions and Recommendations adopted by Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011) (available at < www.hcch.net > under 'Child Abduction Section'), Recommendation No 58.

39 Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012) (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), Recommendation No 7.

40 For further information on the Malta Process and the Malta Conferences, see the Malta Declarations (available at < www.hcch.net > under 'Child Abduction Section'); see also *The Judges' Newsletter on International Child Protection*, Vol. XVI (spring 2010) on the Third Malta Judicial Conference on Cross-Frontier Family Law Issues (23-26 March 2009) (available at < www.hcch.net > under 'Publications').

41 Conclusions and Recommendations adopted by the 2009 Council (*op. cit.* note 32), p. 2.

15 The Working Party was set up in June 2009 and consisted of a small number of independent mediation experts as well as experts from Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. The latter list comprises both Contracting and non-Contracting States to the 1980 Hague Child Abduction Convention. The Working Party held two conference call meetings, on 30 July and 29 October 2009, as well as one in-person meeting from 11 to 13 May 2010 in Ottawa (Canada). Two Questionnaires, one on existing mediation structures and one on the enforceability of mediated agreements, were circulated in preparation of the Working Party conference calls, responses to which are published on the Hague Conference website.[42] Following the second conference call meeting, Draft Principles for the establishment of mediation structures were established, then discussed and further elaborated by the Working Party at the in-person meeting in Ottawa. The Principles were finalised in autumn 2010 together with an Explanatory Memorandum, both of which are available on the Hague Conference website, in English, French and Arabic.[43]

16 In early 2011, some States commenced implementation of the Principles in their jurisdictions and designated a Central Contact Point for international family mediation.[44] In April 2011 the Council 'welcomed the Principles for the establishment of mediation structures in the context of the Malta Process (...) and agreed that the Principles should be presented for discussion at the Sixth Meeting of the Special Commission'.[45] At the same time, the Council mandated the Working Party to continue work on the implementation of mediation structures in the context of the Malta Process.[46]

17 At its meeting in June 2011, the Special Commission on the practical operation of the 1980 and the 1996 Hague Conventions noted 'the efforts already being made in certain States to establish a Central Contact Point in accordance with the Principles' and encouraged States 'to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point'.[47]

18 Further steps towards an implementation of the Principles for an effective establishment of mediation structures for cross-border family disputes were discussed by the Working Party at an in-person meeting in The Hague on 16 April 2012 and reported to the 2012 Council. The Council welcomed the report and 'direction for future work outlined' and 'agreed that the Working Party continue its work on the implementation of mediation structures, with the expectation of a further report on progress to the Council in 2013'.[48]

42 At < www.hcch.net >, under 'Child Abduction Section' then 'Cross-border family mediation' ('Questionnaire I' and 'Questionnaire II').

43 'Principles for the Establishment of Mediation Structures in the context of the Malta Process', drawn up by the Working Party on Mediation in the context of the Malta Process with the assistance of the Permanent Bureau, November 2010 (hereinafter, 'Principles for the Establishment of Mediation Structures'), reproduced in Annex 1 below (also available at < www.hcch.net > under 'Child Abduction Section' then 'Cross-border family mediation').

44 These States include Australia, France, Germany, Pakistan and the United States of America. Further information on the Central Contact Points is available at < www.hcch.net > under 'Child Abduction Section' then 'Cross-border family mediation'.

45 Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011) (available at < www.hcch.net > under 'Work in Progress' then 'General Affairs'), Recommendation No 8.

46 *Ibid*.

47 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 61.

48 See Conclusions and Recommendations adopted by the 2012 Council (*op. cit.* note 39), Recommendation No 9.

B Work by other bodies

19 Mediation and other means of alternative dispute resolution are also promoted by other multilateral instruments and initiatives.

20 An example of a regional instrument encouraging the use of mediation and similar processes is the *European Convention on the Exercise of Children's Rights* prepared by the Council of Europe and adopted on 25 January 1996.[49]

21 A further example is Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter, 'the Brussels IIa Regulation').[50]

22 At the same time, the increasing use of mediation in national and international commercial and civil law prompted several international and regional initiatives to develop rules and minimum standards for the mediation process itself.[51]

23 On 21 January 1998, the Council of Europe adopted Recommendation No R (98) 1 on family mediation,[52] encouraging States to introduce and promote family mediation or to strengthen existing family mediation while, at the same time, requesting adherence to principles to ensure the quality of mediation and the protection of vulnerable persons affected. The principles address national family mediation as well as international family mediation.

24 On 18 September 2002, the Council of Europe adopted Recommendation Rec (2002)10 on mediation in civil matters,[53] which is broader in scope and describes further principles important for the promotion of mediation in a responsible manner.

---

49 Council of Europe – ETS-No 160, available at < http://conventions.coe.int/treaty/en/treaties/html/160.htm > (last consulted 16 June 2012), Art. 13 (Mediation or other processes to resolve disputes):

'In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties.'

50 See Brussels IIa Regulation, Preamble, para. 25:

'Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.'

See also Art. 55 e):

'The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: (...) e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.'

51 Many of these regional and international instruments focus on alternative dispute resolution in commercial matters, see for example the UNCITRAL Model Law on International Commercial Conciliation (*supra* note 3) and the UNCITRAL Conciliation Rules, adopted in 1980, available at < http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf > (last consulted 16 June 2012).

52 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 16 June 2012).

53 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 16 June 2012).

25 In 2001 the National Conference of Commissioners of Uniform State Laws of the United States of America developed the Uniform Mediation Act[54] as a model law to encourage the effective use of mediation and ensure legal privilege for all mediation communications. Several US states, meanwhile, have implemented these rules in their jurisdiction.[55] In 2005, the American Arbitration Association, the American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution adopted the 'Model Standards of Conduct for Mediators' revising an older version of Standards from 1994.[56] The Model Standards are meant to give guidance to mediators but also serve to inform the mediating parties and to promote public confidence in mediation.[57]

26 With the assistance of the European Commission, a group of stakeholders developed the 'European Code of Conduct for Mediators',[58] launched on 2 July 2004. The European Code of Conduct established a number of principles to which individual mediators in civil and commercial mediation may commit themselves on a voluntary basis and under their own responsibility.

27 On 21 May 2008, the European Parliament and the Council of the European Union concluded the European Directive on certain aspects of mediation in civil and commercial matters.[59] According to Article 12 of the Directive, EU Member States were obliged to 'bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011 with the exception of Article 10, for which the date of compliance (was) 21 November 2010 (...)'.[60] Another European Union initiative should be mentioned in this context: following a ministerial seminar organised by the Belgian Presidency of the European Union on 14 October 2010, a working group on family mediation in cases of international child abduction was set up within the European Judicial Network in civil and commercial matters[61] in order to synthesise the different related initiatives and works and to propose means to promote and improve the use of mediation in this matter.

28 In addition, several bilateral arrangements drafted to address cross-border family disputes concerning children promote the amicable resolution of these disputes.[62]

54 The text of the Uniform Mediation Act (hereinafter, 'United States UMA') in its amended version of August 2003 is available on the Uniform Law Commission website at < http://www.uniformlaws.org >.

55 See information on the Uniform Law Commission website at < http://www.uniformlaws.org >.

56 The text of the Model Standards of Conduct for Mediators (hereinafter, 'US Standards of Conduct') is available at < http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf > (last consulted 16 June 2012).

57 See Preamble of the US Standards of Conduct, *ibid*.

58 Available at < http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm > (last consulted 16 June 2012).

59 European Directive on mediation (*supra* note 5).

60 Regarding the measures taken in the European Union Member States to comply with the Directive, see the European Judicial Atlas at < http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm > under 'Mediation (Directive 2008/52/EC)' (last consulted 16 June 2012).

61 For further information on the European Judicial Network in civil and commercial matters, see the European Commission website at < http://ec.europa.eu/civiljustice/index_en.htm >.

62 See, for example, Art. 6 of the 'Agreement between the Government of Australia and the Government of the Arab Republic of Egypt regarding cooperation on protecting the welfare of children', Cairo, 22 October 2000; Art. 2 of the 'Convention entre le gouvernement de la République française et le gouvernement de la République algérienne démocratique et populaire relative aux enfants issus de couples mixtes séparés franco-algériens', Algiers, 21 June 1988; Art. 2 of the 'Protocole d'accord instituant une commission consultative belgo-marocaine en matière civile', Rabat, 29 April 1981; the texts of all these bilateral arrangements are available at < www.incadat.com >, under 'Legal Instruments' then 'Bilateral Arrangements'.

C Structure of the Guide

29 The Principles and Good Practices in this Guide are explored in the following order:
- Chapter 1 gives a general overview of the advantages and risks of the use of mediation in international family disputes.
- Chapter 2 explores the specific challenges posed by mediation in international child abduction cases within the scope of the 1980 Hague Child Abduction Convention.
- Chapter 3 deals with the question of the special qualifications necessary to mediate in international child abduction cases.
- Chapters 4 to 13 follow the mediation process in international child abduction cases in a chronological order from questions of access to mediation to the outcome of mediation and its legal effects.
- The last Chapters are dedicated to the use of mediation to prevent child abductions (Chapter 14), the use of other alternative dispute resolution mechanisms to bring about agreed solutions in international child abduction cases (Chapter 15) and, finally, special issues regarding the use of mediation in non-Convention cases (Chapter 16).

D The context – Some typical cases

30 Some typical factual situations may illustrate the usefulness of mediation in international family disputes concerning children under the 1980 Hague Child Abduction Convention.

a In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.

b Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his / her contact rights are sufficiently secured. Here, an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation.

c In the course of Hague return proceedings, mediation may be used to establish a less conflictual framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings.[63]

d Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.[64]

e At a very early stage in a family dispute concerning children, mediation can be of assistance in preventing abduction. Where the relationship of the parents breaks down and one of the parents wishes to leave the country with the child, mediation can assist the parents in considering relocation and its alternatives, and help them to find an agreed solution.[65]

63 This topic is also covered by the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).

64 This topic is also covered by the Guide to Good Practice on Enforcement (*op. cit.* note 23).

65 This topic is also covered by the Guide to Good Practice on Preventive Measures (*op. cit.* note 23).

The Guide

1 The general importance of promoting agreements in cross-border family disputes over custody and contact

31 There is increasing use of mediation and similar processes facilitating the amicable resolution of disputes in family law in many countries. At the same time, an increasing number of States allow for more party autonomy in the resolution of family disputes while safeguarding the rights of third parties, in particular children.

1.1 Advantages of agreed solutions

→ 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.

32 The promotion of dispute resolution by agreement has proven to be particularly helpful in family disputes concerning children, where the parties to the conflict will usually need to co-operate with each other on a continuing basis. Hence, in a dispute arising out of a parental separation, an agreed solution can be particularly helpful to assist in securing the 'child's right to maintain on a regular basis (...) personal relations and direct contacts with both parents' as guaranteed by the United Nations Convention on the Rights of the Child (UNCRC).[66]

33 Agreed solutions are more sustainable since they are more likely to be adhered to by the parties. At the same time, 'they establish a less conflictual framework for the exercise of custody and contact and are therefore strongly in the interests of the child'.[67] Furthermore, agreed solutions are said to be more satisfactory for the parties; each can influence the result and engage in finding a solution considered 'just' for both parties. Solving disputes by agreement avoids the perception of one party 'winning' and one 'losing' as an outcome. In contrast, court proceedings concerning matters of custody and contact can worsen the relationship between the parents, as a result of which children are likely to suffer psychologically.[68]

34 Among the different methods to bring about agreed solutions in family disputes, the process of mediation has particular advantages; it facilitates communication between the parties in an informal atmosphere and allows the parties to develop their own strategy regarding how to

66 *United Nations Convention of 20 November 1989 on the Rights of the Child*, see Art. 10(2), text available at < http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx > (last consulted 16 June 2012).

67 W. Duncan, 'Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report', Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002 (available at < www.hcch.net > under 'Child Abduction Section'), at para. 89; see also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 2.1, p. 6.

68 See, for example, for **Germany** the findings of the evaluative report comparing mediation and legal proceedings in national family disputes over custody and contact, commissioned by the German Federal Ministry of Justice, drawn up by R. Greger, 'Mediation und Gerichtsverfahren in Sorge- und Umgangsrechtskonflikten', January 2010, p. 118, available at < http://www.reinhard-greger.de/ikv3.pdf > (last consulted 16 June 2012).

overcome the conflict. Mediation is a structured but flexible process, which can easily be adapted to the needs of the individual case. It allows for the simultaneous discussion of legal and extra-legal considerations as well as for the informal involvement of (third) persons who might not have legal standing in the case.[69] Another very important advantage of mediation is that it empowers the parties to face future conflicts in a more constructive way.[70] Also, since the threshold for entering into mediation is generally lower than for entering into court proceedings, mediation can be of assistance at an early stage of a conflict before a possible escalation. Mediation may allow the parties to avoid cumbersome legal proceedings. In cross-border family disputes concerning children, where legal proceedings in one country may be followed or accompanied by legal proceedings in another country concerning different aspects of the same dispute, an agreement-based solution can be particularly advantageous.

35 This points to another benefit that mediation may bring, which is cost-effectiveness. Mediation can offer a path to avoiding costly legal proceedings – costly both for the parties and for the State.[71] However, since mediation costs differ immensely from jurisdiction to jurisdiction and, since some jurisdictions may offer legal aid for judicial proceedings but not for mediation, it cannot be said that mediation will in every case be less costly than legal proceedings for the parties. But when comparing costs in the individual case, the possibility that the mediation is more likely to lead to a sustainable solution, and is therefore likely to avoid possible legal proceedings between the same parties in the future, needs to be taken into consideration. On the other hand, costs necessary to render the mediated agreement binding and enforceable in the two jurisdictions concerned, which may require the involvement of judicial authorities, need to be included in the calculation of mediation costs.[72]

36 An example will illustrate some of the advantages that mediation may offer in an international child abduction case:

- *In 2005, F and M, unmarried and both nationals of State A, move from State A to the distant State Z together with their 2-year-old daughter, for whom they have joint custody according to the laws of both State A and State Z. The reason for their relocation is the employment of the father (F) by a firm in State Z. In the following years the family settles in State Z, although the mother (M) finds it difficult to adapt to the new environment due to language and cultural differences. Since State A is several thousand kilometres away, family visits are rare; the maternal grandparents therefore put pressure on M to return to State A. Following relationship problems, M finally decides to move back to State A in 2010. She secretly makes preparations and, following the Christmas holidays of 2010 which she spends at her parents' home in State A together with the child, she informs her husband that she and the child will not return to State Z. F is shocked and, having found out about the 1980 Hague Child Abduction Convention which is in force between State A and State Z, he lodges a return application and return proceedings are initiated in State A. At the same time, F applies to the courts in State Z for provisional sole custody of his daughter.*

  Apart from the obvious advantages of an agreed solution for the child in such a case in terms of maintaining personal relations and direct contact with both parents, an amicable resolution can help the parties to avoid a cumbersome and lengthy judicial resolution of the matter in the courts of the two States concerned. Namely: (1) return proceedings in State A, which, if none of the restricted exceptions to return apply, will lead to an expeditious return of the child to State Z, (2) the ongoing custody proceedings in State Z, which may possibly be followed by (3) proceedings for relocation from State Z

69 See N. Alexander (*op. cit.* note 7), p. 48.

70 See also K.J. Hopt and F. Steffek (*op. cit.* note 2), p. 10.

71 See, for example, for **Germany**, the findings of the evaluative report comparing mediation and legal proceedings in national family disputes over custody and contact, in R. Greger (*op. cit.* note 68), p. 115; see also for the **United Kingdom (England and Wales)** the report from the National Audit Office, 'Legal aid and mediation for people involved in family breakdown', March 2007, pp. 8, 10, available at < http://www.nao.org.uk/publications/0607/legal_aid_for_family_breakdown.aspx > (last consulted 16 June 2012).

72 See further regarding costs of mediation under section 4.3.

to State A initiated by the mother. The lengthy judicial resolution of the parental dispute will not only deplete the financial resources of the parties but will most probably deepen the parents' conflict. Also, if the return proceedings in State A should end with a refusal to return, further proceedings (namely custody and contact proceedings) are likely to follow if the parental conflict is not settled.
Should the parents be able to find an agreed solution, they can both 'move on' and concentrate on exercising their parental responsibilities amicably.

Mediation is flexible and can adapt to the needs of the specific case. For example, the mediation process could, if both parties agree and it is considered appropriate and feasible, include discussions with the maternal grandparents, who would not have legal standing in the judicial proceedings[73] to the conflict but who have a strong influence on one of the parties. Ensuring their support for the resolution of the conflict can make the solution more sustainable. Mediation can also be advantageous at the organisational level, since it can be organised cross-border with mediation sessions taking place through video link, for example, if the parties' participation in an in-person meeting is not feasible. ■

1.2 Limits, risks and safeguards

→ Safeguards and guarantees should be put in place to prevent engagement in mediation from resulting in any disadvantage for either of the parties.

37 The limits and risks that can be connected with agreed solutions reached in mediation or through similar dispute resolution mechanisms should not normally be taken as a reason to avoid the use of these means as a whole, but should lead to awareness that necessary safeguards may need to be established.

38 Not all family conflicts can be solved amicably. This is an obvious point, but it cannot be emphasised enough. Some cases require the intervention of a judicial authority. This may be related to the nature of the conflict, the specific needs of the parties or the specific circumstances of the case, as well as to particular legal requirements. Parties in need of a judicial determination should not be denied access to justice. Precious time can be lost in attempting mediation in cases where one party is clearly not willing to engage in the mediation process or in cases otherwise not suitable for mediation.[74]

39 Even where both parties agree to mediation, attention needs to be paid to specific circumstances such as possible indications of domestic violence.[75] The very fact of a joint meeting between the parties in the course of a mediation session might put the physical or psychological integrity of one of the parties, and indeed that of the mediator, at risk. Also, consideration may have to be given to the possibility that drug or alcohol abuse by one of the parties may result in that person's inability to protect his or her interests.

40 Assessment of cases for suitability for mediation is an essential tool to identify cases of special risk.[76] Potential mediation cases should be screened for the presence of domestic violence, as well as drug and alcohol abuse and other circumstances that may affect the suitability of the case for mediation. Where mediation in a domestic violence case is still considered feasible,[77] necessary safeguards need to be taken to protect the security of those affected. Also, attention needs to be paid to differences in bargaining power, whether due to domestic violence or other circumstances or simply resulting from the personalities of the parties.

---

73 In some States grandparents may have a contact right of their own and could thus be a party to judicial proceedings concerning contact with the child.

74 The question of assessing the suitability for mediation is dealt with in detail under section 4.2 below.

75 See Chapter 10 on the subject of domestic violence.

76 See section 4.2 below for further details.

77 See Chapter 10 on the subject of domestic violence.

41 Furthermore, there may be a risk that the agreed solution will not have legal effect and thus may not safeguard the parties' rights in case of further dispute. There are various possible reasons for this. The mediated agreement or part of it may be in conflict with the applicable law or not legally binding and enforceable due to the fact that the agreement has not been registered, court approved and / or included in a court order where this is required. It needs to be highlighted in this context that several jurisdictions restrict party autonomy in regard to certain aspects of family law.[78] For example, in some systems agreements on parental responsibility may have no legal effect unless approved by a court. Also, many legal systems restrict the ability of a parent to limit the amount of payable child support by agreement.

42 In cross-border family disputes especially, the legal situation is complex. The interplay of two or more legal systems needs to be taken into account. It is important that parents be well informed about the law applicable to the subject matters dealt with in mediation as well as the law applicable to the mediation process itself, including confidentiality, and about how to give legal effect to their agreements in both (all) legal systems concerned.[79]

43 Some of the risks that may occur when agreements are drawn up without taking into consideration all necessary aspects of the legal situation are illustrated by the following variations of the example given above at paragraph 36.

VARIATION 1

Following the wrongful removal of the child from State Z to State A by the mother (M), the parents agree that M will return to State Z with the child under the condition that the father (F) will provide, until the custody proceedings in State Z are finalised, the necessary maintenance to enable the returning parent to remain in State Z with the child, including use of the family home, while F promises to reside in another location to avoid further disputes. Subsequently M, relying on the agreement, returns to State Z with the child, but F refuses to leave the family home and to financially support M. Given that the parental agreement was neither rendered enforceable in State A nor in State Z before its implementation, and given that neither State considers a parental agreement of that kind to have any legal effect without court approval, one parent can easily renege on the agreement to the disadvantage of the other.

VARIATION 2

Following the wrongful removal of the child from State Z to State A by the mother (M), the parents agree that the child is to remain with M in State A and will spend part of the school holidays each year with the father (F) in State Z. Three months following the date of the wrongful removal, the child travels to State Z to spend the Easter holidays with F. At the end of the holidays F refuses to send the child back to State A. He claims that he is not wrongfully retaining the child since the child is now back at her place of habitual residence, from which she had only been away due to the wrongful removal by M. F also refers to the provisional sole custody order the competent court in State Z had granted him immediately after the wrongful removal by M. Again, in cases where the mediated solution is not rendered legally binding in the relevant jurisdictions before its practical implementation, it can easily be disobeyed by one of the parents.

VARIATION 3

The child is wrongfully removed from State Z to a third State T where the mother (M) wants to relocate for work reasons. While the left-behind unmarried father (F) has ex lege *custody rights under the laws of State A and State Z, he does not have custody rights according to the laws of State T. The 1996 Hague Child Protection Convention is not in force between these States. Unaware of this situation, F gives his acquiescence to the relocation of the mother and child to State T based on the condition that he can have regular personal contact with the child. The mediated agreement, drawn up without taking into consideration the legal situation, is not registered or in any other way formalised; it does not have legal effect under the law of State Z or State T. A year later, M disrupts the contact*

78 See Chapter 12 for further details.

79 See section 6.1.7 on informed decision-making and Chapters 12 and 13 below.

between father and child. According to the law of State T, which is, in this case, now applicable to custody and contact rights due to the change of the child's habitual residence, the unmarried father has no parental rights in respect of the child.[80]

44 Another difficult issue in the mediation of international family disputes over custody and contact is how best to safeguard the rights of the children concerned. The court in a contact or custody decision will – according to the law of most countries – take into consideration the best interests of the child and in many jurisdictions the voice of the child, if of sufficient age and maturity, will be heard either directly or indirectly in this context. Mediation differs substantially from court proceedings when it comes to introducing the child's views into the process. A judge may, depending on the age and maturity of the child, hear the child in person or have the child interviewed by a specialist with the appropriate safeguards to protect the child's psychological integrity. The views of the child can thus directly be taken into account by the judge. The procedural powers of a mediator, in contrast, are limited. He or she has no interrogative powers and cannot, as judges can in some countries, summon the child to a hearing or order an expert interview of the child.[81] Safeguards need to be taken to protect the rights and welfare of children in mediation.[82]

1.3 General importance of linkage with relevant legal procedures

- → **Mediation and other processes to bring about agreed solutions of family disputes should generally be seen as a complement to legal procedures, not as a substitute.**
- → **Access to judicial proceedings should not be restricted.**
- → **Mediation in international family disputes needs to take account of relevant national and international laws, to prepare the ground for a mediated agreement that is compatible with the relevant laws.**
- → **Legal procedures should be available to give legal effect to the mediated agreement.**

45 It is important to note that mediation and similar processes facilitating agreed solutions should not be seen as a complete substitute for judicial procedures, but as a complement.[83] A close link between these processes can be fruitful in many ways and at the same time help to overcome certain shortcomings that exist in both judicial proceedings and amicable dispute resolution mechanisms, such as mediation.[84] It has to be emphasised that even where mediation and similar processes introduced at an early stage of an international family dispute are able to avoid litigation, complementary 'judicial processes' will frequently be required to render an agreed solution legally binding and enforceable in all legal systems concerned.[85]

---

80 If the 1996 Hague Child Protection Convention is in force between State T and State Z, the father's *ex lege* parental responsibility will subsist; see Art. 16(3) of the Convention. See also P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, in *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605, at pp. 579, 581 (also available at < www.hcch.net > under 'Publications').

81 See also the Terminology section above, 'Mediation'.

82 See section 6.1.6 on the consideration of the interests and welfare of the child in mediation, and Chapter 7 on the involvement of the child.

83 See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Preamble: 'Noting that although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system'; and Principle III, 5 (Organisation of mediation): 'Even if parties make use of mediation, access to the court should be available, as it constitutes the ultimate guarantee protecting the rights of the parties.'

84 It should be added that if amicable dispute resolution means are to be used in an international child abduction case, the close linkage with judicial proceedings is not just fruitful but almost inevitable, see further below, particularly at section 2.2.

85 The processes required to render a mediated agreement legally binding and enforceable differ from one legal system to another. For further details on the topic see Chapters 12 and 13 below.

46 When mediation is offered to the parties to an international family dispute, they need to be informed that mediation is not their only recourse. Access to judicial proceedings must be available.[86]

47 The legal situation in international family disputes is often complex. It is important that the parties have access to relevant legal information.[87]

48 In international family disputes it is particularly important to ensure that the mediated agreement has legal effect in the relevant jurisdictions, before implementation of the agreement begins.[88] Appropriate procedures should be made available to give legal effect to mediated agreements, be it by court approval, court registration or otherwise.[89] Again, close co-operation between mediators and legal representatives of the parties may be very helpful in this regard, as well as the provision of relevant information by Central Authorities or Central Contact Points for international family mediation.[90]

2 The use of mediation in the framework of the 1980 Hague Child Abduction Convention – An overview of specific challenges

49 The 1980 Hague Child Abduction Convention promotes a search for amicable solutions. Article 7 states that the Central Authorities 'shall take all appropriate measures (...) *c)* to secure the voluntary return of the child or to bring about an amicable resolution of the issues', which is partially repeated in Article 10: 'The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.'

50 Chapter 2 of this Guide is meant to draw attention to the specific challenges to the use of mediation in international child abduction cases under the 1980 Hague Child Abduction Convention.

51 It cannot be emphasised enough that there is a difference between national family mediation and international family mediation. Mediation in international family disputes is much more complex and requires mediators to have relevant additional training. The interplay of two different legal systems, different cultures and languages makes mediation much more difficult in such cases. At the same time, the risks that come with the parties relying on mediated agreements which do not take into account the legal situation and have no legal effect in the jurisdictions concerned are

86 See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle III, 5 (Organisation of mediation): 'Even if parties make use of mediation, access to the court should be available, as it constitutes the ultimate guarantee protecting the rights of the parties.' See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 17.

87 See section 6.1.7 and Chapters 12 and 13 below; for the role of Central Authorities and other bodies in facilitating the provision of this information, as well as regarding the role of the parties' representatives, see section 4.1 below.

88 See also the Principles for the Establishment of Mediation Structures in Annex 1 below; see Chapters 11, 12 and 13 below.

89 See also the European Directive on mediation (*supra* note 5), Art. 6 (Enforceability of agreements resulting from mediation):

'1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an 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.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.'

90 On the role of Central Authorities and other bodies in facilitating the provision of this information as well as the role of the parties' representatives, see section 4.1 below.

much higher. The parties might not be aware that the cross-border movement of persons or goods, to which they have agreed, will result in a change of their legal situation. When it comes to rights of custody or contact, for example, habitual residence is a widely used 'connecting factor' in private international law. Hence the change of the child's habitual residence from one country to another following the implementation of a parental agreement may affect jurisdiction and applicable law regarding custody and contact, and may thus affect the legal evaluation of the parties' rights and duties.[91]

52 International child abduction cases characteristically involve high levels of tension between the parties. The left-behind parent, often in shock as a result of the sudden loss, may be driven by the fear of never seeing his / her child again while the taking parent, once realising the full consequences of his / her action, may be in fear of legal proceedings, a forced return and a possible negative impact on custody proceedings. Besides the practical difficulties of how to engage the parents in a constructive mediation process, there is the all-encompassing need for expeditious action. Additional difficulties might arise from criminal proceedings brought against the taking parent in the country of the child's habitual residence, as well as from visa and immigration issues.

2.1 Timeframes / Expeditious procedures

- → **Mediation in international child abduction cases has to be dealt with expeditiously.**
- → **Mediation 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 used in international child abduction cases need to provide for the scheduling of mediation sessions on short notice.**
- → **Initiating return proceedings before commencing mediation should be considered.**

53 Time is crucial in international child abduction cases. The 1980 Hague Child Abduction Convention seeks to ensure the child's prompt return to the State of his / her habitual residence.[92] It is the purpose of the 1980 Convention to restore the *status quo ante* the abduction as quickly as possible to lessen the harmful effects of the wrongful removal or retention for the child. The 1980 Convention protects the interests of the child by preventing a parent from gaining advantage through establishing 'artificial jurisdictional links on an international level, with a view to obtaining ((sole)) custody of a child'.[93]

54 It has to be emphasised that in abduction cases, time plays on the side of the 'taking parent'; the longer the child stays in the country of abduction without the underlying family dispute being resolved, the more difficult it becomes to restore the relationship between the child and the left-behind parent. Delay may affect the rights of the left-behind parent, but more importantly it undermines the right of the child concerned to maintain continuing contact with both parents, a right embodied in the UNCRC.[94]

55 When the return proceedings are commenced before the court more than one year after the abduction, the 1980 Hague Child Abduction Convention gives discretion to the court to refuse the return, provided that it is proven the child has settled into his / her new environment (Art. 12(2)).

56 Mediation in child abduction cases has to be conducted rapidly at whatever stage it is introduced. Circumvention of the 1980 Hague Child Abduction Convention to the disadvantage of the children concerned is one of the major issues against which safeguards in the use of mediation

91 See Chapters 12 and 13 below.

92 See the Preamble of the 1980 Convention.

93 See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, in *Actes et documents de la Quatorzième session (1980)*, Tome II, *Child abduction*, The Hague, Imprimerie Nationale, 1998, pp. 425-476, at p. 428, para. 11 (also available at < www.hcch.net > under 'Publications').

94 See Art. 10(2) of the UNCRC.

need to be established.[95] As much as it is in everybody's interest that an amicable resolution of an international family conflict be attempted, the misuse of mediation by one parent as a delaying tactic must be prevented.

57 Entrusted with a return application, Central Authorities under the 1980 Hague Child Abduction Convention will, as soon as the whereabouts of the child are known, generally try to bring about a voluntary return of the child (Arts 7(2) *c)* and 10). At this very early stage, where appropriate services for child abduction cases are available, mediation should already be suggested. See also Chapter 4 below ('Access to mediation').

58 The suitability of mediation in the specific child abduction case should be assessed before mediation is attempted, to avoid any unnecessary delays.[96]

59 Mediation services offered for abduction cases under the 1980 Hague Child Abduction Convention need to provide short-notice scheduling of mediation sessions. This requires a lot of flexibility from the mediators involved. However, the burden can be lessened with the help of a pool of qualified mediators who commit themselves to a system that secures availability on short notice.

60 In some States, mediation schemes specifically developed for international child abduction cases are already successfully providing such services.[97] Typically, they may offer two or three mediation sessions spread over a minimum of two (often subsequent) days, each session taking up to three hours.[98]

61 The institution of Hague return proceedings before commencing mediation should be considered. Experience in several countries has shown that the immediate initiation of return proceedings

95 See also S. Vigers, 'Mediating International Child Abduction Cases – The Hague Convention', Hart Publishing, Oxford, 2011, pp. 42 *et seq*.

96 For more information on the initial screening, particularly regarding what issues may influence the suitability for mediation as well as who can conduct the screening, see section 4.2.

97 For example, in the **United Kingdom (England and Wales)**, the non-governmental organisation reunite International Child Abduction Centre (hereinafter, 'reunite') has offered specialist mediation services in cases of international child abduction for more than 10 years, see the reunite website at < www.reunite.org >; see also the report of October 2006 on 'Mediation In International Parental Child Abduction – The reunite Mediation Pilot Scheme' (hereinafter, '2006 Report on the reunite Mediation Pilot Scheme'), available at < http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20Report.pdf >. In **Germany**, the non-profit organisation MiKK e.V., founded in 2008 by the German associations BAFM and BM, is continuing the work of the latter associations in the field of 'Mediation in International Disputes Involving Parents and Children' including specialist mediation in Hague abduction cases. Mediation services are currently available under four bi-national co-mediation programmes: the **German-Polish** project (commenced in 2007), the **German-American** project (commenced in 2004), the **German-British** project in co-operation with reunite (commenced in 2003/4) and the **German-French** project carrying on the work of the Franco-German mediation scheme organised and financed by the French and German Ministries of Justice (2003-2006). A fifth mediation scheme involving **German** and **Spanish** mediators is in preparation, see < www.mikk-ev.de >. In the **Netherlands**, the non-governmental organisation *Centrum Internationale Kinderontvoering* (IKO) offers specialist mediation services in Hague child abduction cases organised through its Mediation Bureau since 1 November 2009, see < www.kinderontvoering.org > (last consulted 16 June 2012); see also R.G. de Lange-Tegelaar, 'Regiezittingen en mediation in internationale kinderontvoeringszaken', Trema Special, No 33, 2010, pp. 486, 487.

98 See, *e.g.*, the mediation services offered in the **United Kingdom (England and Wales)** by reunite (< www.reunite.org >), and the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 11. See also the mediation services offered in **Germany** through the association MiKK e.V., and S. Kiesewetter and C.C. Paul, 'Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines', in C.C. Paul and S. Kiesewetter (Eds), *Cross-Border Family Mediation – International Parental Child Abduction, Custody and Access Cases*, Wolfgang Metzner Verlag, 2011, pp. 39 *et seq*. See also in the **Netherlands**, the Dutch Mediation Pilot Programme using 3x3-hour sessions in the course of two days, see I. Bakker, R. Verwijs *et al., Evaluatie Pilot Internationale Kinderontvoering*, July 2010, p. 77.

followed, where necessary,[99] by a stay of these proceedings for mediation works well.[100] This approach has several advantages:[101]

a It may positively affect the taking parent's motivation to engage in finding an amicable solution when otherwise faced with the concrete option of court proceedings.
b The court may be able to set a clear timeframe within which the mediation sessions must be held. Thus the misuse of mediation as a delaying tactic is avoided and the taking parent is not able to gain any advantages from the use of Article 12(2) of the 1980 Hague Child Abduction Convention.
c The court may take necessary protective measures to prevent the taking parent from taking the child to a third country or going into hiding.
d The left-behind parent's possible presence in the country to which the child was abducted to attend the Hague court hearing can be used to arrange for a short sequence of in-person mediation sessions without creating additional travel costs for the left-behind parent.
e The court seised could, depending on its competency in this matter, decide on provisional contact arrangements between the left-behind parent and the child, which prevents alienation and may have a positive effect on the mediation process itself.
f Funding for court-referred mediation may be available.
g Furthermore, the fact that the parties will most likely have specialist legal representation at this stage already helps to ensure that the parties have access to the relevant legal information in the course of mediation.
h Finally, the court can follow up the result of mediation and ensure that the agreement will have legal effect in the legal system to which the child was abducted, by turning the agreement into a court order or taking other measures.[102] The court can also assist with ensuring that the agreement will have legal effect in the other relevant jurisdiction.

62 However, the question of when to institute return proceedings where mediation is an option may be answered differently. Depending on how the Hague return proceedings are organised in the relevant legal system and depending on the circumstances of the case, the commencement of mediation before the institution of return proceedings can be an option. In Switzerland, for example, the legislation implementing the 1980 Hague Child Abduction Convention provides for an explicit possibility for the Central Authority to initiate conciliation or mediation procedures before the institution of the return proceedings.[103] In addition, the Swiss implementation legislation emphasises the importance of attempting an amicable settlement of the conflict by requiring that the court, once seised with the Hague return proceedings, initiate mediation or conciliation procedures if the Central Authority has not already done so.[104]

99 States which do not stay the return proceedings for mediation are, for example, **France**, **Germany** and the **Netherlands**. In **Germany** and the **Netherlands**, the mediation in international abduction cases is integrated into the schedule of the court proceeding, *i.e.*, mediation takes place within the short period of 2-3 weeks before the (next) court hearing. A stay of proceedings is therefore not necessary in these States. In **France**, mediation is conducted as a process parallel to, and independent of, the Hague return proceedings; *i.e.*, the return proceedings follow the usual timeline regardless of whether there is an ongoing mediation or not. An amicable result reached in the parallel process of mediation can be introduced into the return proceedings at any time.

100 For example, **Germany** and the **United Kingdom**; see also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 95), pp. 45 *et seq.*

101 See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 2.4, p. 10.

102 On the question of rendering the agreement enforceable and the question of jurisdiction, see Chapters 12 and 13 below.

103 See Art. 4 of the **Swiss** Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on 1 July 2009 (*Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007*), available at < http://www.admin.ch/ch/d/sr/2/211.222.32.de.pdf > (last consulted 16 June 2012), unofficial English translation available at < http://www.admin.ch/ch/e/rs/2/211.222.32.en.pdf > (last consulted 16 June 2012); see also A. Bucher, 'The new Swiss Federal Act on International Child Abduction', *Journal of PIL*, 2008, pp. 139 *et seq.*, at 147.

104 Art. 8 of the Swiss Federal Act of 21 December 2007.

63 Independently of whether mediation or similar processes in international child abduction cases under the 1980 Hague Child Abduction Convention are introduced prior to or following the institution of return proceedings, it is of the utmost importance that Contracting States take safeguards to ensure that mediation and similar processes take place with very clear and limited timeframes.

64 Regarding the scope of mediation, a balance has to be struck between giving the communication process between the parties sufficient time and not delaying possible return proceedings.[105]

2.2 Close co-operation with administrative / judicial authorities

→ **Mediators and bodies offering mediation in international child abduction cases should co-operate closely with the Central Authorities and courts.**

65 Mediators and organisations offering mediation in international child abduction cases should co-operate closely with the Central Authorities and courts on an organisational level to ensure a speedy and efficient resolution of the matter. The mediators should do their best to make the organisational aspects of the mediation procedures as transparent as possible, while safeguarding the confidentiality of mediation. For example, the Central Authority and the court seised should be informed of whether mediation will be conducted or not in the case. The same is true when mediation is terminated or interrupted. This information should be communicated speedily to the Central Authority and the court seised. It is therefore advisable in international child abduction cases that the Central Authority and / or the relevant court should maintain close links with the specialist mediation services on an administrative level.[106]

2.3 More than one legal system involved; enforceability of the agreement in both (all) jurisdictions concerned

→ **Mediators need to be aware that mediation in international child abduction cases has to take place against the background of interaction between two or more legal systems and of the applicable international legal framework.**

→ **The parties need to have access to relevant legal information.**

66 Specific difficulties for the mediation process itself may result from the fact that more than one legal system is involved. To find a sustainable solution for the parties that can have legal effect, it is therefore important to take the laws of both (all) legal systems concerned into consideration, as well as regional or international law applicable in the case.

67 It has already been stressed above in section 1.2 how dangerous it can be when parties rely on mediated agreements that have no legal effect in the relevant jurisdictions. Mediators conducting mediation in international family disputes concerning children have a responsibility to draw the parties' attention to the importance of obtaining the relevant legal information and specialist legal advice. It needs to be highlighted in this context that mediators, even those having the relevant specialist legal training, are not in a position to give legal advice to the parties.

---

105 See Chapter 5 below; see also the Conclusions and Recommendations of the Fourth Meeting of the Special Commission (*op. cit.* note 34), Recommendation No 1.11, 'Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings', reiterated in the Conclusions and Recommendations of the Fifth Meeting of the Special Commission (*id.*), Recommendation No 1.3.1.

106 For example, in **Germany**, the Central Authority concluded a co-operation contract with the specialist mediation organisation MiKK e.V., which includes, *inter alia*, terms on a speedy information exchange on an organisational level.

68 Legal information becomes particularly relevant with respect to two aspects: first, the content of the mediated agreement, which needs to be compatible with legal requirements and, second, the question of how to give legal effect to the mediated agreement in the two or more legal systems concerned. The two are closely linked.

69 The parties should be made aware of the fact that specialist legal advice may be needed with regard to the relevant legal systems' approaches to the law applicable to the matters discussed in the mediation. The parents' autonomy regarding agreements on custody and contact in respect of their child may be restricted in that the law may provide for mandatory court approval of any such agreement to ensure that the best interests of the child are secured.[107] At the same time, the parents should understand that, once a mediated agreement has legal effect in one jurisdiction, further steps might be necessary to give it legal effect in the other legal system(s) concerned in their case.[108]

70 The parties should ideally have access to pertinent legal information throughout the mediation process. That is why many mediators working in the field of international child abduction encourage the parties to maintain specialist legal representatives throughout the mediation process. Relevant information may also be provided by Central Authorities or Central Contact Points for international family mediation.[109]

2.4 Different cultural and religious backgrounds

→ **Mediation in international family disputes should take due consideration of the possibly different cultural and religious backgrounds of the parties.**

71 One of the particular challenges of international family mediation in general is that the parties often have different cultural and religious backgrounds. Their values and expectations regarding many aspects of the exercise of parental responsibility, such as the education of their children, may differ immensely.[110] The cultural and religious backgrounds of the parties may also affect the way they communicate with each other and with the mediator.[111] The mediator needs to be aware that a part of the family dispute may be caused by misunderstandings due to a lack of recognition of the other party's cultural differences.[112]

72 Mediators conducting mediation in such cases should have a good understanding of the cultures and religious background(s) of the parties.[113] Specific training is needed in this respect.[114] Where a choice of specialist mediators is available and feasible for the parties, it can be helpful to employ mediators versed in the cultural and religious backgrounds of the parties or sharing one party's background and being versed in the other party's culture and religion.

---

107 See Chapter 12.

108 See Chapters 12 and 13.

109 On the role of Central Authorities and other bodies in facilitating the provision of this information as well as the role of the parties' representatives, see section 4.1 below.

110 See, *e.g.*, K.K. Kovach, *Mediation in a nutshell*, St. Paul, 2003, at pp. 55, 56; D. Ganancia, 'La médiation familiale internationale', Érès, Ramonville Saint-Agne 2007, 132 ff; R. Chouchani Hatem, 'La différence culturelle vécue au quotidien dans les couples mixtes franco-libanais', *Revue Scientifique de L'AIFI*, Vol. 1, No 2, *Automne* 2007, pp. 43-71; K. Kriegel, 'Interkulturelle Aspekte und ihre Bedeutung in der Mediation', in S. Kiesewetter and C.C. Paul (Eds), *Mediation bei internationalen Kindschaftskonflikten – Rechtliche Grundlagen, Interkulturelle Aspekte, Handwerkszeug für Mediatoren, Einbindung ins gerichtliche Verfahren, Muster und Arbeitshilfen*, Verlag C.H. Beck, 2009, pp. 91-104; M.A. Kucinski, 'Culture in International Parental Kidnapping Mediations', *Pepperdine Dispute Resolution Law Journal*, 2009, pp. 555-582, at 558 *et seq.*

111 See, *e.g.*, K.K. Kovach (*loc. cit.* note 110), pointing out that eye contact may in some cultures be considered as insulting or demonstrating a lack of respect, while in most Western cultures it is on the contrary a sign of active listening. D. Ganancia, 'La médiation familiale internationale' (*id.*), 132 ff.

112 See K.K. Kovach (*op. cit.* note 110), at p. 56.

113 See also section 6.1.8 below.

114 See Chapter 3 on mediator training.

73 A model that has been successfully followed in some mediation schemes and which was specifically developed for cross-border child abductions involving parents from different States of origin is that of 'bi-national' mediation.[115] Here, the requirement that the mediators have a good understanding of the parties' cultural backgrounds is met by employing, in co-mediation, two mediators from the two States concerned, each being knowledgeable of the other culture. 'Bi-national' could as well stand for 'bi-cultural' in this context. It is important to highlight that mediators are neutral and impartial and do not represent either of the parties.[116]

2.5 Language difficulties

→ **In mediation each party should, as far as possible, have the opportunity to speak a language with which he or she feels comfortable.**

74 A further challenge to mediation in international family disputes arises when the parties to the dispute speak different mother tongues. Where the parties have different native languages, they may in mediation, at least temporarily, each prefer to speak their own language. This may be the case even if one of the parties masters the other's language or is comfortable using a language other than his / her mother tongue in the everyday context of their relationship. In the emotionally stressful circumstances of discussing their dispute, the parties may simply prefer speaking their mother tongue, and this might also give them the feeling of being on equal footing.

75 On the other hand, parties with different mother tongues may well feel comfortable speaking a third language in mediation, *i.e.*, the mother tongue of neither of the parties, or one party may be willing to speak the other's language. In any case, the mediator has to be aware of the additional risk of misunderstandings as a result of language difficulties.

76 The wishes of the parties regarding the language(s) used in mediation should be respected as much as possible. Ideally, the mediator(s) themselves should be able to understand and speak those languages.[117] Co-mediation allows for the involvement of mediators with the same mother tongues as the parties and fluent in, or having a good command of, the other relevant language (so-called 'bilingual' co-mediation).[118] Co-mediation may also include one mediator speaking only the mother tongue of one party and the other being fluent in the two relevant languages. Here, however, the mediator speaking the two languages will partly play an interpreting role.

77 Offering the parties the possibility to directly communicate in their preferred language during mediation is clearly the first choice; however, there may be cases where this is not feasible. Communication in the preferred language might also be facilitated through the use of interpretation. Where interpretation is considered an option, the interpreter has to be chosen with care and needs to be well prepared and aware of the highly sensitive nature of the conversation, and of the emotional atmosphere of the mediation, so as not to add a further risk of misunderstanding and jeopardise an amicable resolution. Furthermore, safeguards concerning confidentiality of mediation communications must be extended to include the interpreter(s).[119]

115 Franco-German Project of Bi-national Professional Mediation (2003-2006); US-German Bi-national Mediation Project; Polish-German Bi-national Mediation Project; see also section 6.2.3 below.

116 See further under Chapter 6, section 6.2.3 below.

117 See also section 3.3 regarding lists of mediators.

118 The bi-national mediation programmes referred to under note 115 above are all bilingual mediation programmes.

119 Regarding confidentiality, see section 6.1.5 below.

2.6 Distance

→ **The geographical distance between the parties to the dispute needs to be taken into account when it comes to making arrangements for a mediation meeting, as well as in relation to the modalities agreed on in the mediated agreement.**

78 Another challenge of mediation in cases of child abduction from one country to another is that of geographical distance between the parties. The distance between the State of the child's habitual residence, which is where the left-behind parent resides, and the State to which the child was taken may be very great.

79 Distance may on the one hand affect the practical arrangements for the mediation sessions. On the other hand, distance may play a role regarding the content of the mediated solution itself, which may need to take account of the possibility that a considerable geographical distance will remain between the parents in the future. The latter would be the case, for example, if the left-behind parent agreed to relocation of the child together with the taking parent, or in cases where the child is returned to the State of habitual residence but the taking parent decides to remain abroad.

80 When it comes to arranging a mediation session, the distance between the parties and the potentially high travel costs will affect the question of the appropriate venue for mediation, and the question of whether direct or indirect mediation should be used. Both topics are dealt with in detail below (the place of mediation under section 4.4, and the question of direct or indirect mediation under section 6.2). Of course, modern means of communication such as video-link or Internet communication may assist in mediation.[120]

81 As regards the content of an eventual agreement allowing for the exercise of cross-border custody and / or contact rights, *i.e.*, where the parents decide to reside in different countries, the geographical distance as well as the connected travel costs need to be given due consideration. Any arrangements agreed on need to be realistic and feasible in terms of time and expenses. This topic will be explored further under Chapter 11 ('Reality check').

2.7 Visa and immigration issues

→ **All appropriate measures should be taken to facilitate the provision of necessary travel documents, such as a visa, to a parent wishing to attend an in-person mediation meeting in another State.**

→ **All appropriate measures should be taken to facilitate the provision of necessary travel documents, such as a visa, to any parent needing to enter another country to exercise his / her custody or contact rights with his / her child.**

→ **The Central Authority should take all appropriate steps to assist the parents with obtaining the necessary documents through provision of information and advice, or by facilitating specific services.**

82 In cases of international family disputes, visa and immigration issues often add to the difficulties of the case. In order to promote amicable resolutions of international family disputes, States should take measures to ensure that a left-behind parent is capable of obtaining necessary travel documents to attend a mediation session in the country to which the child was abducted, or indeed to participate in legal proceedings.[121] At the same time, States should take measures to facilitate the

120 For further details see section 4.4 below.

121 For information on possible assistance with visa and immigration issues, see the Country Profiles under the 1980 Hague Child Abduction Convention developed by the Permanent Bureau, finalised in 2011 (available at < www.hcch.net > under 'Child Abduction Section'), at sections 10.3 j) and 10.7 l).

provision of necessary travel documents to the taking parent to re-enter the State of the habitual residence of the child for a mediation session and / or legal proceedings.[122]

83 The provision of travel documents may also play an important part in the result of legal proceedings or mediation in an international parental dispute. For example, where the return of a child is ordered in Hague return proceedings, the taking parent might need travel documents to re-enter the State of the child's habitual residence together with the child. States should facilitate the provision of necessary travel documents in such cases. The same applies to cases where the taking parent decides to return the child voluntarily, including where a return of the child and parent has been agreed on in mediation. Nor should visa and immigration issues constitute an obstacle to the cross-border exercise of contact rights; the right of children to have contact with both their parents, as supported by the UNCRC, needs to be safeguarded.[123]

84 The Central Authority should assist the parents in obtaining promptly the necessary travel documents by providing information and advice or by providing assistance with the application for any necessary visa.[124]

2.8 Criminal proceedings against the taking parent

→ **Mediation in international child abduction cases needs to take into consideration possible criminal proceedings initiated against the taking parent in the country from which the child was abducted.**

→ **Where criminal proceedings were initiated, the issue needs to be addressed in mediation. Close co-operation among the relevant judicial and administrative authorities may be needed to help ensure that any agreement reached in mediation is not frustrated by ongoing criminal proceedings.**

85 Although the 1980 Hague Child Abduction Convention only deals with the civil aspects of international child abduction, criminal proceedings against the taking parent in the country of the child's habitual residence may affect return proceedings under the 1980 Convention.[125] The criminal charges may include child abduction, contempt of court and passport offences. Pending criminal

122 See also the Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 31.

123 See also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22.

124 *Ibid.* See also the Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 31:

'Where there is any indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary. States should act as expeditiously as possible when issuing clearances or visas for this purpose and should impress upon their national immigration authorities the essential role that they play in the fulfilment of the objectives of the 1980 Convention.'

125 The responses to the 2006 Questionnaire showed that criminal proceedings are commonly, but not necessarily, viewed as having a negative effect, see question No 19 of the 'Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Including questions on implementation of the *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*)', drawn up by the Permanent Bureau, Prel. Doc. No 1 of April 2006 for the attention of the Fifth Meeting of the Special Commission of October / November 2006 on the Civil Aspects of International Child Abduction; see also 'Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *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* (30 October – 9 November 2006)', drawn up by the Permanent Bureau, March 2007, at p. 56; both documents are available at < www.hcch.net > under 'Child Abduction Section'.

proceedings in the State of the child's pre-abduction residence can – under certain circumstances – result in the court seised with a Hague return application refusing to return the child. This may, in particular, be the case where the child was abducted by the actual carer and the return order would result in the separation of actual carer and child,[126] and this separation – due to the age of the child or other circumstances – would constitute a grave risk of physical or psychological harm in the sense of Article 13(1) *b)* of the 1980 Convention.[127]

86 The means by which criminal charges can be brought against the taking parent and whether and to what extent the left-behind parent has an influence on the initiation of criminal proceedings related to the child abduction will depend on the relevant legal system and the circumstances of the case. It should be noted that, even in cases where criminal proceedings were initiated on the motion or with the agreement of the left-behind parent, it might be a matter left to the prosecutor or court alone to decide whether criminal proceedings may be terminated. This means that should criminal proceedings against the taking parent turn out to be a possible obstacle to the return of the child, the left-behind parent may have little influence on removing this obstacle, whether or not the criminal charges were brought on his or her motion or with his or her approval.

87 Within mediation in international child abduction cases, it is important to take into consideration that criminal proceedings, particularly if threatening an imprisonment of the taking parent, may have been initiated or that there is a potential risk that such criminal proceedings might be filed in the future, even after the agreed return of the taking parent and child. In view of the possible implication these proceedings may have, it is crucial to address the issue in mediation.

88 Central Authorities and courts involved should as far as possible support the parties in obtaining the necessary general information on the relevant laws governing the initiation and termination of criminal proceedings as well as on the specific status of criminal proceedings. Close co-operation among the relevant judicial and administrative authorities may be necessary to ensure that criminal proceedings are not pending before a mediated agreement providing for the taking parent or child to travel to the State of the child's pre-abduction residence is implemented, or that no such proceedings can be initiated following the return of the taking parent and child. With regard to co-operation among the relevant judicial authorities, the International Hague Network of Judges may be of particular use.[128]

89 General information regarding criminal law aspects of international child abduction in the different Contracting States including information on who is able to initiate, withdraw or suspend criminal proceedings relating to the wrongful removal or wrongful retention of a child can be found in the Country Profiles under the 1980 Hague Child Abduction Convention.[129]

126 Because the parent's only choice was between not returning with the child or imprisonment upon return.

127 'This problem has sometimes been resolved by suspending (the enforcement of) the return order until the charges against the abducting parent are withdrawn', see the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22 and note 118.

128 For more information on the International Hague Network of Judges and the functioning of direct judicial communications, see 'Emerging rules regarding the development of the International Hague Network of Judges and draft General Principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges', drawn up by the Permanent Bureau, Prel. Doc. No 3 A of March 2011, and P. Lortie, 'Report on Judicial Communications in relation to international child abduction', Prel. Doc. No 3 B of April 2011, both documents for the attention of the Special Commission of June 2011 and available at < www.hcch.net > under 'Child Abduction Section'.

129 See section 11.3. of the Country Profiles under the 1980 Convention (*supra* note 121).

3 Specialised training for mediation in international child abduction cases / Safeguarding the quality of mediation

3.1 Mediator training – Existing rules and standards

90 To guarantee the quality of mediation it is indispensible that those conducting mediation have undergone appropriate training. Some States have enacted legislation regulating mediator training or the qualifications or experience[130] a person must have before being able to obtain a certain title, be registered as mediator, or be allowed to conduct mediation or certain forms of mediation (for example, State funded mediation).

91 For example, Austria established a State register for mediators in 2004. Registration requires mediators to comply with regulated training requirements.[131] The registration is only valid for five years; renewal requires proof of continuing training as set forth in the law.[132]

92 France also introduced legislation regarding the training for family mediation and penal mediation.[133] A State diploma in family mediation was introduced in 2004.[134] Only candidates with professional experience and / or a national diploma in the social or health sectors are admitted,[135] and they must have successfully passed the selection process.[136] The curriculum is regulated in detail and comprises 560 hours of training in, *inter alia*, law, psychology and sociology, 70 hours of which must be devoted to practice.[137] Another way to obtain the diploma is through recognition of professional experience.[138]

93 In many of the legal systems where mediator training has not been regulated by legislation, mediation organisations and associations have, with a view to guaranteeing the quality of mediation, established minimum training requirements which they request mediators to fulfil when joining the network. However, often due to the lack of a central point of reference regarding the training requirements for the relevant jurisdiction, there is no uniform approach to training standards.

---

130 The following States indicated in the Country Profiles under the 1980 Convention (*supra* note 121) that legislation on mediation (and in the case of some States, specific legislation on family mediation) addresses the issue of necessary qualifications and experience of mediators: **Argentina**, **Belgium**, **Finland**, **France**, **Greece**, **Hungary**, **Norway**, **Panama**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Switzerland** and the **United States of America**.

131 See *Bundesgesetz über die Mediation in Zivilrechtssachen (ZivMediatG)* of 6 June 2003, available at < http://www.ris.bka.gv.at/Dokumente/BgblPdf/2003_29_1/2003_29_1.pdf > (last consulted 16 June 2012) and *Zivilrechts-Mediations-Ausbildungsverordnung* (ZivMediatAV) of 22 January 2004, available at < http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2004_II_47/BGBLA_2004_II_47.html > (last consulted 16 June 2012).

132 See Arts 13 and 20 of the *Bundesgesetz über die Mediation in Zivilrechtssachen (ZivMediatG)* of 6 June 2003 (*supra* note 131).

133 See K. Deckert, 'Mediation in Frankreich – Rechtlicher Rahmen und praktische Erfahrungen', in K.J. Hopt and F. Steffek (*op. cit.* note 2), pp. 183-258, at pp. 242, 243.

134 See *Décret No 2003-1166 du 2 décembre 2003 portant création du diplôme d'État de médiateur familial* and *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007*, available at < http://www.legifrance.gouv.fr > (last consulted 16 June 2012); see also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 7, p. 22.

135 For details see *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007* (*supra* note 134), Art. 2.

136 *Ibid.*, Art. 3.

137 *Ibid.*, Arts 4 *et seq.*

138 Two stages are necessary for the recognition of professional experience: the public authorities first assess the applicant's admissibility and then a panel of examiners assesses the development of skills acquired through experience, see also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 7, p. 22.

94 An example of a jurisdiction in which central training requirements have evolved indirectly through self-regulation is England and Wales, where only mediators who have completed the Legal Services Commission (LSC) recognised training and have passed successfully the LSC's Assessment of Competence for family mediation are permitted to undertake publicly funded mediation.[139]

95 Furthermore, the issue of mediator training is addressed in several national[140] and regional non-binding instruments, such as mediation standards and codes of conduct[141] or recommendations.[142] However, there is not necessarily consensus regarding the training standards among the different bodies promoting mediator training. Also, many of the rules and standards address mediator training generally and do not focus specifically on training for family mediation, let alone international family mediation.

96 Among the initiatives for regionally promoting standards of mediator training for family mediation is that of AIFI,[143] an interdisciplinary non-governmental organisation with members in Europe and Canada. The AIFI Guide to Good Practice in Family Mediation, drawn up in 2008, addresses the issue of specialised training and accreditation for international family mediation.[144] Another organisation active in this field of mediation is the European Association of Judges for Mediation (GEMME, *Groupement Européen des Magistrats pour la Médiation*),[145] which consists of several national sections. The organisation links judges from different European States with the aim of promoting methods of amicable dispute resolution, in particular mediation. In 2006, GEMME France published a Practical Guide on the use of judicial mediation, which also touches upon issues of mediator training and professional ethics.[146]

97 Some non-binding regional mediation instruments encourage States to provide relevant structures to secure the quality of mediation. For example, Council of Europe Recommendation No R (98) 1 on family mediation encourages States to ensure the existence of 'procedures for the selection, training and qualification of mediators' and emphasises that, '(t)aking into account the particular nature of international mediation, international mediators should be required to undergo specific training'.[147] In addition, Council of Europe Recommendation Rec (2002)10 on mediation in civil matters requests States to 'consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues.'[148] Also the European Directive on mediation, a

139 See Legal Services Commission Mediation Quality Mark Standard, 2nd ed., September 2009, available online at < http://www.justice.gov.uk/downloads/legal-aid/quality/mediation-quality-mark-standard.pdf > (last consulted 16 June 2012).

140 For example, regarding a training model developed by the National Centre for Mediation and Conflict Resolution in the Ministry of Justice in **Israel**, see E. Liebermann, Y. Foux-Levy and P. Segal, 'Beyond Basic Training – A Model for Developing Mediator Competence', in *Conflict Resolution Quarterly* 23 (2005) pp. 237-257.

141 For example, the European Code of Conduct for Mediators (*supra* note 58), which establishes a number of principles to which individual mediators may commit themselves on a voluntary basis, states that '(m)ediators must be competent and knowledgeable in the process of mediation' and emphasises that '(r)elevant factors include proper training and continuous updating of their education and practice in mediation skills (...)', see Point 1.1.

142 See also 'Legislating for Alternative Dispute Resolution – A Guide for Government Policy-Makers and Legal Drafters', November 2006, pp. 49 *et seq.*, drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), available at < http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/LegislatingforAlternativeDisputeResolution.aspx > (last consulted 16 June 2012).

143 *Association Internationale Francophone des intervenants auprès des familles séparées.*

144 Original title: 'Guide de bonnes pratiques en médiation familiale à distance et internationale', see Art. 5.

145 The GEMME website can be found at < www.gemme.eu/en >.

146 The Guide is available on the GEMME website at < http://www.gemme.eu/nation/france/article/le-guide > (last consulted 16 June 2012).

147 *Supra* note 52, see parts II, c) and VIII e).

148 *Supra* note 53, see Principle V.

binding regional instrument, requests European Union Member States to 'encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties'.[149]

3.2 Specific training for mediation in international child abduction cases

→ **Mediation in international child abduction cases should only be conducted by experienced family mediators who preferably should have undergone specific training for mediation in international child abduction cases.**
→ **Mediators working in this field need continuing training to maintain their professional competence.**
→ **States should support the establishment of training programmes and standards for cross-border family mediation and mediation in international child abduction cases.**

98 In view of the particular nature of mediation in international child abduction cases, only experienced family mediators preferably having received specific training for international family mediation and, more specifically, mediation in international child abduction cases should conduct mediation in such cases.[150] Less experienced mediators should ideally only mediate such cases in co-mediation with more experienced colleagues.

99 Training for mediation in international child abduction cases should prepare the mediator to face the specific challenges of cross-border child abduction cases, as set out above, while building on the foundation of the regular mediator training.[151]

100 Generally, the mediator must possess the socio-psychological and legal knowledge necessary for conducting mediation in high conflict family cases. The mediator must have adequate training in assessing the suitability of an individual case for mediation. He or she must be able to assess the parties' capacity to mediate, *e.g.*, recognise mental impairment and language difficulties, and must be able to identify patterns of domestic abuse and child abuse and to draw the necessary conclusions.

101 Furthermore, training for international family mediation should encompass the development or consolidation of the necessary cross-cultural competence as well as the necessary language skills.

102 At the same time, the training needs to impart knowledge and understanding of the relevant regional and international legal instruments as well as the applicable national law. Although it is not the mediator's role to give legal advice, basic legal knowledge is crucial in cross-border family cases. It enables the mediator to understand the greater picture and conduct mediation in a responsible manner.

103 Responsible mediation in international child abduction cases includes encouraging the parents to focus on the needs of the children, and reminding them of their prime responsibility for their children's welfare. It stresses the need for them to inform and consult their children, and draws the parties' attention to the fact that their agreed solution can only be sustainable if it complies with

149 See Art. 4 of the European Directive on mediation (*supra* note 5).

150 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), VIII (International matters): 'e. Taking into account the particular nature of international mediation, international mediators should be required to undergo specific training.'

151 An example of a specialised training programme is the EU-co-founded project TIM (Training in international family mediation), which aims to create a network of international family mediators in Europe, see the network website < http://www.crossbordermediator.eu >. Further details on the TIM project, which is carried out by the Belgian NGO Child Focus in co-operation with the Katholieke Universiteit van Leuven and the German specialist mediation organisation MiKK e.V. with the support of the Dutch Centre for International Child Abduction, are available on the website of the German organisation MiKK e.V. at < http://www.mikk-ev.de/english/eu-training-project-tim/ > (last consulted 16 June 2012).

both (all) legal systems involved and is rendered legally binding in those legal systems, which will require specialist legal advice. Specialised training is required for child-inclusive mediation that takes into account the views of the child in child abduction cases.

104 Mediators working in the field of international child abduction need continuing training to maintain their professional competence.

105 The establishment of mediation training programmes and the further elaboration of standards for cross-border family mediation and mediation in international child abduction cases should be supported by States.

3.3 Establishment of mediator lists

→ **States should consider supporting the establishment of publicly available family mediator lists through which specialist mediators can be identified.**

106 With a view to promoting the establishment of mediation structures for cross-border family disputes, States should consider encouraging the establishment, on a national or supranational level, of publicly available family mediator lists through which specialist mediators and mediation services can be identified.[152] Ideally, these lists should include the mediators' contact details, information about their field(s) of speciality, training, language skills, intercultural competence and experience.

107 States can also facilitate the provision of information on specialised international family mediation services available in their jurisdiction through a Central Contact Point on international family mediation.[153]

3.4 Safeguarding the quality of mediation

→ **Mediation services used in cross-border family disputes should be monitored and evaluated, preferably by a neutral body.**

→ **States are encouraged to support the establishment of common standards for the evaluation of mediation services.**

108 To safeguard the quality of international family mediation, mediation services should be monitored and evaluated, ideally by a neutral body. However, where no such body exists, mediators and mediation organisations should themselves establish transparent rules on the monitoring and evaluation of their services. In particular, the parties should be able to give their feedback on the mediation and a procedure to file complaints should be available.

109 Mediators and mediator organisations working in the field of international child abduction should have a structured and professional approach to administration, record keeping, and evaluation of services, and should have access to the requisite administrative and professional support.[154]

110 States should work towards the establishment of common standards for the evaluation of mediation services.

---

152 For example, **France**, one of the first States to establish a Central Contact Point for international family mediation, is preparing a central list of specialised mediators; **Austria** established a central register for mediators in 2004 (for further details see para. 91 above), which is accessible online at < http://www.mediatoren.justiz.gv.at/mediatoren/mediatorenliste.nsf/contentByKey/VSTR-7DXPU8-DE-p > (last consulted 16 June 2012). Furthermore, the Country Profiles under the 1980 Convention (*supra* note 121) specify an availability of mediator lists (although not necessarily one central list) for the following legal systems and indicate from which bodies these lists can be obtained: **Argentina**, **Belgium**, **China (Hong Kong SAR)**, **Czech Republic**, **Denmark**, **Estonia**, **France**, **Greece**, **Hungary**, **Ireland**, **Norway**, **Panama**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Switzerland**, the **United Kingdom (England and Wales, Northern Ireland)** and the **United States of America**.

153 Regarding the Central Contact Point on international family mediation, see section 4.1 below.

154 See the Principles for the Establishment of Mediation Structures in Annex 1 below.

4 Access to mediation

→ **Information on available mediation services for international child abduction cases as well as other related information, such as mediation costs, should be provided through the Central Authority or a Central Contact Point for international family mediation.**

→ **Contracting States to the 1980 Hague Child Abduction Convention and other relevant Hague Conventions[155] are encouraged to establish a Central Contact Point for international family mediation to facilitate access to information on available mediation services and related issues for cross-border family disputes involving children, or to entrust this task to their Central Authorities.**

111 It is important to facilitate access to mediation. This begins by providing parties who wish to consider mediation with information on mediation services available in the relevant jurisdiction along with other related information.

112 It should be noted that the Principles for the Establishment of Mediation Structures[156] drawn up by the Working Party on Mediation in the context of the Malta Process, the aim of which is to establish structures for cross-border family mediation, ask States which agree to implement those Principles to establish 'a Central Contact Point for international family mediation', which should, *inter alia*, 'provide information about family mediation services available in that country', such as a list of mediators and organisations providing mediation services in international family disputes, information on mediation costs and further details. Furthermore, the Principles request the Central Contact Point to '(p)rovide information on where to obtain advice on family law and legal procedures, (...) on how to give the mediated agreement binding effect (as well as) on the enforcement of the mediated agreement'.

113 According to these Principles, the 'information should be provided in the official language of that State as well as in either English or French'. Furthermore, the Principles demand that 'the Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone number, e-mail address and names of responsible person(s) as well as information on what languages they speak' and that '(r)equests for information or assistance addressed to the Central Contact Point should be processed expeditiously'.

114 Although these Principles were drawn up with a view to establishing cross-border mediation structures for non-Hague cases, they are also relevant for Hague cases. With the rapid and diverse development of family mediation services in recent years, it is difficult to obtain an overview of the services offered, or to judge which of the services may be suitable for mediation in cross-border child abduction cases. It would therefore be extremely valuable if Contracting States to the 1980 Hague Child Abduction Convention and / or other relevant Hague Conventions were to collect and provide information on mediation services available for international family disputes in their jurisdiction, as well as other related information which could be pertinent to mediation in cross-border family disputes, and more specifically in international child abduction cases.

155 Regarding the promotion of mediation by other Hague Children's Conventions, see 'Objectives and scope' above.

156 Principles for the Establishment of Mediation Structures (see Annex 1 below). See also the 'Explanatory Memorandum on the Principles for the Establishment of Mediation Structures in the context of the Malta Process' reproduced in Annex 2 below (also available at < www.hcch.net > under 'Child Abduction Section' then 'Cross-border family mediation').

115 In Contracting States to the 1980 Hague Child Abduction Convention, the Central Authority under the Convention might be in an ideal position to take on that role.[157] However, some Contracting States to the 1980 Convention may prefer to establish an independent Central Contact Point for international family mediation to provide the relevant information. The Central Authority could in that case refer interested parties to that Central Contact Point for international family mediation, provided that the co-operation between Central Authority and Central Contact Point is regulated on an organisational level in such a way that the parties' referral to that Point will not lead to a delay in the processing of the return application.

116 Where an external body is appointed to serve as a Central Contact Point for international family mediation, measures should be taken to avoid any conflicts of interest, especially where that body offers mediation services itself.

117 It should be noted that in addition the Country Profile under the 1980 Hague Child Abduction Convention developed by the Permanent Bureau, finalised in 2011 and subsequently filled in by the Contracting States, can be a helpful source of information on mediation services available in these States.[158]

4.1 Availability of mediation – Stage of Hague return proceedings; referral / self-referral to mediation

→ **The possibility of using mediation or other processes to bring about agreed solutions should be introduced as early as possible to the parties to an international family dispute concerning children.**

→ **Access to mediation and other processes to bring about agreed solutions should not be restricted to the pre-trial stage, but should be available throughout the proceedings, including at the enforcement stage.**

118 The possibility of using mediation or other means of amicable dispute resolution should be introduced as early as possible. Mediation can already be offered as a preventive measure at an early stage of a family conflict to avoid a subsequent abduction.[159] This is particularly significant in cases where, following a couple's separation, one of the parents considers relocation to another country. While awareness needs to be raised that generally one parent may not leave the country without the consent of the other holder of (actually exercised) custody rights or an authorisation by the competent authority,[160] mediation can offer valuable support in finding an amicable solution.

157 At its meeting in June 2011, the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention encouraged States 'to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point', see Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 61.

158 See Part V of the Country Profiles under the 1980 Convention (*supra* note 121).

159 See the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), section 2.1, pp. 15-16; see also Chapter 14 below.

160 See the 'Washington Declaration on International Family Relocation', International Judicial Conference on Cross-Border Family Relocation, Washington, D.C., United States of America, 23-25 March 2010, co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (ICMEC) with the support of the U.S. Department of State: 'States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.' The Washington Declaration is available at < www.hcch.net > under 'Child Abduction Section'.

119 It should be emphasised that the manner in which 'parents are approached to consider mediation is very important'[161] and may be 'critical to its prospects of success'.[162] Since mediation is still relatively new in many jurisdictions, 'parents need full and frank explanations as to what mediation is and what mediation is not, so that they can come to mediation with appropriate expectations'.[163]

120 Once child abduction has occurred, parents should be informed about the possibility of mediation as early as possible, where specific mediation services are available for these cases. It should, however, be highlighted that mediation 'is not the only recourse the parents have and that the availability of mediation does not affect a parent's right to litigate if they prefer'.[164]

121 With a view to increasing the chances of an amicable resolution of the dispute, mediation or similar means should be available not only at a pre-trial stage, but also throughout the judicial proceedings, including at the enforcement stage.[165] The most appropriate of the available processes facilitating agreed solutions at a particular stage of the proceedings will depend on the circumstances.

122 As discussed in detail in section 2.1 (Timeframe / Expeditious procedures), it is of the utmost importance that safeguards be taken to ensure that mediation cannot be used as a delaying tactic by the taking parent. A helpful measure in this regard can be the initiation of return proceedings and, if necessary, the staying of those proceedings for the duration of the mediation.[166]

4.1.1 ROLE OF THE CENTRAL AUTHORITY

→ **Central Authorities shall, either directly or through any intermediary, take all appropriate measures to bring about an amicable resolution of the dispute.**

→ **When receiving a return application, the Central Authority in the requested State should facilitate the provision of information on mediation services appropriate for cross-border child abduction cases within the scope of the 1980 Hague Child Abduction Convention where available in that jurisdiction.**

→ **States should include information on mediation and similar processes and their possible combination in the training of their Central Authority staff.**

123 Central Authorities under the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention play a key role in encouraging an amicable resolution of international family disputes concerning children. Both the 1980 and 1996 Conventions recognise the need to promote agreed solutions and require Central Authorities to play an active role in achieving that goal. Article 7(2) *c)* of the 1980 Convention requires Central Authorities to take all appropriate measures 'to secure the voluntary return of the child or to bring about an amicable resolution of the issues'. Similarly, Article 31 *b)* of the 1996 Convention requires the Central Authorities to take all appropriate steps to 'facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies'.

124 Central Authorities under either Convention should therefore, as early as possible, facilitate the provision of information on mediation services or similar means available to assist with finding an agreed solution where parties seek the Central Authority's support in a cross-border family dispute.[167] Such information however should not be given instead of, but rather in addition to, information on procedures under the Hague Conventions and other related information.

---

161 See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 17.

162 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 8.

163 S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 18.

164 See S. Vigers, *(ibid.)*, (5.1), p. 17.

165 See also the Guide to Good Practice on Enforcement (*op. cit.* note 23), sections 5.1, 5.2, p. 25.

166 See section 2.1 above.

167 The Central Authority may in this regard serve as a Central Contact Point in the sense described in the Principles for the Establishment of Mediation Structures (see Annex 1 below); for further details on the Principles, see the introduction to Chapter 4 above. See also section 4.1.4 below.

125 For example, in an international child abduction case, the Central Authority in the requested State should, when contacted by the left-behind parent (either directly or through the Central Authority in the requesting State), provide the parent with information about the mediation and similar services available in that jurisdiction along with information on the Hague procedures. At the same time the Central Authority may, when approaching the taking parent to encourage the voluntary return[168] of the child, inform that parent about the possibilities for mediation and similar processes facilitating agreed solutions. Also, the Central Authority in the requesting State can provide information to the left-behind parent on methods to solve disputes amicably alongside information on the Hague return proceedings. The task of providing information on relevant mediation services can also be delegated to another body.[169]

126 However, the duty of the Central Authority to process return applications expeditiously must not be compromised. Central Authorities have a special responsibility to stress that abduction cases are time-sensitive. Where the Central Authority delegates the provision of information on relevant mediation services to another body, the Central Authority has to ensure that the parties' referral to that body does not lead to a delay. Furthermore, where the parties decide to attempt mediation, they should be informed that mediation and return proceedings can be pursued in parallel.[170]

127 In 2006, the comparative study on mediation schemes in the context of the 1980 Hague Child Abduction Convention[171] identified some Central Authorities that actively promote mediation, either by offering mediation themselves in certain cases or by employing the services of a local mediation provider. Today, as is also indicated by the Country Profiles under the 1980 Convention,[172] an increasing number of Central Authorities are proactive in encouraging parties to attempt mediation or similar processes to bring about an agreed solution of their dispute.[173]

128 States are encouraged to include in the training of Central Authority staff general information on mediation and similar processes, as well as specific information on available mediation and similar services in international child abduction cases.

---

168 Art. 7(2) *c)* and Art. 10 of the 1980 Hague Child Abduction Convention.

169 For example, a requested State may have designated a body other than the Central Authority as Central Contact Point for international family mediation (see paras 111 *et seq.* above) and tasked the Central Contact Point with not only the provision of information on mediation in non-Hague cases but also with the provision of information on specialised mediation services for international child abduction cases falling within the scope of the 1980 Convention.

170 Regarding the advantages of an initiation of Hague proceedings prior to the commencement of mediation, see section 2.1 above.

171 See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 2.4, p. 10.

172 *Supra* note 121.

173 For example: In **France**, in April 2007 the Central Authority took over the tasks formerly carried out by the Assistance Mission to International Mediation for Families (*Mission d'aide à la médiation internationale pour les familles*, MAMIF), an office established to promote mediation of cross-border family disputes and that was involved in the successful Franco-German bi-national mediation programme; for further information on the Assistance to international family mediation (aide à la médiation familiale internationale, AMIF) now carried out by the French Central Authority, see < http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/la-mediation-21106.html > (last consulted 16 June 2012). In **Switzerland**, the Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on 1 July 2009, implemented concrete obligations for the Swiss Central Authority in regard to promoting conciliation and mediation procedures, see Art. 3, Art. 4 (*Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007*) (*supra* note 103). In **Germany**, the Central Authority notifies the parents about the possibility to mediate. Furthermore, the following other States indicated in the Country Profiles under the 1980 Convention (*supra* note 121) that their Central Authorities provide information on mediation: **Belgium**, **China (Hong Kong SAR)**, **Czech Republic**, **Estonia**, **Greece**, **Hungary**, **Paraguay**, **Poland** (only to applicant), **Romania**, **Slovenia**, **Spain**, the **United Kingdom (England and Wales, Northern Ireland)**, the **United States of America** and **Venezuela**. In **Argentina** and in the **Czech Republic** the Central Authority offers mediation, see section 19.3 of the Country Profiles (*ibid.*).

4.1.2 ROLE OF THE JUDGE(S) / COURTS

129 The role that courts play in family disputes has changed considerably over the past decades in many legal systems. In civil proceedings generally, but especially in family law proceedings, the promotion of agreed solutions has been put on a statutory footing in many States.[174] Nowadays, judges are often under an obligation to attempt the amicable settlement of a dispute. In some legal systems, in family disputes concerning children, attending an information meeting on mediation or attempting mediation or other processes to bring about agreed solutions may even be obligatory for the parties under certain circumstances.[175]

→ The judge(s) seised in an international child abduction case should consider whether a referral to mediation is feasible in the case before him / her, provided that mediation services appropriate for cross-border child abduction cases within the scope of the 1980 Hague Child Abduction Convention are available in that jurisdiction. The same applies for other available processes to bring about agreed solutions.

→ States are encouraged to include information on mediation and similar processes and their possible combination with judicial proceedings in the training of judges.

130 In international child abduction cases, courts play an important role in promoting agreed solutions. Regardless of whether mediation has already been suggested by the competent Central Authority, a court seised with Hague return proceedings should consider the referral of the parties to mediation or similar services, where available and regarded as appropriate. Among the several factors that may influence this consideration are issues affecting the general suitability of the individual case for mediation[176] as well as the question of whether appropriate mediation services, *i.e.*, services that are compatible with tight timeframes and other specific requirements for mediation in international child abduction cases, are available. Where mediation has already been attempted without success before the institution of the Hague return proceedings, referral to mediation for a second time may not be appropriate.

---

174 See, for example, in **Israel**, the State courts presiding in a civil matter may, at any stage in the proceedings, propose to the parties that the matter or part of it be referred to mediation, section 3 of the State of Israel Regulation No 5539 of 10 August 1993. See also for **Australia**, Arts 13 C *et seq*. of the Family Law Act 1975 (last amended by Act No 147 of 2010), according to which '(a) court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make one or more of the following orders: (...) (b) that the parties to the proceedings attend family dispute resolution', which includes mediation; the full text of the law is available at < http://www.comlaw.gov.au/Details/C2010C00870 > (last consulted 16 June 2012). See also, more generally on the promotion of alternative dispute resolution in Australia, the website of the National Alternative Dispute Resolution Advisory Council (NADRAC) at < http://www.nadrac.gov.au/ >; NADRAC is an independent body established in 1995 to provide policy advice to the Australian Attorney-General on the development of ADR. In **South Africa**, the Children's Act 38 of 2005 (last amended in 2008), available at < http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf > (last consulted 16 June 2012), also encourages the amicable resolution of family disputes and allows judges to refer certain matters to mediation or similar processes.

175 See for example in the **United Kingdom (England and Wales)** the Practice Direction 3A – Pre-Application Protocol for Mediation Information and Assessment – Guidance for HMCS, entered into force on 6 April 2011, available at < http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a > (last consulted 16 June 2012), which stipulates for family proceedings as follows, unless one of the exceptions stated in the Protocol applies: 'Before an applicant makes an application to the court for an order in relevant family proceedings, the applicant (or the applicant's solicitor) should contact a family mediator to arrange for the applicant to attend an information meeting about family mediation and other forms of alternative dispute resolution (referred to in this Protocol as 'a Mediation Information and Assessment Meeting').'

176 See below under section 4.2.

131 When a judge refers a case to mediation, the judge needs to remain in control of the timeframe. Depending on the applicable procedural law, the judge may choose to adjourn the proceedings[177] for mediation for a short period of time or, where no adjournment is necessary, set the next court hearing before which mediation has to be finalised, within a reasonably short time, *e.g.*, between two and four weeks.[178]

132 Furthermore, where a judge refers a case to mediation, it is preferable for that judge to retain sole management of the case in the interest of continuity.

133 When it comes to mediation at the stage of judicial proceedings, two types of mediation can be distinguished: 'court based or annexed mediation' and 'out of court mediation'.[179]

134 Several 'court based or annexed mediation schemes' have been developed for disputes in civil matters, including family matters.[180] In these schemes mediation is offered either by a mediator working for the court or by a judge with mediator training, who is not the judge seised in the case.[181] However, in most States, these 'court annexed or court based mediation services' were created with a clear focus on purely national disputes, *i.e.*, disputes without international links. Therefore, the adaptability of existing 'court based or annexed mediation schemes' to the special needs in international family disputes and particularly disputes within the scope of the 1980 Hague Child Abduction Convention has to be considered carefully. Only where an existing 'court annexed or court based mediation service' fulfils the principal criteria set out in this Guide as essential for child abduction mediation schemes should a referral to that service be considered in Hague return proceedings.

135 Referral to mediation at the stage of court proceedings is also possible to 'out of court' mediation services, *i.e.*, mediation services operated by mediators or mediation organisations not directly linked to the court.[182] As for 'court based or annexed mediation services', the adaptability of existing 'out of court' mediation services to the special needs in international family disputes has to be considered carefully.

---

177 For example in the **United Kingdom (England and Wales)** the court seised with Hague return proceedings can refer the parties to mediation to take place during an adjournment of the proceedings, see S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.2, p. 18, referring to the United Kingdom and the reunite Mediation Pilot Scheme (*supra* note 97). Regarding the advantages of an initiation of Hague proceedings prior to the commencement of mediation, see section 2.1 above. On the subject of compulsory mediation sessions, see section 6.1.1 below.

178 See, for example, for the family court of **New Zealand**, the Practice Note 'Hague Convention Cases: Mediation Process – Removal, Retention And Access', available at < http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/ > (last consulted 16 June 2012), which provides for a 7- to 14-day period within which mediation in Hague child abduction cases should take place.

179 See above, in the Terminology section; see also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle III (Organisation of mediation): '4. Mediation may take place within or outside court procedures.'

180 Among the many States in which court annexed mediation schemes currently exist are: **Argentina** (*Ley 26.589 - Mediación y Conciliación of 03.05.2010, Boletín Oficial de 06.05.2010* replacing earlier legislation dating back to 1995; attending mediation is mandatory in most civil cases save regarding certain exceptional matters such as custody, see Arts 1 and 5 of the law); **Germany** (court annexed mediation schemes operate in several *Bundesländer* in civil matters, see, *inter alia*, the report on the mediation pilot project in Lower Saxony, commissioned by the Lower Saxony Ministry of Justice and Economics and Culture, drawn up by G. Spindler, 'Gerichtsnahe Mediation in Niedersachsen', Göttingen, 2006); and **Mexico** (see *Ley de Justicia Alternativa del Tribunal Superior de Justicia para el Distrito Federal* of 8 January 2008, last revised on 8 February 2011, published in *Gaceta Oficial del Distrito Federal el 08 de enero de 2008*, No 248 and *Gaceta Oficial del Distrito Federal el 08 de febrero de 2011*, No 1028; mediation is facilitated through the *Centro de Justicia Alternativa* (Alternative Dispute Resolution Center) within the *Tribunal Superior de Justicia del Distrito Federal* (Superior Court of Justice of the Federal District); the centre administers the mediation processes, including the appointment of the mediator from a list of registered mediators).

181 Regarding the difference between mediation by a judge and conciliation by a judge, see the Terminology section above.

182 See above, in the Terminology section; see also the Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), section 2.4, p. 6.

136 Many of the mediation schemes specifically developed for child abduction cases within the scope of the 1980 Hague Child Abduction Convention are currently run as 'out of court mediation'.[183]

137 Once the parties have reached an agreement in mediation or through similar means, the court seised with Hague return proceedings may, depending on the content of the agreement and the court's jurisdiction[184] in this regard, be asked to turn the agreement into a court order.

138 It is of great importance that judges dealing with international family disputes be well informed about the functioning of mediation and similar processes facilitating amicable dispute resolution and their possible combination with judicial proceedings. States are therefore encouraged to include general information on such matters in the training of judges.

139 In particular, the training of judges dealing with Hague return proceedings should include details on mediation schemes and similar processes suitable for use in international child abduction cases.

4.1.3 ROLE OF LAWYERS AND OTHER PROFESSIONALS

140 In recent years, in many jurisdictions, the role of lawyers in family disputes has changed, along with that of courts, with greater emphasis being placed on finding agreed solutions. Recognising the importance of a stable and peaceful basis for ongoing family relations, lawyers today are more inclined to promote an agreed solution rather than to take a purely partisan approach on behalf of their clients.[185] Developments such as collaborative law and co-operative law[186] and the growing number of lawyers with mediator training reflect this trend.

→ **Information on mediation and similar processes should be included in the training of lawyers.**

→ **Lawyers and other professionals dealing with the parties to an international family dispute should, where possible, encourage the amicable resolution of the dispute.**

→ **Where the parties to an international family dispute decide to attempt mediation, the legal representatives should support the parties by providing the legal information needed for the parties to make an informed decision. Furthermore, the legal representatives need to support the parties in giving legal effect to the mediated agreement in both (all) legal systems involved in the case.**

141 As has been highlighted above in relation to judges' training, it is important that States raise awareness within the legal profession of amicable dispute resolution. Information on mediation and similar processes should be included in the curriculum of lawyers.

142 When representing a party to an international family dispute over children, lawyers should be aware that their responsibility towards their client encompasses a certain responsibility for the interests and welfare of the child concerned. Given that an agreed solution will generally be in the child's best interests, the legal representative should, where the parents are willing to attempt mediation, be supportive and, as far as his / her mandate allows, co-operate closely with the other party's legal representative.

143 Once the parties have decided to commence mediation, the legal representatives play an important role in providing the legal information necessary for the parties to make informed decisions and in ensuring that the mediated agreement has legal effect in both (all) legal systems concerned. It should be emphasised that, due to the complexity of the legal situation in international family conflicts, lawyers should only agree to represent a party to such a conflict when they have the

183 For example in **Germany**, the **Netherlands** and the **United Kingdom (England and Wales)**, for details see note 97 above.

184 See Chapters 12 and 13 below.

185 See N. ver Steegh (*op. cit.* note 8), pp. 666 *et seq.*, with further references.

186 See Chapter 15 for an examination of other means of solving disputes amicably and their suitability for international child abduction cases.

necessary specialist knowledge. The involvement of a non-specialist lawyer in international child abduction cases can have negative effects and may create additional obstacles to finding an amicable resolution of the matter. In mediation it can add to an imbalance of powers between the parties.

144 Depending on how the mediation process is organised and on how the mediator(s) and parties wish to proceed, legal representatives may be present during all or part of the mediation sessions. It is, however, important that lawyers attending a mediation session together with their clients understand their very different role during the mediation session, which is a subsidiary one.

145 Close co-operation with the specialist legal representatives is particularly important when it comes to evaluating whether the solution favoured by the parties would fulfil the legal requirements in both jurisdictions concerned and determining what additional steps may be necessary to render the agreed solution legally binding and enforceable.

146 A lawyer, of course, may also conduct mediation him- or herself, if he or she meets any existing requirements for acting as a mediator in his or her jurisdiction. However a lawyer may not 'mediate' a case in which he or she represents a party, due to conflicts of interest.[187]

147 A lawyer may also engage in the amicable resolution of a family dispute in other ways. See Chapter 15 below on other mechanisms to encourage agreed solutions, such as co-operative law.

4.2 Assessment of suitability for mediation

→ **Initial screening should take place to assess the suitability of the individual case for mediation.**

148 Before commencing mediation in international child abduction cases, an initial screening should be conducted to assess the suitability of the individual case for mediation.[188] This helps to avoid delays that can be caused by attempting mediation in cases poorly suited to it. At the same time, initial screening helps to identify cases that carry special risks, such as cases involving domestic violence or alcohol or drug abuse, where either special precautions must be taken or mediation might not be appropriate at all.[189]

149 Two important questions arise in this context: (1) what issues should be addressed in the assessment of suitability for mediation and (2) who can / should carry out this assessment.

150 Whether a case is suitable for mediation needs to be decided on an individual basis. It has to be noted that there are no universal rules on this question. The suitability of the case for mediation will depend on the circumstances of the individual case and, to a certain extent, on the facilities and characteristics of the available mediation services and standards applied by the mediator / mediation organisation to such matters.

151 Among the many issues that may affect the suitability of an international child abduction case for mediation, are:

- willingness of the parties to mediate,[190]
- whether the views of one or both of the parties are too polarised for mediation,
- indications of domestic violence and its degree,[191]

187 The lawyer cannot be a neutral and impartial third party and at the same time respect the professional obligation to protect the interests of his / her client.

188 See sections 19.4 c) and d) of the Country Profiles under the 1980 Convention (*supra* note 121) for information on the assessment of suitability for mediation in the different Contracting States to the 1980 Convention.

189 See also Chapter 10 below on mediation and accusations of domestic violence.

190 Of course, where a party with no knowledge of the mediation process is opposed to the idea of mediation, the provision of more detailed information on how mediation works may affect that party's willingness to attempt mediation positively. See, however, section 6.1 below regarding the principle of voluntariness of mediation.

191 In cases involving alleged domestic violence for example, some mediators generally refuse to conduct mediation. Others may consider a case with alleged domestic violence suitable for mediation, depending on the alleged degree of violence and on the protective measures available to avoid any risks associated with the mediation process, see Chapter 10 below.

- incapacity resulting from alcohol or drug abuse,[192]
- other indications of a severe imbalance in bargaining powers,
- indications of child abuse.

152 The assessment of the suitability of the case for mediation should involve a confidential exchange with each party individually to enable each party to express his / her possible concerns regarding mediation freely.

153 The initial exchange with the parties to assess the suitability of the case for mediation can be used to address various logistical issues, arising, for example, from disabilities of one of the parties, which might need to be taken into account when making practical arrangements for the mediation session. Also, the language(s) that mediation should be conducted in can be addressed in the initial exchange. At the same time, it can be assessed whether interim contact with the child should be arranged and whether the child concerned has attained an age or degree of maturity at which his / her views should be heard. See further in Chapter 7 below regarding hearing the child in mediation.

154 The initial screening interview is also an ideal occasion to inform the parties of the details of the mediation process and about how mediation and Hague return proceedings affect each other.[193]

155 The assessment of the suitability of the case for mediation should be entrusted to a mediator or other experienced professional with knowledge of the functioning of international family mediation. Appropriate training is required to recognise cases of special risk and indications of differences in bargaining powers. Whether the assessment should be conducted by a person linked to the relevant mediation service itself or a person working for the Central Authority, another central body or the court will very much depend on the way mediation is organised in the relevant jurisdiction. Some mediators emphasise the importance of the assessment being carried out by the mediator(s) who are asked to mediate the case.[194] Other mediators prefer the assessment to be made by a colleague mediator familiar with the mediation service suggested to the parties.

156 Should the assessment of the suitability of the case for mediation be carried out by a person not familiar with the mediation services in question, there is a risk that a second assessment by a person familiar with the mediation services or the mediator(s) who is (are) asked to mediate the case might be necessary, which may lead to an unnecessary delay of the matter and possibly additional costs.

157 Many mediation services established for international child abduction cases successfully use initial screening.[195] In some programmes the suitability of the case for mediation is assessed through a written questionnaire in combination with a telephone interview.

---

192 Where the individual case is still considered to be suitable for mediation, safeguards may need to be taken to avoid disadvantages for the party in question.

193 See also section 6.1.2 below on informed consent.

194 It needs to be highlighted in this context that the question of whether the mediator is willing to take on the mediation of an individual case is to be distinguished from that of the suitability of a case for mediation. Once the suitability of a case for mediation is established, the mediator approached by the parties is generally still free in his / her discretion to take on mediation in that case.

195 For example, in the **United Kingdom (England and Wales)** the reunite scheme, see 'Mediation Leaflet', available at < http://www.reunite.org/edit/files/Downloadable%20forms/Mediation%20Leaflet.pdf > (last consulted 16 June 2012); see also the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), pp. 10, 13, in which the following are considered as indicative of unsuitability for mediation in child abduction cases: (1) one parent is not willing to attend mediation; (2) the views of the parents are too polarised; (3) there are concerns about domestic violence or its alleged degree; (4) there are allegations of child abuse.

4.3 Costs of mediation

→ **All appropriate efforts should be made to avoid a situation in which the costs of mediation become an obstacle or a deterrent to the use of mediation.**
→ **States should consider making legal aid available for mediation in international child abduction cases.**
→ **Information on costs for mediation services and possible further cost implications, as well as the interplay with costs for Hague return proceedings, should be made available in a transparent way.**

158 The willingness of parties to attempt mediation is likely to be influenced by the overall costs connected with the mediation. These costs may include costs for the initial assessment of the case's suitability for mediation, the mediator's fee, travel expenses, costs for reserving the rooms in which mediation is to take place, possible interpretation fees or for the involvement of other experts, and the possible costs of legal representation. Mediator's fees, which may be charged on an hourly or daily basis, may differ immensely from jurisdiction to jurisdiction and between different mediation services.

159 Some pilot projects specifically designed for mediation in international child abduction cases have offered mediation to the parties cost-free.[196] However, in many jurisdictions it has proven difficult to secure the funding to offer such services to parties for free on a long-term basis.

160 In many jurisdictions, no legal restrictions on mediator fees apply; the question is left to the self-regulation of the 'market'.[197] However, many mediators sign up to a fee scheme when joining a mediation association, or to codes of conduct requiring them 'to charge reasonable fees taking into account the type and complexity of the subject matter, the expected time the mediation will take and the relative expertise of the mediator'.[198] At the same time, several codes of conduct stress that 'the fees charged by a mediator should not be contingent on the outcome'.[199] In other States, mediation fees are regulated by law or may be defined by a court and allocated between the parties.[200]

161 Every effort must be made to ensure that the cost of mediation will not become an obstacle or a deterrent to its use. Acknowledging the advantages of promoting mediation in international child abduction cases, some States offer mediation in international child abduction cases free of charge

196 For example, the **Franco-German** bi-national mediation project, and see the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97). See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11); regarding the reunite Mediation Pilot Scheme, see 5.3, p. 19:
'To undertake its pilot project reunite was awarded a research grant by the Nuffield Foundation. All costs associated with the mediation, including travel to and from the UK were fully funded for the applicant parent up to an upper limit. Hotel accommodation and additional travel and subsistence costs were also fully funded. The mediators' fees, administration fees and interpreters' fees were also covered by the grant. The UK based parent was also reimbursed for all travel and subsistence costs and provided with accommodation where necessary.'

197 See K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 33.

198 See Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), section 2.7.3, p. 12.

199 *bid.*, section 2.7.3, pp. 12, 13, with further references.

200 See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.3, p. 19, referring, *inter alia*, to **France**, where court control has been established regarding the fees of court annexed mediation; see also K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 34 for further examples.

or have opened their legal aid system to mediation.[201] States that have not yet done so should consider the desirability of making legal aid available for mediation, or otherwise ensure that mediation services can be made available either cost-free or at a reasonable price for parties with limited means.[202]

162 It should be noted that it is a great achievement of the 1980 Hague Child Abduction Convention that return proceedings are made available to the applicant parent in some States completely cost-free;[203] in other States the national legal aid systems can be used for Hague proceedings.[204] It would be encouraging if similar support could be made available for mediation in international child abduction cases in the context of the 1980 Convention.

163 The costs associated with mediation are an essential aspect of access to mediation in practice. Information on mediation fees and other possible related costs, such as fees for rendering the mediated agreement binding in the two (all) legal systems concerned, is important for the parties to decide on whether to attempt mediation or not.

164 Parents should therefore be given detailed and clear information on all possible expenses connected with mediation, to allow them to properly estimate their likely financial burden.[205]

165 'It is often recommended that such information is put in writing before the mediation';[206] it can be made part of the contract to mediate that is frequently concluded between the mediator and the parties before commencing the mediation.[207]

---

201 Free of charge mediation in international child abduction cases under the 1980 Hague Child Abduction Convention is, for example, available in: **Denmark**, **France** (mediation arranged for by the Central Authority), **Israel** (for mediation through the court assistance unit), **Norway** and **Sweden** (if the court appoints the mediator), see also the Country Profiles under the 1980 Convention (*supra* note 121) at section 19.3 d). Legal aid for mediation in international child abduction cases is available under certain conditions, for example, in the **United Kingdom (England and Wales)** where mediators or mediation organisations that hold a Public Funding Franchise from the Legal Services Commission can offer publicly funded mediation to clients who are eligible for legal aid, see < http://www.legalservices.gov.uk >. Similarly, in the **Netherlands**, legal aid is available for mediation costs provided mediation is conducted by mediators registered with the Dutch Legal Aid Board (official website < www.rvr.org >), see the Dutch Legal Aid Act *(Wet op de rechtsbijstand)*. Furthermore, according to the Country Profiles under the 1980 Convention (*ibid.*), legal aid may cover mediation costs in international child abduction cases, for example, in the following jurisdictions: **Argentina**, **Israel**, **Slovenia**, **Switzerland** and the **United Kingdom (Northern Ireland)**.

202 See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle III (Organisation of mediation):

> '9. States should consider the opportunity of setting up and providing mediation, wholly or partly free of charge, or of providing legal aid for mediation, in particular if the interests of one of the parties require special protection.
> 10. Where mediation gives rise to costs, they should be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator.'

203 Art. 26(2) of the 1980 Convention requests Contracting States to 'not require any payment from the applicant towards cost and expenses of the (Convention) proceedings', but many Contracting States have made use of the possibility to declare a reservation regarding Art. 26 and have thereby subjected Hague proceedings to the normal legal aid rules in their jurisdiction; for details see also the Country Profiles under the 1980 Convention (*supra* note 121).

204 See also Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), sections 2.7.3, p. 12; for details see also the Country Profiles under the 1980 Convention (*supra* note 121).

205 See also the European Code of Conduct for Mediators (*supra* note 58), 1.3 (Fees):

> 'Where not already provided, mediators must always supply the parties with complete information as to the mode of remuneration which they intend to apply. They must not agree to act in a mediation before the principles of their remuneration have been accepted by all parties concerned.'

206 See Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), section 2.7, p. 12.

207 See section 4.5 below on the contract to mediate.

4.4 Place of mediation

166 As set out under section 2.6, geographical distance poses special challenges for mediation in international child abduction cases. Arranging for an in-person meeting for one or several mediation sessions may be costly and time-consuming. Nonetheless, many experienced mediators recommend in-person meetings if feasible.

→ **The views and concerns of both parents need to be taken into consideration when determining in which State an in-person mediation session should be convened.**
→ **The venue chosen for the in-person mediation sessions needs to be neutral and appropriate for mediation in the individual case.**
→ **Where the physical presence of both parties in a mediation session is not appropriate or feasible, long-distance and indirect mediation should be considered.**

167 Mediators approached with a mediation request in an international child abduction case will have to discuss the feasibility of in-person mediation sessions with the parties as well as the appropriate location for such in-person mediation sessions, both of which will depend on the circumstances of the individual case.

168 Very often, mediation sessions in child abduction cases are held in the country to which the child was abducted. One advantage of such an arrangement is the possibility to arrange for interim contact between the left-behind parent and the child during the left-behind parent's stay in that country; this can have a positive effect on the mediation.[208] Another advantage is that this simplifies linking the mediation process with the Hague court proceedings. However, choosing as the location the State to which the child was taken may be construed as an additional injustice by the left-behind parent who might already consider his / her agreement to attempt mediation (instead of simply following the Hague return proceedings) as a concession. Besides practical impediments, such as travel expenses, the left-behind parent might also face legal difficulties in entering the State to which the child was abducted due to visa and immigration issues (see above, section 2.7). On the other hand, the left-behind parent's possible presence in the State to which the child was taken, to attend the Hague return proceedings (for which a visa should also be granted – see section 2.7) can be used as an opportunity to attempt mediation in that State. In such a case at least no additional travel costs need to be borne by the left-behind parent.

169 Holding an in-person mediation session in the country from which the child was wrongfully removed, by contrast, may pose some additional practical challenges. The taking parent might face criminal prosecution in that country (see section 2.8 above) or be reluctant to leave the child in the care of a third person during his / her absence.

170 In exceptional circumstances consideration may be given to holding an in-person mediation meeting in a third 'neutral' country. However, travel costs and visa issues may be impediments.

171 As concerns the actual venue for the in-person mediation meeting, it is evident that the meeting must take place in neutral premises, such as rooms in a court building or the premises of an independent body offering the mediation service. A religious or community building might also be considered a neutral location by the parties. The location of the mediation meeting must be suitable to the individual case, for example providing adequate security for the persons involved if necessary.[209]

172 Although mediators generally consider the atmosphere of an in-person meeting as conducive to reaching an amicable resolution, the circumstances of the individual case will determine which option is feasible and most appropriate. Where an in-person mediation session is not appropriate or feasible, long-distance mediation may be an option. With the help of modern technology virtual

208 S. Kiesewetter and C.C. Paul, 'Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 46, 47.

209 See, *e.g.*, regarding the specific needs in domestic violence cases, Chapter 10 below.

in-person meetings may be relatively easy to set up.[210] In some States, such as Australia, due to their large geographic territory, long-distance mediation services, by phone, video link or online (also referred to as Online Dispute Resolution – ODR), have developed rapidly in the past years.[211]

173 Long-distance mediation, however, faces a number of specific challenges,[212] one of which is how to ensure the confidentiality of the mediation session. At the same time, the practical arrangements for the mediation session have to be considered carefully. For example, to avoid any doubts regarding fairness and neutrality of the mediation, it may be helpful, in a case of single mediation, to avoid the mediator joining a video link together with one of the parties (*i.e.*, in the same room as the party).

174 Long-distance mediation might also be of interest for cases where there are allegations of domestic violence and one of the parties indicates that, though wishing to mediate, the prospect of being in the same room with the other party would be very difficult.[213]

4.5 The contract to mediate – Informed consent to mediation

→ **To ensure that the parties are well informed about the terms and conditions of the mediation service, it can be advisable to establish a contract between the mediator and the parties (contract to mediate).**

→ **The contract to mediate should be clear and provide the necessary information on the mediation process, including detailed information on possible costs.**

→ **Where no such contract to mediate is established, it must be ensured that the parties are otherwise well informed about the terms and conditions of the mediation service before entering into mediation.**

175 With a view to ensuring the informed consent of the parties to the mediation, the establishment of a written agreement between the mediator and the parties on the terms and conditions of the mediation service should be considered, unless otherwise regulated in the relevant legal system.[214] This contract to mediate should be clear and contain the necessary information on the mediation process.

176 The contract should explain the mediator's role as a neutral and impartial third party. It should be highlighted that the mediator only assists with communication between the parties and that he or she does not represent (one of) the parties. The latter is of particular importance where mediation is to be conducted as bi-national, bilingual co-mediation, in a cross-border family conflict where the parties might tend to feel a closer link with the mediator who speaks the same language and shares the same cultural background.[215]

---

210 Regarding the use of technology in international family mediation, see, for example, M. Kucinski, 'The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases', *Journal of Dispute Resolution*, 2010, pp. 297 *et seq.* at pp. 312 *et seq.*

211 Regarding the development of an online family dispute resolution service in **Australia** see, for example, T. Casey, E. Wilson-Evered and S. Aldridge, 'The Proof is in the Pudding: The Value of Research in the Establishment of a National Online Family Dispute Resolution Service', 11th Australian Institute of Family Studies conference proceedings, available at < http://www.aifs.gov.au/conferences/aifs11/ > (last consulted 16 June 2012).

212 Regarding the special challenges of long-distance mediation, see the Draft Principles for Good Practice on 'Dispute Resolution and Information Technology', drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), 2002, available at < http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/PrinciplesonTechnologyandADR.aspx > (last consulted 16 June 2012).

213 See Chapter 10 below on mediation and accusations of domestic violence.

214 See also section 6.1.2.

215 See also section 6.2.3 on the concept of bi-cultural, bilingual co-mediation.

177 A contract to mediate drawn up for 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 him- or herself, even if referring to legal information, will not give legal advice.[216] This is where close co-operation with the specialist legal representatives of the parties can be helpful and / or the parties can be referred to sources of independent specialist legal advice.

178 The contract to mediate should highlight the importance of confidentiality of the mediation process and should draw attention to applicable legal provisions.[217] In addition, the contract may include terms obliging the parties not to subpoena the mediator.[218]

179 Reference should be made in the contract to mediation methods / models used and to the scope of mediation.[219]

180 The contract should also provide detailed information on the possible costs of the mediation.[220]

181 Where no contract to mediate is drawn up the above information should nonetheless be made available to the parties in writing, for example through information leaflets, a personalised letter or general terms and conditions available on the website to which reference is made before commencing mediation.

5 Scope of mediation in international child abduction cases

182 An issue always highlighted when referring to the advantages of mediation in comparison with court proceedings is that of the scope of mediation. It is said that mediation can better deal with all the facets of a conflict, since mediation can also include topics that are not legally relevant and which would therefore have no place in a court hearing. In a family dispute, mediation can help with disentangling old, long-lasting family feuds of which the current dispute might be a mere symptom. However, this can mean engaging in a time-consuming process.

5.1 Focus on the issues of urgency

→ **Mediation in international child abduction cases under the 1980 Hague Child Abduction Convention has to comply with very rigid time requirements and may therefore need to be limited in scope.**

→ **A good balance needs to be struck between including the topics necessary to work out a sustainable agreed solution and complying with the strict time requirements.**

216 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.'

217 For further details on confidentiality, see section 6.1.5 below.

218 For the example of including a deterring provision 'that a party must pay the mediator's attorneys' fee if the party subpoenas the mediator and the testimony is not compelled' where the law does not protect the confidentiality of the mediation, see K.K. Kovach (*op. cit.* note 110), at pp. 197, 198.

219 On the scope of mediation, see Chapter 5 below.

220 See also Standard VIII of the US Standards of Conduct, prepared by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution in 1994, as revised in 2005 (*supra* note 56).

183 Mediation in the particular circumstances of international child abduction has to be conducted against the background of the applicable international legal framework. To be compatible with the 1980 Hague Child Abduction Convention, mediation has to comply with very rigid time requirements and thus may need to be limited in scope. The 1980 Convention may furthermore give indications as to the subjects addressed in the mediation.

184 The primary issue at stake is, evidently, the return of the child. As the comparative study prepared for the 2006 Special Commission highlighted in this context:

> '(An) application under the (1980) Convention is primarily concerned with seeking the return of a child habitually resident in one Contracting State who has been wrongfully removed to or retained in another Contracting State (...) The basic premise of the Convention is that the State of the child's habitual residence retains jurisdiction to decide on issues of custody / contact and that prompt return of the child to that State will enable such decisions to be made expeditiously in the interests of the child without the child having the time to become settled in another State.'[221]

185 The 1980 Hague Child Abduction Convention seeks to expeditiously restore the *status quo ante* the abduction, leaving the long-term decisions on custody and contact, including the question of a possible relocation of the child, to the competent court which, in accordance with the 1996 Hague Child Protection Convention and other relevant instruments supporting that principle, is in the State of the child's habitual residence. Where none of the exceptions apply, the judge seised with a Hague return application is required to order the return of the child.

186 One could consequently raise the question of whether mediation in child abduction cases under the 1980 Hague Child Abduction Convention should be restricted to discussing the modalities of the immediate return of the child to the competent jurisdiction. The clear answer is no. Mediation in the context of the 1980 Convention can also discuss the possibility of a non-return, its conditions, modalities and connected issues, *i.e.*, the long-term decision of the child's relocation. Dealing with those issues in mediation is not, in principle, in contradiction with the 1980 Convention and other relevant instruments, although the legal framework naturally affects what *in concreto* may be agreed upon.[222]

187 It should be noted that mediation does not face the same jurisdictional restrictions as judicial proceedings. While court proceedings can only deal with matters for which the court has (international) jurisdiction, mediation is not restricted in the same way, even though jurisdictional issues will play a role when it comes to rendering the mediated agreement legally binding in the different legal systems involved. It is therefore widely accepted that mediation in international child abduction cases can also deal not only with the conditions and modalities of a return or non-return but also other longer-term issues affecting the parental responsibility of the parties, including custody, contact or even child support arrangements.

188 By contrast, Hague return proceedings cannot, in general, address the merits of custody. Article 16 of the 1980 Hague Child Abduction Convention states that '(a)fter receiving notice of a wrongful removal or retention of a child (...) the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned (...)'. The 1996 Hague Child Protection Convention works hand in hand with the 1980 Convention in this regard: long-term decisions on custody are left to the jurisdiction of the competent court in the State of the habitual residence of the child immediately before the abduction. According to Article 16 of the 1980 Convention, the possibility of a change in jurisdiction on matters of custody to the courts of the requested State generally only arises when the ongoing Hague return proceedings have ended.[223]

---

221 See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 3.1, pp. 10, 11.

222 See also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 95), pp. 39 *et seq.*; see also E. Carl and M. Erb-Klünemann, 'Integrating Mediation into Court Proceedings in Cross-Border Family Cases', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 59-76.

223 See Chapter 13 below on issues of jurisdiction and applicable law rules; regarding a change of jurisdiction in accordance with Art. 7 of the 1996 Convention, see also Chapter 13 of the Practical Handbook on the 1996 Hague Child Protection Convention (available at < www.hcch.net > under 'Publications').

189 When it comes to deciding exactly which issues can be covered in the mediation sessions in the individual international child abduction case, a good balance has to be struck between addressing the topics necessary to work out a sustainable agreed solution and complying with rigid time requirements. Also, the possible (additional) steps required to render the agreement on a certain subject matter legally binding and enforceable in both legal systems concerned need to be considered carefully, when deciding on the scope of mediation. It is, for example, conceivable that, in the individual case, the inclusion of maintenance issues in an agreement on the return of the child may risk delaying considerably the process of rendering the mediated agreement enforceable in the two legal systems due to complex jurisdictional issues.[224] Here, it may be advisable to separate the matter of maintenance from the issues primarily at stake in the international child abduction situation, *i.e.*, the question of return or non-return of the child and possibly related questions concerning parental responsibility. The parties should be made aware that the exclusion of any matters from the scope of the mediation at this stage does not constitute an obstacle to taking up these matters in separate mediation sessions at a later stage.

5.2 Importance of jurisdiction and applicable law regarding parental responsibility and other subjects dealt with in the mediated agreement

→ **In international family mediation, the interrelation between the subjects covered in mediation and aspects of jurisdiction and applicable law need to be taken into account.**

190 Mediation in international family disputes needs to take into consideration the interrelation between the matters dealt with in mediation and issues of applicable law and jurisdiction. Giving legal effect to a mediated agreement will often require the involvement of a court, be it for registration purposes or for turning the agreement into a court order. Hence, considering which court(s) may have jurisdiction on the issues that are to be included in the mediated agreement is important, as is the question of applicable law. Where a mediated agreement covers a wide range of subjects, it may be that the involvement of more than one judicial or administrative authority in the process of giving legal effect to the content of that agreement becomes necessary.[225]

6 Mediation principles / models / methods

191 With a view to guaranteeing the quality of mediation, several mediation principles have been developed, many of which can be found incorporated in mediation legislation, codes of conduct and other relevant instruments. Some of these principles, such as impartiality and neutrality, are often even featured in the definition of mediation itself.

192 Even though the mediation principles promoted in different jurisdictions and by individual mediation bodies may vary, many common elements can be identified. This Guide deals with good practice regarding the most commonly promoted principles, which have particular relevance for mediation in international child abduction cases.

193 When it comes to mediation models and methods employed in different States and by different mediation schemes, the picture is even more diverse and this Guide cannot give an exhaustive overview. While respecting the diversity in approach to mediation methods and models, the Guide aims to draw attention to certain good practices useful for mediation in international child abduction cases.

---

224 See section 5.2 below and Chapter 13 for further details on the issue of jurisdiction.

225 See Chapter 13 below on the issues of jurisdiction and applicable law.

6.1 Mediation principles – International standards

6.1.1 VOLUNTARY NATURE OF MEDIATION

→ **Mediation is a voluntary process.**
→ **The commencement of Hague return proceedings should not be made contingent upon attendance at mediation or at a mediation information session.**
→ **The willingness or lack thereof to enter into mediation should not influence Hague return proceedings.**

194 It is the very nature of mediation to engage the parties in a voluntary process of finding an amicable resolution to their dispute. 'Voluntariness' is a basic and undisputed principle of mediation commonly used in mediation definitions and it has, therefore, also been incorporated in the definition of mediation for this Guide.[226]

195 The principle of 'voluntariness' is not contrary to the requirements in some jurisdictions of mandatory information meetings on mediation.[227] Even in jurisdictions where it is compulsory for the parties to a dispute to attempt mediation,[228] it can be argued that this is compatible with the voluntary nature of mediation as long as the parties are not forced to actually settle their dispute in mediation.

196 In international child abduction cases, the use of mediation should not delay expeditious return proceedings, and thus the use of 'compulsory' measures to promote mediation has to be considered carefully.

197 The institution of Hague return proceedings should not depend on the attendance of both parties at a mediation information session, especially if, as a result, the taking parent would be given the possibility to delay unilaterally the institution of proceedings. Furthermore, any compulsory measures encouraging parents to mediate cannot disregard the specific circumstances of international abduction cases. States need to consider whether the mechanisms used in national family law disputes to promote the use of mediation are appropriate for international child abduction cases under the 1980 Hague Child Abduction Convention.

198 A recurring pattern of these cases is, for example, that the left-behind parent is not familiar with the legal system of the requested State (the State to which the child was taken) and does not speak the language of that State, while the taking parent usually has at least the language link with this State. Here, pressure put on the left-behind parent to enter into mediation only available in the language of the requested State, *i.e.*, in which the left-behind parent will not be able to communicate in his or her mother tongue, will most likely be perceived as unfair by that parent. Giving the left-behind parent in such a situation the impression that the commencement of Hague proceedings is dependent on his or her attempting mediation might well be viewed by the parent as undue pressure and therefore be counterproductive.

---

226 See the Terminology section above.

227 For example in **France** and in **Germany**, in a parental dispute over children, the family judge may oblige the parents to attend an information meeting about mediation, but may not oblige them to attempt mediation, see Art. 373-2-10 (last amended 2004) and Art. 255 (last amended 2002) of the French Civil Code and § 156 para. 1, sentence 3 (last amended 2012) and § 81 para. 2, number 5 (last amended 2012) of the German Domestic Family Law Procedure Act (FamFG); also in **Australia**, a court may order 'that the parties to the proceedings attend family dispute resolution (...)', which includes mediation, see Arts 13 C *et seq.* of the Family Law Act 1975 (last amended by Act No 147 of 2010) (*supra* note 174). For further information on compulsory meetings regarding mediation in civil matters in some States, see also K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 12.

228 See H. Joyce, 'Mediation and Domestic Violence: Legislative Responses', Comment, 14 *J. Am. Acad. Matrimonial Law* (1997), p. 451.

199 Both parents need to be informed that mediation is only an option, which exists in addition to recourse to Hague return proceedings. The parents' willingness or lack of willingness to enter into mediation or to continue mediation once commenced should not influence the decision of the court.[229]

6.1.2 INFORMED CONSENT

→ The parties' decision to enter into mediation should be based on informed consent.

200 All necessary information on mediation and connected issues should be provided to the parties in advance of the mediation process to allow the parties to make an informed decision about entering into mediation.[230] This information should include: details on the mediation process and the principles determining that process, such as confidentiality; details on the method and model used, as well as information on the practical modalities; the possible costs involved for the parties. Furthermore, information should be given on the interrelation of mediation and judicial proceedings. The parties should be informed that mediation is only one option and that attempting mediation does not prejudice their access to judicial proceedings.

201 Where a contract to mediate between the mediator and the parties is drawn up on the terms and conditions of the mediation, the relevant information could be reflected in that contract; see also section 4.5 above on the subject of the 'contract to mediate'.

202 Since the legal situation in international family disputes is particularly complex, the parties' attention should be drawn to the fact that specialist legal information is necessary to inform the discussion in mediation and to assist with drafting the mediated agreement, as well as with giving legal effect to the agreement in the jurisdictions concerned. Access to this information could be facilitated by the Central Authority or a Central Contact Point for international family mediation set up for this purpose (see Chapter 4 above, 'Access to mediation') or could be provided by specialist legal representatives of the parties.[231]

6.1.3 ASSESSMENT OF SUITABILITY FOR MEDIATION

→ A screening process should be applied to assess the suitability of mediation for the particular case.

203 The advantages of an initial screening have been set out above, in sections 2.1 and 4.2.

---

229 See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, pp. 17, 18, referring to the reunite Mediation Pilot Scheme (*supra* note 97):

'When potential participants for the reunite pilot project were approached it was emphasised to both parents that mediation could only be undertaken with the full consent of both parties and an unwillingness to enter mediation would have no effect on the outcome of the Hague application.'

230 See the Principles for the Establishment of Mediation Structures in Annex 1 below, including the general principle of 'Informed consent'.

231 See below, section 6.1.7, regarding informed decision making; see also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.'

6.1.4 NEUTRALITY, INDEPENDENCE, IMPARTIALITY AND FAIRNESS

→ **The general principles of neutrality, independence, impartiality and fairness are indispensible for mediation; they need to be safeguarded.**

204 The principles of neutrality, independence, impartiality and fairness are crucial to mediation.[232] They are closely linked although they address different aspects of the mediation process. Mediation should be neutral in relation to the outcome of the process. The mediator needs to be independent as to the way in which he or she conducts mediation. At the same time, the mediator needs to be impartial towards the parties.[233] Finally, the mediation must be conducted fairly. The latter implies that the parties need to be given equal opportunity to participate in the mediation process. The mediation process needs to be adapted in each individual case to allow for balanced bargaining powers. For example, the parties' wish to use their mother tongue or a language with which they feel comfortable should be respected as far as possible.[234]

6.1.5 CONFIDENTIALITY

→ **States should ensure that appropriate safeguards are in place to support the confidentiality of mediation.**
→ **States should consider the introduction of rules ensuring that the mediator and others involved in the mediation may not be compelled to give evidence on communications related to the mediation in civil or commercial proceedings unless certain exceptions apply.**
→ **In international family mediation, the parties need to be fully informed about the rules applicable to confidentiality in the different jurisdictions concerned.**

205 All communications in the course of, and in the context of, mediation should, subject to the applicable law,[235] be confidential, unless otherwise agreed by the parties.[236] Confidentiality of communications related to the mediation helps to create the atmosphere of trust needed for the parties to engage in an open discussion on a whole range of possible solutions to their dispute. The parties may be less willing to consider different options if they fear that their proposals may be taken as a concession and held against them in legal proceedings. In a child abduction case for example, the left-behind parent is likely to feel reluctant to indicate that he or she could agree to the child remaining in the other jurisdiction, if he or she fears that this might be interpreted as 'acquiescence' in the sense of Article 13(1) *a)* of the 1980 Hague Child Abduction Convention.

206 Passing on purely administrative information regarding whether the mediation has commenced, is continuing or has been terminated to the competent court or Central Authority who was involved

---

232 See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 3.2-3.4, pp. 11-13, and also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):
'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles:
i. the mediator is impartial between the parties;
ii. the mediator is neutral as to the outcome of the mediation process;
iii. the mediator respects the point of view of the parties and preserves the equality of their bargaining positions'.

233 See also Standard II of the US Standards of Conduct (*supra* note 56); see also Art. 8 of the AIFI Guide to Good Practice in Family Mediation (*op. cit.* note 144); see also J. Zawid, 'Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators', *Inter-American Law Review*, Vol. 40, 2008, 1 *et seq.*, 37 *et seq.*

234 See section 2.5 above.

235 See below, para. 211, for exceptions to the principle of confidentiality.

236 See also Standard V of the US Standards of Conduct (*supra* note 56); see also Art. 7 of the AIFI Guide to Good Practice in Family Mediation (*op. cit.* note 144).

in the referral to mediation does not infringe confidentiality.[237] On the contrary, sharing this information is an important part of the organisational co-operation between mediators, the Central Authorities and courts in international child abduction cases.[238]

207 Different measures are applied to help secure the confidentiality of mediation. In many Contracting States to the 1980 Hague Child Abduction Convention, confidentiality of mediation is addressed in legislation.[239] Furthermore, contracts concluded between the mediator and the parties before commencing mediation often include rules on confidentiality.[240] The contract may, for example, include terms that forbid the parties to subpoena the mediator, and even include as a deterrent a provision whereby a party that subpoenas the mediator needs to cover the mediator's attorneys' fees.[241]

208 However, in the absence of legislation or other rules binding the courts, exempting the mediator and others involved in the mediation process from being called to give evidence on information obtained in connection with the mediation in civil or commercial proceedings, the confidentiality of mediation may be pierced in the course of such legal proceedings.

209 States should consider the introduction of rules to ensure that this would not be the case unless certain exceptions apply.[242] Different regional instruments, such as the European Directive on mediation[243] or the United States of America's model law on mediation (the United States

237 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52):
'V. Relationship between mediation and proceedings before the judicial or other competent authority (...)
b. States should set up mechanisms which would: (...)
iii. inform the judicial or other competent authority whether or not the parties are continuing with mediation and whether the parties have reached an agreement'.

238 See section 2.1.2 above.

239 See the Country Profiles under the 1980 Convention (*supra* note 121), section 19.2; the States with legislation on the confidentiality of mediation include: **Belgium**, **Denmark**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Ireland**, **Israel**, **Lithuania**, **Norway**, **Panama**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Sweden**, **Switzerland** and the **United States of America** (different rules apply in the different US federal states).

240 See section 4.5 above; see also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 95), pp. 47 *et seq.*

241 See K.K. Kovach (*op. cit.* note 110), at pp. 197, 198.

242 For the exceptions, see para. 211 below.

243 European Directive on mediation (*supra* note 5), see Art. 7 (Confidentiality of mediation):
'1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.'
See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):
'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)
v. the conditions in which family mediation takes place should guarantee privacy;
vi. discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties or in those cases allowed by national law'.

UMA),[244] request that confidentiality of mediation be safeguarded by such legislative measures. And many States have indeed already introduced such measures.

210 The mediator needs to inform the parties fully about the applicable rules on confidentiality. In international family mediation it is of the utmost importance that the views of both (all) relevant jurisdictions on the issue of confidentiality be considered. The parties need to know whether the information exchanged in the course of the mediation can be used in court in any of the jurisdictions in question. If the mediator has no knowledge of the other jurisdictions' confidentiality rules, he or she needs to draw the parties' attention to the fact that these rules may be different and that the communications in the course of mediation might not be considered confidential in the other jurisdiction. Inquiries with the specialist legal representatives of the parties can be encouraged. In addition, the Country Profiles under the 1980 Hague Child Abduction Convention can be a useful source of information regarding existing legislation on the confidentiality of mediation in a Contracting State to the Convention.[245]

211 There are, of course, exceptions to the principle of confidentiality when it comes to information on committed or planned criminal acts. Many rules regulating the confidentiality of mediation include explicit exceptions in this regard.[246] In addition, exceptions may derive directly from other rules such as criminal law rules. According to such rules a mediator or other person involved in mediation may be obliged to report certain information to the police and, where the information is

244 United States UMA (*supra* note 54), see Section 4 (Privilege against disclosure; admissibility; discovery):
'(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
(b) In a proceeding, the following privileges apply:
(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.'

245 *Supra* note 121, see also note 239. Relevant legislation referred to in the Country Profiles is, if submitted by the relevant Contracting States, also available on the Hague Conference website together with the Country Profiles.

246 See also the European Directive on mediation (*supra* note 5), Art. 7 (a), providing for an exception 'where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person'; see also the United States UMA (*supra* note 54), Section 6 (Exceptions to privilege):
'(a) There is no privilege under Section 4 for a mediation communication that is:
(1) in an agreement evidenced by a record signed by all parties to the agreement;
(2) available to the public under (insert statutory reference to open records act) or made during a session of a mediation which is open, or is required by law to be open, to the public;
(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or
(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the (Alternative A: (State to insert, for example, child or adult protection) case is referred by a court to mediation and a public agency participates.)
(Alternative B: public agency participates in the (State to insert, for example, child or adult protection) mediation)
(...).'

related to a potential risk of psychological or physical harm to a child, possibly to additional child welfare organisations or other child protection bodies. Whether a mediator can, in such cases, be asked to give evidence before a court on the information obtained in the context of the mediation is another question, and will depend on the applicable law.

6.1.6 CONSIDERATION OF THE INTERESTS AND WELFARE OF THE CHILD

→ Mediation in international child abduction cases needs to take the interests and welfare of the child concerned into consideration.
→ The mediator should encourage parents to focus on the needs of the children and remind them of their prime responsibility for their children's welfare, and of the need for them to inform and consult their children.[247]

212 Given that the outcome of mediation in parental conflicts on custody and contact directly affects the child concerned, mediation needs to take the interests and welfare of the child into account. Of course, mediation is not a directive process; the mediator only facilitates communication between the parties, enabling them to find a self-accountable solution to their conflict. However, the mediator:

> 'should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children'.[248]

213 Also, the Principles for the Establishment of Mediation Structures in the context of the Malta Process[249] recognise the importance of this point by stating that parents should be assisted with reaching an agreement 'that takes into consideration the interests and welfare of the child'.

214 Taking into account the interests and welfare of the child concerned does not only give due importance to the rights of the child, but may also be decisive when it comes to giving legal effect to the mediated agreement. In many States, parental agreements relating to parental responsibility will need to be approved by the court ensuring that the agreement is compatible with the best interests of the child concerned.

6.1.7 INFORMED DECISION-MAKING AND APPROPRIATE ACCESS TO LEGAL ADVICE

→ A mediator conducting mediation in international child abduction cases needs to draw the parties' attention to the importance of considering the legal situation in both (all) legal systems concerned.
→ The parties need to have access to the relevant legal information.

215 The parties' agreed solution should be the result of informed decision making.[250] They need to be fully aware of their rights and duties, as well as the legal consequences of their decisions. As already highlighted, the legal situation in international family disputes is particularly complex. The parties' attention must therefore be drawn to the fact that specialist legal information is necessary to inform the discussion in mediation sessions, and to assist both with drafting the mediated agreement and giving it legal effect in the jurisdictions in question.

---

247 This principle is included in Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), under III (Process of mediation).

248 *Ibid.*

249 See Annex 1 below.

250 See *ibid.*, including the general principles of 'Informed decision making and appropriate access to legal advice'.

216 The parties should have access to specialist legal advice.[251] Access to relevant legal information could be facilitated by the Central Authority or a Central Contact Point for international family mediation set up for this purpose (see section 4.1.4 above), or could be provided by specialist legal representatives of the parties.[252]

217 Where only one party is legally represented, the mediator needs to draw the other party's attention to the necessity of accessing legal information. Certain legal information can also be provided by the mediator him- or herself, of course, with the latter making clear, however, that he / she is not in a position to give legal advice.

6.1.8 INTERCULTURAL COMPETENCE

→ **Mediation in international family disputes needs to be conducted by mediators with intercultural competence.**

218 As has been pointed out above, mediation in international family disputes regularly involves parties from different cultural and religious backgrounds.[253] Mediators conducting mediation in such cases need to be knowledgeable of, and sensitive to, the cultural and religious issues that may be involved. Specific training is needed in this regard.[254]

6.1.9 QUALIFICATION OF MEDIATORS OR MEDIATION ENTITIES – MINIMUM STANDARDS FOR TRAINING

→ **Mediation in international child abduction cases needs to be conducted by experienced family mediators specifically trained for this kind of mediation.**

219 Specialist training is required for mediators conducting mediation in international child abduction cases. See Chapter 3 above for further information.

6.2 Mediation models and methods

220 As stated above, when it comes to mediation models and methods employed in different States and by different mediation schemes, this Guide cannot possibly give an exhaustive overview. Nor can it conclude that one model or method is preferable to another. The Guide aims to draw attention to specific good practices useful for mediation in international child abduction cases regarding certain mediation models or methods.

---

251 See also section 6.1.2 above on informed consent, para. 202.

252 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.'

253 See section 2.4 above; see also, for example, K. Kriegel, 'Interkulturelle Aspekte und ihre Bedeutung in der Mediation', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 91-104; R. Chouchani Hatem (*op. cit.* note 110), pp. 43-71; D. Ganancia (*op. cit.* note 110), pp. 132 *et seq.*; M.A. Kucinski (*op. cit.* note 110), pp. 555-582.

254 On the subject of training, see Chapter 14 below.

6.2.1 DIRECT OR INDIRECT MEDIATION

→ Whether direct or indirect mediation is most appropriate in the individual case will depend on the circumstances of the case.

221 The decision on whether to use direct or indirect mediation,[255] or a combination of the two, will depend on the circumstances of the case, such as the costs related to geographical location, and possible allegations of domestic violence (see Chapter 10), etc. The decision is also closely linked to that of determining the place of mediation, once a face-to-face meeting has been identified as the way forward (see above, section 4.4).

6.2.2 SINGLE OR CO-MEDIATION

→ In highly conflictual international child abduction cases the use of co-mediation should be encouraged where feasible.

222 Co-mediation, *i.e.*, mediation conducted by two mediators, has been used successfully in international child abduction cases by different mediation schemes set up specifically for those cases.

223 Mediation in highly conflictual international child abduction cases is very intense and complex; the parties' discussion may be very emotional and can be potentially explosive. The use of co-mediation in such circumstances has proven to be particularly advantageous.[256] Co-mediation is beneficial in providing the experience, knowledge and methodology of two mediators, which increases the likelihood of arriving at an agreed outcome in these highly conflictual cases. Already the presence of two mediators in the room can make it easier to create a calm and constructive atmosphere for discussion. The mediator's co-operation can serve as an example to the parents. Furthermore, the very fact that co-mediation can guarantee that the parties are never left alone with each other throughout the mediation sessions is an advantage. At the same time, it has to be taken into account that mediation in international child abduction cases has to take place within a tight timeframe, which can mean that mediation sessions might have to be organised in a short sequence of mediation sessions of two to three hours. Taking into account that mediation under such circumstances places a heavy burden on the mediator, co-mediation can be helpful for the sake of all involved.[257]

224 However, there may be cases where co-mediation is not feasible. Co-mediation is likely to be more expensive than single mediation. In addition, finding two appropriate mediators within the given short timeframe may be difficult. Furthermore, if the two mediators have not co-mediated before, there may be a risk that they will need time to adapt to the different dynamics of co-mediation. This points to the advantages of single mediation by a mediator with experience in mediating disputes in international child abduction, which is likely to be less costly, may be easier to schedule and does not involve the risk that the methodologies of two mediators who have not co-mediated before will conflict.

225 Nonetheless, in view of the various advantages of co-mediation, when envisaging the setting up of a mediation scheme for child abduction cases under the 1980 Hague Child Abduction Convention, the introduction of co-mediation for high conflict cases should be considered.[258]

---

255 For the definitions, see the Terminology section above.

256 See for example the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), pp. 42-44, on the experience of mediators in international child abduction cases.

257 In the 2006 Report on the reunite Mediation Pilot Scheme (*ibid.*), at p. 11, mediators highly recommended that mediation be conducted as co-mediation in such cases.

258 For Contracting States to the 1980 Convention in which co-mediation is available, see also the Country Profiles (*supra* note 121) at section 19.1 d). Co-mediation is, for example, available in **Australia**, **Belgium**, **France**, **Germany**, **Hungary**, **Lithuania**, **Slovenia**, the **United Kingdom (England and Wales, Northern Ireland)** and the **United States of America**.

6.2.3 CONCEPT OF BI-CULTURAL, BILINGUAL MEDIATION

→ Where appropriate and feasible, the use of bi-cultural, bilingual co-mediation should be encouraged in cross-border child abduction cases.

→ Information about the possible mediation models and procedures should be made available to interested parties through the Central Authority or a Central Contact Point for international family mediation.

226 A special form of co-mediation is bi-cultural, bilingual mediation. Bi-cultural, bilingual co-mediation addresses the specific needs for intercultural competence as well as language skills when mediating between parties from different States of origin with different mother tongues.

227 According to this model, mediation is to be conducted by two experienced family mediators: one from each party's State of origin and cultural background. Where different languages are spoken in the States of origin, the mediators will bring with them the necessary language skills, although it has to be highlighted that at least one of them needs to have a good understanding of the other language involved. There are two further issues that some of the mediation schemes set up for international child abduction using bi-national mediation try to balance, *i.e.*, the gender and professional expertise of the mediators. Co-mediation in these schemes is conducted by one female and one male mediator, one with a legal background and one with a socio-psychological background. This allows for the combining of professional expertise and cultural competence in handling different mediation issues. These co-mediation schemes involving mediators of different genders and from different professional backgrounds could thus be referred to as bi-cultural, bi-lingual, bi-gender and bi-professional mediation schemes.[259]

228 Historically, the development of bi-cultural mediation schemes in the context of child abductions under the 1980 Hague Child Abduction Convention goes back to a bi-national Franco-German parliamentary mediation initiative. To assist particularly difficult abduction cases between Germany and France, involving nationals from both countries, the Ministers of Justice of France and Germany decided in 1998 to establish a group of Parliamentarian mediators and to fund its work. The group, comprising three French and three German Parliamentarians, one of each being Members of the European Parliament, commenced its work in 1999. Cases were mediated in co-mediation by one French and one German mediator.[260] In 2003 the parliamentary scheme was replaced by a scheme involving non-Parliamentarian professional mediators from both countries, which operated until 2006.[261] Moving away from the involvement of Parliamentarians and towards co-mediation by professional independent mediators was a step forward in avoiding the

259 For example, the mediation schemes currently accessible through the German non-profit organisation MiKK e.V.: the **German-Polish** project (commenced in 2007), the **German-American** project (commenced in 2004), the **German-French** project carrying on the work of the Franco-German mediation scheme organised and financed by the French and German Ministries of Justice (2003-2006), the **German-British** project in co-operation with reunite (commenced in 2003/4), for further details see note 97 above. See also the Wroclaw declaration from 2008 for the principles to which these 'bi-cultural' mediation schemes aspire to adhere, discussed in S. Kiesewetter, C.C. Paul and E. Dobiejewska, 'Breslauer Erklärung zur binationalen Kindschaftsmediation', in FamRZ 8/2008, pp. 753 *et seq.*; the Wroclaw declaration is also available at:
< http://www.mikk-ev.de/english/codex-and-declarations/wroclaw-declaration/ > (last consulted 16 June 2012).

260 For a brief description of the parliamentary mediation initiative project, see the report on the **Franco-German** professional bi-national co-mediation in T. Elsen, M. Kitzing and A. Böttger, 'Professionelle binationale Co-Mediation in familienrechtlichen Streitigkeiten (insbesondere Umgang) – Endbericht', Hannover 2005. In the Franco-German parliamentary mediation project there were also professional mediators involved, see *ibid.*

261 See also *ibid.*, 'The German Ministry of Justice estimates that around 30 cases of mediation have been or are being handled by this group for the period from its establishment in October 2003 until its termination in March 2006.' Knowing that the governmental funding of the project would end in 2006, the professional mediators involved in these cases established in 2005 an association for bi-national family mediation in Europe – *Médiation familiale binationale en Europe* (MFBE) – to allow the project to continue.

politicisation and nationalistic characterisation of some private family disputes.[262]

229 Following the positive experiences of the Franco-German mediation project,[263] further bi-national mediation projects were initiated in Germany (one with the United States of America, as well as a Polish-German bi-national pilot mediation scheme).

230 Of course, it is not the nationality of the professional mediators *per se* which makes them particularly well-suited to conduct mediation in tandem in cases where parties from the mediators' home countries are involved. It is rather the mediator's cultural background and resulting ability to understand the party's values and expectations which are important, as well as the ability to translate culturally linked verbal and non-verbal communication in a way that renders it more understandable for the other party. The latter evidently presupposes that the mediator has a good knowledge of the other party's culture.

231 Recognising that a person's culture is influenced by many factors, of which nationality is only one, and that in a given case other aspects like religion and the link to a specific ethnic group might influence a person's culture in a much stronger way than his or her citizenship, one might wish to speak of encouraging 'bi-cultural' mediation as a principle.[264]

232 The big advantage of 'bi-cultural', 'bilingual' co-mediation is that it may provide a confidence-building framework for the parties, creating an atmosphere where the parties feel understood and assisted in their communication by someone from their own linguistic and cultural background. In view however of the possible danger of a party identifying him- or herself with one of the mediators and considering this person as a representative in the mediation, the mediators need to highlight their role as neutral and impartial third parties.

233 The model of 'bi-cultural' mediation can also be helpful where the parties come from the same State of origin but have a different cultural identity because they belong to different religious or ethnic communities and where mediation could then be conducted in co-mediation by mediators with the same cultural backgrounds.

234 Disadvantages of 'bi-cultural', 'bilingual' co-mediation can be the cost implications. Moreover, it might be even more difficult to find appropriate, available mediators within a short time-period than with regular co-mediation, particularly when the mediation is in addition to be 'bi-gender', 'bi-professional' mediation.

235 Clearly, in cases where the parties come from the same cultural background, 'bi-cultural' mediation does not bring an added value; however, 'bi-gender', 'bi-professional' co-mediation might, where feasible.

236 Information about mediation models should be made available to interested parties through the Central Authority or a Central Contact Point for international family mediation (see Chapter 4 above).

---

262 Unfortunately, many of the particularly difficult international child abduction cases are additionally polarised by the media, regularly overemphasising the nationality aspects of the cases. For the relevant international legal framework, especially the 1980 Hague Child Abduction Convention but also other instruments such as the 1996 Hague Child Protection Convention and the Brussels IIa Regulation, the nationality of the parties does not play a role. What matters according to these instruments is the habitual residence of the subject child.

263 For details see the report on the German Bi-national Professional mediation project drafted on request of the German Ministry of Justice: T. Elsen, M. Kitzing and A. Böttger (*op. cit.* note 260); see also E. Carl, J.-P. Copin and L. Ripke, *Das deutsch-französische Modellprojekt professioneller Mediation*, KindPrax 2005, 25-28.

264 See also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 95), pp. 34 *et seq.*

7 Involvement of the child

237 In international family disputes concerning children, the involvement of the child in the resolution of the dispute can serve different purposes. First, listening to the child's views provides insight into his or her feelings and wishes, which may be important information when it comes to determining whether a solution is in the child's best interests. Second, it may open the parents' eyes to their child's wishes and help them to distance themselves from their own positions for the sake of an acceptable common solution.[265] Third, the child's involvement respects the child's right to be heard[266] while at the same time providing an opportunity for the child to be informed about what is going on.

238 In considering the extent to which children could and should be in involved in mediation in international child abduction cases, it is helpful to take a brief look at the involvement of children in Hague return proceedings and family law proceedings in general in different legal systems. Particularly when it comes to rendering a mediated agreement legally binding and enforceable, the standards set by the relevant legal systems concerned will have to be considered.

7.1 Involvement of the child in Hague return proceedings and family law proceedings

239 In return proceedings under the 1980 Hague Child Abduction Convention, the child's views can, depending on his or her age and maturity, inform the judge's decision. Particular emphasis is given to a child's objection to return. Article 13(2) of the 1980 Convention provides that the court may 'refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views'.[267]

240 Historically, this provision was to be read in connection with Article 4 of the 1980 Hague Child Abduction Convention, which limits the Convention's application to children under the age of 16 years and acknowledges that 'a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority'.[268] Article 13(2) was introduced to give the court discretion regarding the return order if an older child under the age of 16 years objects to being returned.[269]

265 See for example J. McIntosh, *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, Australian Family Relations Clearinghouse, 2007, pp. 1-23.

266 See Art. 12 of the UNCRC, which promotes the child's right 'to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'; regarding the effective implementation of Art. 12, see General Comment No 12 (July 2009) – The right of the child to be heard, drawn up by the Committee on the Rights of the Child, available at < http://www2.ohchr.org/english/bodies/crc/comments.htm > (last consulted 16 June 2012).

267 In addition, interviewing the child might be important in considering whether 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation', in the sense of Art. 13(1) *b)* of the 1980 Convention.

268 E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 93), p. 450, para. 77; see also P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford 1999, pp. 177, 178.

269 On the further background of Art. 13(2) of the 1980 Convention, see E. Pérez-Vera (*loc. cit.* note 268). See also P. McEleavy, INCADAT-Case Law Analysis Commentary: Exceptions to Return – Child's Objection – Requisite Age and Degree of Maturity, available at < www.incadat.com > under 'Case Law Analysis'.

241 Today, however, this provision is increasingly viewed in the wider context of the child's right to be heard,[270] as recognised by the UNCRC,[271] the 1996 Hague Child Protection Convention[272] and several regional instruments[273] and initiatives.[274]

242 This development is reflected in the information provided by Contracting States in the Country Profiles[275] to the 1980 Hague Child Abduction Convention and was discussed at the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions. The Special Commission 'welcome(d) the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defense has been raised'.[276] The Special Commission also recognised 'the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity'.[277]

270 See P. Beaumont and P. McEleavy (*loc. cit.* note 268).

271 See Art. 12 of the UNCRC (reproduced in note 266 above) promoting the child's right to be heard; regarding the effective implementation of Art. 12, see General Comment No 12 (July 2009) – The right of the child to be heard (*op. cit.* note 266).

272 Inspired by Art. 12 of the UNCRC, the 1996 Hague Child Protection Convention provides in Art. 23(2) *b)* that recognition of a measure taken in a Contracting State may be refused 'if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State'; see also P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (*op. cit.* note 80), p. 585, para. 123.

273 For example, in 1996 the Council of Europe adopted the *European Convention on the Exercise of Children's Rights*, which entered into force 1 July 2000, aiming to protect the best interests of children through a number of procedural measures to allow the children to exercise their rights, in particular in judicial family proceedings. The Convention was in force at the time of writing in Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Montenegro, Poland, Slovenia, The former Yugoslavian Republic of Macedonia, Turkey and Ukraine, see < http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=8&DF=05/12/2010&CL=ENG > (last consulted 16 June 2012); also, the Brussels IIa Regulation, applicable as of 1 March 2005 for all EU Member States except Denmark, which supplements the application of the 1980 Hague Child Abduction Convention in these States, reflects the recent rapid developments in promoting children's rights in legal proceedings. Based to a large extent on the 1996 Hague Child Protection Convention, the Brussels IIa Regulation encourages even more vigorously the consideration of children's wishes.

274 For example, the 'Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice', adopted on 17 November 2010 by the Committee of Ministers of the Council of Europe, available at < https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 > (last consulted 16 June 2012); see also 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU Agenda for the Rights of the Child', COM(2011)60 final of 15.2.2011, in particular p. 6, available online at < http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf > (last consulted 16 June 2012). See further the preparatory report by U. Kilkelly, 'Listening to children about justice: Report of the Council of Europe on Child-friendly Justice', available at < http://www.coe.int/t/dghl/standardsetting/childjustice/CJ-S-CH%20_2010_%2014%20rev.%20E%205%20oct.%202010.pdf > (last consulted 16 June 2012).

275 See section 10.4 of the Country Profiles under the 1980 Convention (*supra* note 121).

276 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 50.

277 *Ibid.*

243 It should be added that case law in many Contracting States also reflects the increased awareness of the need for separate representation of the child in certain difficult abduction cases.[278]

244 Nevertheless, it has to be said that the paths States take to protect children's rights and interests in legal proceedings are diverse and the manner in which the child may be involved or represented in legal proceedings, or the methods by which the child's views may be ascertained, differ considerably.[279] In some States judges in family proceedings concerning parental responsibility hear children directly; the child may be interviewed in a normal court hearing or in a special hearing, where the judge interviews the child alone or in the presence of a social worker, etc.[280] But even among the countries that involve children directly in judicial proceedings, views on the earliest age at which a child may be involved differ. In other States, where judges are reluctant to hear children directly, the child's view might be submitted to the court through a report prepared, for example, by a social worker or psychologist who interviews the child for that purpose.[281]

245 Apart from the question of how the child's views can be made known to the judge seised, the separate question of how much importance should be accorded the child's opinions and wishes will depend on the subject matter of the case and the child's age and degree of maturity.

246 At the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, the Special Commission 'note(d) the different approaches in (State's) national law as to the way in which the child's views may be obtained and introduced into the proceedings' and emphasised 'the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible'.[282]

7.2 The voice of the child in mediation

→ **The child's views should be considered in mediation in accordance with the child's age and maturity.**

→ **How the child's views can be introduced into the mediation and whether the child should be involved directly or indirectly must be given careful consideration and depend on the circumstances of the individual case.**

278 See section 10.4 d) of the Country Profiles under the 1980 Convention (*supra* note 121) and the Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 51. See also regarding the **United Kingdom**, M. Freeman and A.-M. Hutchinson, 'Abduction and the Voice of the Child: Re M and After', *IFL* 2008, 163-167; see also, for example, in **New Zealand**, the Practice Note 'Hague Convention Cases: New Zealand Family Court Guidelines', available at < http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes > (last consulted 16 June 2012) and sec. 106 and 6 of the New Zealand Care of Children Act 2004 No 90 (as at 29 November 2010), available at < http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html > (last consulted 16 June 2012).

279 See for example a comparison of different European States in M. Reich Sjögren, 'Protection of Children in Proceedings', Note prepared for the European Parliament's Committee on Legal Affairs, Brussels, November 2010, PE 432.737.

280 See for example **Germany**: children have to be heard as of the age of 14 years or younger if the child's views are considered particularly relevant for the proceedings (§ 159 FamFG, *supra* note 227, replacing § 50 b FGG), which will normally be the case in custody proceedings (here, children are sometimes heard as early as 3 or 4 years old); see also a study requested by the Ministry of Justice on the hearing of children, M. Karle, S. Gathmann, G. Klosinski, 'Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach § 50 b FGG', 2010. In **France** children can be heard by the judge or a person designated by the judge to hear the child in accordance with Art. 388-1 of the French Civil Code.

281 See, with further references, M. Reich Sjögren (*op. cit.* note 279); in the **United Kingdom** the court can order a Welfare report from a specialist social worker of the Children and Family Court Advisory and Support Service (CAFCASS) in the context of custody or contact proceedings; see also M. Potter, 'The Voice of the Child: Children's 'Rights' in Family Proceedings', *IFL* 2008, 140-148, at p. 143.

282 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 50.

247 In the mediating of a family dispute concerning children, the child's views need to be taken into consideration.[283] The same applies to other alternative dispute resolution mechanisms. Particularly in view of the developments in safeguarding children's rights and interests in the context of judicial proceedings, there should be a parallel respect for children's rights and interests, and particularly for the child's right to have his / her views taken into account, in alternative forms of dispute resolution.

248 Confirming this principle, in its discussion of the effective implementation of Article 12 of the UNCRC, the Committee on the Rights of the Child stated in its 2009 General Comment on the right of the child to be heard that the right 'to be heard in any judicial and administrative proceedings affecting the child' also needs to be respected where those proceedings 'involve alternative dispute mechanisms such as mediation and arbitration'.[284]

249 When it comes to 'hearing the voice of the child' in mediation, two major differences exist in comparison with judicial proceedings. First, the means by which a child's voice may be introduced into the mediation process may differ considerably from those available in the context of judicial proceedings. Second, there is a difference in the manner in which the child's opinions and wishes can be taken into consideration.

250 Whether and the means by which the voice of the child can be introduced in the mediation process will to some extent depend on the parents' agreement to a certain procedure. This is due to the fact that in most jurisdictions mediators do not have interrogative powers, *i.e.*, in contrast to judges, mediators are generally not in a position to summon the child to a hearing or to order an expert interview of the child and a report being drawn up. The mediator can only draw the parents' attention to the importance of hearing the child's voice and indicate, where applicable, that the court requested to render the agreement legally binding and enforceable may examine whether the child's views have been sufficiently taken into account. The mediator should recommend a procedure of introducing the child's voice into mediation taking into consideration the circumstances of the individual case (*e.g.*, the age of the children, the risk of re-abduction, whether there is a history of domestic violence, etc.). One possible option is the direct participation of the child in one or more of the mediation sessions. Another possibility is arranging for a separate interview of the child and reporting back to the parents.[285] However, the person interviewing the child needs to have specialised training,[286] to guarantee that the consultation with the child is conducted in a 'supportive, and developmentally appropriate manner' and to ensure 'that the style of consultation avoids and removes any burden of decision-making from the child'.[287]

251 Once the child's views have been introduced into the mediation process, the manner of taking them into consideration also differs from judicial proceedings. In judicial proceedings, the judge will draw his / her conclusions from the hearing and, depending on the age and maturity of the child, will take the child's views into consideration when making his / her decision regarding the

283 See also 'The Involvement of Children in Divorce and Custody Mediation – A Literature Review', published by the Family Justice Services Division of the Justice Services Branch (British Columbia Ministry of Attorney General), March 2003, available at < http://www.ag.gov.bc.ca/dro/publications/index.htm > (last consulted 16 June 2012).

284 See General Comment No 12 (2009) – The right of the child to be heard (*op. cit.* note 266), p. 12, para. 33; see also p. 15, para. 52.

285 In the Mediation Pilot project of the *Centrum Internationale Kinderontvoering* in the **Netherlands**, a specially trained mediator, who was not conducting the mediation in the specific case, interviewed the child concerned and submitted a report on the interview; in the **United Kingdom**, the mediators involved in the reunite mediation scheme, where appropriate, ask the court seised with the return proceedings to order that the child be interviewed by a Children and Family Court Advisory Support Service Officer (CAFCASS Officer) and that the report be made available to the parents and mediators, see the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 10.

286 For example in the **United Kingdom (England and Wales)**, the Family Mediation Council's 'Code of Practice for Family Mediators' agreed by the Member Organisations, 2010, available at < www.familymediationcouncil.org.uk > (last consulted 16 June 2012), provides that '(m)ediators may only undertake direct consultation with children when they have successfully completed specific training approved by their Member Organisation and / or the Council and have received specific clearance from the Criminal Records Bureau' (at paras 3.5 and 5.7.3); see also Chapter 14 below.

287 See J. McIntosh (*op. cit.* note 265), p. 5.

child's best interests. In contrast a mediator can only draw the parties' attention to the child's point of view or to aspects that may be relevant to the interests and welfare of the child, but it remains entirely up to the parents to decide on the content of their agreement. As already stated above, it needs to be emphasised in this respect that the mediator 'should have a special concern for the welfare and best interests of the children (and) should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children (...)'.[288]

252 Depending on the legal systems involved, the mediator may also need to remind the parents that judicial approval of the agreement may depend on whether the rights and interests of the children have been properly protected.

8 Possible involvement of third persons

→ Where the parties to the conflict agree, and where the mediator considers it feasible and appropriate, mediation can be open to the involvement of third persons whose presence might be of assistance in finding an agreed solution.

253 To reach a sustainable solution in a family dispute, it can sometimes be helpful to include within the mediation process a person who has close links with one or both of the parties and whose co-operation is needed to implement the agreed solution successfully. This may be, for example, the new partner of one of the parents or a grandparent. Depending on the parties' cultural background, the parties might wish to have a senior representative of their community participate in the mediation.

254 It is indeed one of the advantages of mediation that the process is flexible enough to allow for the inclusion of persons that do not have a legal standing in the case, but who may still have a strong influence on the success of the dispute resolution. However, the mediator will have to decide on a case-by-case basis whether the inclusion of a third person in a mediation session or part of it is feasible and appropriate without endangering the effectiveness of mediation. The attendance of a third person at a mediation session or arranging for a mediator to interview a third person, of course, presupposes the agreement of both parties. The inclusion of a third person may constitute a challenge particularly when it comes to ensuring that there is no imbalance of power between the parties. Also, should a third person participate in mediation communications, the issue of confidentiality has to be addressed.

255 When it comes to the agreed solution found in mediation, it has to be emphasised that it is an agreement between the parties and that the third person does not through his or her involvement in the mediation become a party to that agreement. However, in certain cases it may be helpful if the third person, on whose co-operation the implementation of the agreement depends, gives his or her endorsement to the agreement of the parties as a sign of his or her commitment to support that agreement.

288 See Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), under III (Process of mediation); on the principle of consideration of the interests and welfare of the child, see section 6.1.6 above.

9 Arranging for contact between the left-behind parent and child during the mediation process

256 Child abduction regularly leads to a sudden and complete disruption of contact between left-behind parent and child. This is very painful for both and may, depending on the duration of the disruption of their contact, lead to alienation. In order to protect the child from further harm and in view of the child's right to maintain contact with both parents, the swift restoration of contact between child and left-behind parent is important. There are various ways by which contact can be restored on an interim basis immediately following the abduction. Modern means of communication can be considered (including e-mail, instant messaging, Internet calls, etc.).[289]

257 If the left-behind parent is travelling to the requested State on the occasion of a court hearing in connection with Hague return proceedings or for a mediation meeting, it is highly recommended that measures be considered to allow for an in-person meeting between the child and the left-behind parent.[290] This is a valuable step towards de-escalation of the conflict. Particularly in mediation, where constructive dialogue between the parties is crucial, such in-person meetings can be very helpful. Mediators with experience in international child abduction cases acknowledge the positive effects of such in-person contact on the mediation process itself.[291]

9.1 Safeguards / Avoiding re-abduction

→ **Safeguards may need to be put in place to ensure respect for the terms and conditions of interim contact arrangements and to eliminate any risk of re-abduction.**
Such safeguards may include:[292]

- **the surrender of passport or travel documents, requesting that foreign consulates / embassies should not issue new passports / travel documents for the child;**
- **requiring the requesting parent to report regularly to the police or some other authority during a period of contact;**
- **the deposit of a monetary bond or surety;**
- **supervision of contact by a professional or a family member;**
- **restricting the locations where visitation may occur, etc.**

258 For further details see the Guide to Good Practice on Transfrontier Contact Concerning Children,[293] Chapter 6, which also takes into consideration the objectives of the Council of Europe *Convention of 15 May 2003 on Contact concerning Children*.[294]

289 See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 6.7, p. 33.

290 See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 6.1, p. 20.

291 See, *e.g.*, S. Kiesewetter and C.C. Paul, 'Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), p. 47.

292 See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 6.3, pp. 31-32.

293 *Ibid.*, pp. 31 *et seq.*

294 CETS 192; Convention text available at < http://conventions.coe.int/Treaty/en/Treaties/Html/192.htm > (last consulted 16 June 2012).

9.2 Close co-operation with Central Authorities and administrative and judicial authorities

→ When arranging for contact between the left-behind parent and abducted child in the course of the mediation process, co-operation with the authorities may be necessary to eliminate any risks for the child, including re-abduction.

259 Under the 1980 Hague Child Abduction Convention the Central Authority has a responsibility 'in a proper case, to make arrangements for organising or securing the effective exercise of rights of access' (see Art. 7(2) *f)*; see also Art. 21).[295] At the same time Article 7(2) *b)* of the 1980 Convention obliges Central Authorities to take all appropriate measures 'to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures'. As recognised by the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, 'pursuant to Articles 7(2) *b)* and 21 of the 1980 Convention, during pending return proceedings a requested Contracting State may provide for the applicant in the return proceedings to have contact with the subject child(ren) in an appropriate case'.[296]

260 Central Authorities are encouraged 'to take a pro-active and hands-on approach in carrying out their respective functions in international access / contact cases'.[297] Mediators should be aware of the considerable assistance that Central Authorities may be able to give in arranging for interim contact between the left-behind parent and the abducted child. They should equally be aware of the need for close co-operation with Central Authorities and other bodies regarding the arrangement of necessary protective measures. For further details see the Guide to Good Practice on Transfrontier Contact Concerning Children.[298]

10 Mediation and accusations of domestic violence

261 Domestic violence, unfortunately, is a widespread phenomenon that can take many forms: it can consist of physical or psychological abuse;[299] it can be directed towards the child ('child abuse')[300] and / or towards the partner;[301] and it can range from a single isolated incident to being part of a sustained and recurring pattern. Where domestic violence is recurring, a typical cycle of

295 For details see the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.6, p. 23.

296 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 20; see also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22.

297 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 18; see also the Guide to Good Practice on Transfrontier Contact (*loc. cit.* note 296).

298 *Op.cit.*note 16.

299 Physical and psychological abuse can extend to sexual, emotional and even financial abuse. Domestic violence is 'a complex and culturally nuanced phenomenon' and 'cuts across gender, race, ethnicity, age and socio-economic lines', see J. Alanen, 'When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense', 40 *U. Miami Inter-Am. L. Rev.* 49 (2008-2009), p. 64.

300 Regarding violence against the child, the Guide distinguishes direct from indirect violence. Direct violence is defined as violence directed towards the child and the latter is violence directed against a parent or another member of the household, which affects the child. See also the definition of domestic violence in the Terminology section above and at para. 270 below.

301 In the majority of cases, the woman in a couple is the victim of domestic violence; see, *e.g.*, 'Domestic Violence Parliamentary Report of the United Kingdom', published in June 2008, Summary in *IFL* 2008, pp. 136, 137, 'the vast majority of serious and recurring violence was perpetrated by men towards women'; see also H. Joyce (*op. cit.* note 228), p. 449, 'Women are the victims in 95 percent of reported domestic violence incidents.'

violence can consist of: (1) a tension-building phase with minor assaults; (2) an acute incident with an escalation of violence; and (3) a reconciliation phase, in which the perpetrator often begs for forgiveness and promises never to be violent again while the victim tries to believe the assurances, sometimes even feeling responsible for the abuser's psychological well-being.[302] It is a characteristic of recurring violence that the victim feels trapped in the cycle of violence and helpless, believing that the situation cannot change and afraid to leave the perpetrator for fear of retaliatory violence.[303]

262 In international child abduction cases, allegations of domestic violence are not rare. Some of these accusations may prove to be unfounded but others are legitimate and may be the reason why the taking parent left the country with the child. Domestic violence is a very sensitive issue and needs to be dealt with accordingly.

263 Views differ widely as to whether family disputes involving domestic violence are suitable for mediation. Some experts consider mediation in such cases generally inappropriate, for a number of reasons. They point out that mediation may put the victim at risk. Based on the consideration that the moment of separation from the abuser is the most dangerous time for the victim, they argue that a possible face-to-face contact with the abuser at that time carries the risk of further violence or traumatisation.[304] Furthermore, it is reasoned that mediation as a means of solving disputes amicably is ineffective in cases involving domestic violence, since mediation is based on co-operation[305] and its success depends on the parties having equal bargaining powers. It is argued that, since victims of domestic violence often have difficulties in advocating their own interests when facing the abuser, mediation is bound to lead to unfair agreements.[306] Some of those opposed to the use of mediation in domestic violence cases point out that mediation would legitimise domestic violence instead of punishing abusers.

264 By contrast, many experts are against a general exclusion of mediation in cases involving domestic violence, provided that well-trained professionals knowledgeable in the subject matter are involved.[307] They point to the fact that cases of domestic violence differ significantly, and that a case-by-case assessment is key: some cases may be amenable to a mediation process while some should clearly be dealt with by the courts.[308] Where a victim has received sufficient information to make an informed choice, the victim's wish to participate in a process that could be beneficial – if safe – should be respected.[309] Some authors have stated that a victim's involvement in an appropriate and well-run mediation process can be empowering for that person.[310] Concerns about victims' safety in the course of mediation are met with the counter-argument that mediation does not necessarily have to involve in-person mediation sessions, but can also be conducted as a telephone conference or as shuttle mediation.

265 In relation to the mediation process, the argument is that there are many ways in which it can be adapted to protect and empower the victim. For example, the rules set out for the mediation session can prohibit degrading behaviour combined with a provision for the mediation's immediate termination if these rules are not respected. Mediation professionals should be aware of rehabilitation programmes and other resources that might be available for an abusive parent.

266 The different views are also reflected in legislation. In some jurisdictions statutory provisions explicitly bar the use of mediation in family disputes involving children where there is evidence of a 'history' of domestic violence, or make mediation in such cases subject to certain conditions.[311]

---

302 *Ibid.*, pp. 499, 450.

303 *Ibid.*

304 For further references regarding this view, see *ibid.*, p. 452.

305 For further references regarding this view, see *ibid.*

306 For further references regarding this view, see *ibid.*, p. 451.

307 See, for example, the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 97), p. 53.

308 See, with further references, N. ver Steegh (*op. cit.* note 8), p. 665.

309 See, with further references, *ibid.*

310 J. Alanen (*op. cit.* note 299), p. 69, note 69.

311 See also H. Joyce (*op. cit.* note 228), pp. 459 *et seq.*

267 It should be emphasised that the domestic violence itself often constitutes a serious offence and is not, of course, the subject of the mediation; at issue in mediation are such matters as child custody and access, support stipulations, and other family organisation matters.[312]

10.1 Treatment of domestic violence in Hague return proceedings

268 Before addressing the question of mediation in child abduction cases involving accusations of domestic violence, it is important to say a few words on domestic violence accusations in Hague return proceedings in general.

269 Where a child abduction has occurred, Central Authorities are under the obligation 'to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures' in accordance with Article 7(2) *b)* of the 1980 Hague Child Abduction Convention. Thus, if there is a risk that the taking parent could harm the child, the Central Authority could, depending on the powers given to it by the relevant Contracting State, take provisional measures or cause the competent authority to take such measures. This provision works hand in hand with Article 11 of the 1996 Hague Child Protection Convention which, in cases of urgency, confers jurisdiction to take necessary protective measures on the authorities of the Contracting State where the child is present.

270 In the majority of cases, however, accusations of domestic violence are not made against the taking parent but against the left-behind parent.[313] An immediate safety risk for the taking parent and / or the child will be met by the authorities in the requested State in accordance with that State's procedural law. Measures may for example be taken by the Central Authority and / or the court to avoid revealing the current whereabouts of the victim of domestic violence to the other parent, or to otherwise ensure that an unaccompanied meeting of the parties does not occur.[314]

271 In the course of Hague return proceedings, domestic violence accusations play a role when it comes to deciding whether an exception to the child's return in accordance with Article 13(1) *b)* of the 1980 Hague Child Abduction Convention can be established. According to that Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if it is established that 'there is a grave risk that (the child's) return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'. Not just child abuse, but also domestic violence against the taking parent which indirectly affects the child, may be the cause of such a risk. However the exceptions of Article 13, in line with the objectives of the 1980 Convention, are construed narrowly.[315] Whether the conditions for the grave risk exception are fulfilled in a case with domestic violence allegations, will, besides the circumstances of the individual case, also depend on the ability to arrange for protective measures to ensure the safe return[316] of the child and possibly the taking parent to the State of his / her habitual residence.

272 Even though the 1980 Hague Child Abduction Convention deals with the return of the child, the safe return of the taking parent will often be a matter of concern for the court seised with the Hague return proceedings, particularly where the taking parent is the sole primary carer of the child. Arranging for the safe return of the taking parent can be a necessary condition to ordering the child's return, if the separation of parent and child due to the inability of the taking parent to return would expose the child to a grave risk of harm. See also above section 2.8 regarding criminal proceedings as an obstacle to the taking parent's return.

---

312 J. Alanen (*op. cit.* note 299), pp. 87-88, note 151.

313 Art. 7(2) *b)* of the 1980 Hague Child Abduction Convention was drawn up mainly with a view to avoiding another removal of the child. See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 93), para. 91.

314 See also para. 277 below.

315 See E. Pérez-Vera (*ibid.*), p. 434, para. 34; see also the Conclusions and Recommendations of the Fourth Meeting of the Special Commission (*op. cit.* note 34), No 4.3, p. 12, and the Conclusions and Recommendations of the Fifth Meeting of the Special Commission (*id.*), No 1.4.2, p. 8.

316 Measures to ensure the safe return can include mirror orders, a safe harbour order or other protective measures. See further the Guide to Good Practice on Enforcement (*op. cit.* note 23), Chapter 9, pp. 35 *et seq.*; see also J.D. Garbolino, *Handling Hague Convention Cases in U.S. Courts* (3rd ed.), Nevada 2000, pp. 79 *et seq.*

273 Where it is established that the return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation, the court seised with the return application is not obligated to order the return of the child.[317] A non-return decision will, in most cases, ultimately result in a shift of jurisdiction[318] on custody issues to the State of the child's new habitual residence.[319]

274 Dealing with domestic violence accusations in Hague return proceedings is a very sensitive issue and cannot, particularly in view of the many facets of cases in which domestic violence is alleged, be generalised. The Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions highlighted the autonomy of the court seised with the return proceedings regarding 'the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) *b)*), including allegations of domestic violence, (...) having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child'.[320] At the same time, the Special Commission suggested measures to promote greater consistency in the interpretation and application of Article 13(1) *b)*.[321] Following this suggestion the Council decided in April 2012 'to establish a Working Group, composed of a broad range of experts, including judges, Central Authorities and cross-disciplinary experts, to develop a Guide to Good Practice on the interpretation and application of Article 13(1) *b)* of the 1980 Child Abduction Convention, with a component to provide guidance specifically directed to judicial authorities'.[322]

10.2 Safeguards in mediation / Protection of the vulnerable party

→ The use of mediation in cases where there is an issue of domestic violence should be considered carefully. Adequate training in assessing the suitability of a case for mediation is necessary.

→ Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members or the mediator. The choice between direct and indirect mediation, the mediation venue and the mediation model and method must be adapted to the circumstances of the case.

→ Where mediation is considered suitable in a case involving an issue of domestic violence, it needs to be conducted by experienced mediators specially trained to mediate in such circumstances.

317 The Brussels IIa Regulation, which works hand in hand with the 1980 Hague Child Abduction Convention, contains the additional rule in Art. 11(4) that '(a) court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'.

318 Regarding questions of jurisdiction, see Chapter 13 below; see also Chapter 13 of the Practical Handbook on the 1996 Hague Child Protection Convention (*op. cit.* note 223) regarding a change of jurisdiction in accordance with Art. 7 of the 1996 Convention.

319 According to Art. 11(8) of the Brussels IIa Regulation, the child might have to be returned despite the non-return decision in the event of 'any subsequent judgment (requiring) the return of the child issued by a court having jurisdiction under this Regulation'.

320 See the Conclusions and Recommendations adopted by Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012) (available at < www.hcch.net > under 'Child Abduction Section'), Recommendation No 80.

321 *Ibid.*, Recommendations Nos 81 and 82:

'81. The Special Commission recommends that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) *b)* including, but not limited to, allegations of domestic and family violence.
82. The Special Commission recommends that the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) *b)*, with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice.'

322 See Conclusions and Recommendations adopted by the 2012 Council (*op. cit.* note 39), Recommendation No 6.

275 The suitability of mediation for an international child abduction case in which accusations of domestic violence are raised against one parent needs to be given careful consideration. The person assessing whether the case is suitable for mediation needs to be trained accordingly.[323] Even where no accusations of domestic violence have been made, an assessment of the suitability of the case for mediation needs to take into consideration that domestic violence may nevertheless be involved in a given case.

276 The following factors may be of particular relevance when assessing the suitability of a specific case for the available mediation service:[324] the severity and frequency of the domestic violence;[325] the target of the domestic violence; the pattern of violence;[326] the parties' physical and mental health;[327] the likely response of the primary perpetrator;[328] the availability of mediation specifically designed for domestic violence cases; how the mediation service available can address safety issues; whether the parties are represented.[329] It should also be emphasised that if, in the course of initial screening or later in the mediation process, a mediator learns of circumstances that suggest a criminal offence (*e.g.*, sexual abuse of a child), he or she will in many jurisdictions be under an obligation to report to the authorities, for example the police and child protection agencies. This obligation may exist despite the principle of confidentiality of mediation.[330]

277 Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members and the mediator. A face-to-face meeting, be it in the course of the mediation or as a preparatory meeting, should only be convened where safety can be ensured. Depending on the circumstances of the case, the assistance of State authorities might be necessary.[331] In other cases, avoiding the risk of the parties meeting unaccompanied may be sufficient. In such cases for example, the chance for the parties to inadvertently meet on their way to the mediation venue should be eliminated; thus separate arrivals and departures should be arranged.[332] Further measures may include an emergency button in the room where the mediation session is to take place. In the course of the mediation session, the parties should never be left alone. In this regard, the use of co-mediation may be particularly helpful. The presence of two experienced mediators will be reassuring for the victim and may help to defuse any tensions. Should one mediator have to leave the session for whatever reason, this also ensures an experienced mediator will remain in the parties' presence. The presence of other persons, such as a lawyer or provider of support, may also be considered where appropriate.[333]

278 Where the available mediation service is not equipped to eliminate the safety risks associated with a face-to-face meeting, or if such a meeting proves inappropriate for other reasons, the use of indirect mediation through separate meetings between the mediator with each party (so-called caucus meetings) or the use of modern technology such as a video link or Internet communications may be considered.

---

323 Regarding the importance of skilled screening procedures, see L. Parkinson, *Family Mediation – Appropiate Dispute Resolution in a new family justice system*, 2nd ed., Family Law 2011, Chapter 3, pp. 76 *et seq.*

324 See also Art. 48 of the Council of Europe *Convention on preventing and combating violence against women and domestic violence of 11 May 2011*, available at < http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm > (last consulted 16 June 2012), which requests State parties to 'take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention'.

325 See, with further references, N. ver Steegh (*op. cit.* note 8), p. 665.

326 *Ibid.*

327 *Ibid.*

328 *Ibid.*

329 *Ibid.*

330 Regarding the exceptions to the principle of confidentiality, see para. 211 above.

331 The more severe the circumstances, the less likely is the case's general suitability for mediation.

332 See also L. Parkinson (*loc. cit.* note 323).

333 See, with further references, N. ver Steegh (*op. cit.* note 8), p. 666.

279 Once safeguards have been established against the risk of harm in mediation, measures must be taken to guarantee that mediation is not prejudiced by unequal bargaining powers.[334] Mediation needs to be conducted by experienced and specially trained mediators; mediators need to adapt the mediation process to the challenges of each individual case. Safety issues associated with implementing the mediated agreement at a later stage need to be given due consideration.

280 In general, close co-operation with the judicial and administrative authorities is conducive to avoiding safety risks.[335]

281 Mediators should in general pay attention to and need to be able to recognise[336] signs of domestic violence and / or risks of future violence, including where no accusations have been made by one of the parties, and must be prepared to take the necessary precautions and measures.[337]

10.3 Information on protective measures

→ Information should be available regarding the possible protective measures for the parent and child in the jurisdictions concerned.

282 Information regarding the possible protective measures which may be taken for the parent and the child in the State of the child's pre-abduction residence, as well as in the State to which the child has been abducted, should be available to inform the discussion in the mediation session. The provision of this information could be facilitated by the Central Authority or a Central Contact Point for international family mediation.[338] In addition, the Country Profiles under the 1980 Hague Child Abduction Convention can be a helpful source of information regarding available protective measures.[339]

11 The terms of the mediated agreement – Reality check

→ The terms of the mediated agreement need to be drafted realistically and to take into consideration all related practical issues, especially concerning the arrangement of contact and visitation.

---

334 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate'.

335 See sections 19.4 g) and h) of the Country Profiles under the 1980 Convention (*supra* note 121) for information on the availability of certain specific safeguards.

336 Regarding the different types of violence and abuse a mediator should be able to recognise and distinguish, for example, see L. Parkinson (*loc. cit.* note 323).

337 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), III (Process of mediation):

'States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: (...)

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate'.

338 On the role of Central Contact Points for international family mediation in facilitating the provision of information, see section 4.1 above.

339 See section 11.2 of the Country Profiles under the 1980 Convention (*supra* note 121).

283 Once an agreed solution is in sight, the mediator has to assist the parties with working out the details of their agreement. The mediator will in many cases be the one who drafts the actual 'agreement' or 'memorandum of understanding' in accordance with the parties' wishes.[340]

284 As stated above in Chapter 5 ('Scope of mediation'), mediated agreements in international child abduction cases are likely to include the following points: an agreement on the return or non-return of the child and in the latter case an agreement on where the child is to establish his / her new residence; with whom the child will live; the question of parental responsibilities and their exercise. Furthermore, the agreement is likely to address certain financial issues such as travel expenses, but also, in some cases, issues of child and spousal support.

285 It is important that the mediated agreement be drawn up in compliance with the applicable legal framework, so that it is capable of obtaining legal effect in both (all) jurisdictions concerned. In this respect, although it is clearly not the mediator's role to give legal advice, he or she can refer the parties to the relevant national or international legal framework. In any case, the mediator should draw the parties' attention to the importance of consulting their specialised legal representatives in this regard, or of otherwise obtaining specialist legal advice on the legal situation in their case.

286 Once the agreement has been drafted, it may be advisable to allow 'a limited time for reflection (...) before signing'.[341] This time should also be used to make necessary legal inquiries.[342]

287 The mediated agreement needs to be realistic and as detailed as possible regarding all the obligations and rights to which it refers. This is not only important for a problem-free implementation of the agreement but also with regard to the agreement's capability of becoming enforceable (see also Chapter 12). For example, if the parents agree on the return of the child, the modalities of the return, including the question of travel costs and with whom the child is to travel back and where the child will stay immediately following the return, need to be addressed.[343] Where the parents are to reside in different States, the cross-border exercise of parental responsibilities needs to be realistically regulated.[344] When drafting cross-border contact arrangements, for example, specific dates and time periods should be included to take account of school holidays, etc. Travel expenses also need to be addressed. It is important to eliminate, in so far as possible, any possible source of misunderstandings and practical obstacles in the use of the contact arrangement. In a case, for example, where a left-behind parent agrees that the child may remain with the taking parent in the State to which the child was taken, provided that his or her contact rights are sufficiently secured, the parents might agree that the taking parent will buy the flight tickets for the child to spend the summer holidays in the prior State of residence with the left-behind parent. The future financial capabilities should be addressed, and to avoid any last minute difficulties with purchasing the tickets, the parents could, for example, agree that a certain amount of money be deposited well in advance of the travel for the left-behind parent to make the travel arrangements.[345]

288 Caution is necessary with regard to conditions that go beyond the sphere of influence of the parties. For example, an agreement should not task one of the parties with the withdrawal of criminal proceedings, if, in the relevant legal system concerned, criminal proceedings, once initiated, can only be dismissed by the prosecutor or the court.[346]

---

340 See K.K. Kovach (*op. cit.* note 110), at p. 205.

341 See Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (*supra* note 53), Principle VI (Agreements reached in mediation):

> '16. In order to define the subject matter, scope and conclusions of the agreement, a written document should usually be drawn up at the end of every mediation procedure. The parties should be allowed a limited time for reflection, which is agreed on by the parties, after the document has been drawn up and before signing it.'

342 See Chapter 12 below on rendering the agreement legally binding and enforceable.

343 Regarding the details which need to be included in a return order, see Chapter 4 of the Guide to Good Practice on Enforcement (*op. cit.* note 23), pp. 21 *et seq.*

344 See Principles for the Establishment of Mediation Structures in Annex 1 below, Part B.3.

345 See also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).

346 Regarding the special challenge of criminal proceedings, see section 2.8 above.

12 Rendering the agreement legally binding and enforceable

→ **The terms of the mediated agreement need to be drafted in such a manner as to allow for the agreement to obtain legal effect and become enforceable in the relevant jurisdictions.**
→ **It is highly recommended that, before the agreement is finalised, a limited time for reflection be given to the parties to enable them to obtain specialist legal advice on the full legal consequences and on whether the content of their 'provisional agreement' complies with the law applicable in the different legal systems concerned.**
→ **The measures necessary to give legal effect to the agreement and render it enforceable in the relevant jurisdictions should be taken with due speed and before the agreement's implementation.**
→ **Access to information on the relevant procedures in the jurisdictions concerned should be facilitated by Central Authorities or Central Contact Points for international family mediation.**
→ **Co-operation among administrative / judicial authorities may be needed to help facilitate the enforceability of the agreement in all the States concerned.**
→ **Courts are encouraged to make use of national, regional[347] and international judicial networks, such as the International Hague Network of Judges, and to seek the assistance of Central Authorities where appropriate.[348]**
→ **States should, where necessary, examine the desirability of introducing regulatory or legislative provisions to facilitate procedures for rendering mediated agreements enforceable.**

289 With a view to its serving as a basis for a sustainable dispute resolution, the agreed solution reached in mediation should meet the requirements for obtaining legal effect in the States concerned and should be rendered legally binding and enforceable in these States before commencing with its practical implementation. The enforceability in both (all) legal systems concerned is particularly crucial where the agreed solution involves the cross-border exercise of parental responsibility. The child concerned needs to be protected from a possible re-abduction in the future, or from any other harm caused through a parent's lack of compliance with the agreement. At the same time, once the parents have agreed, a return of the child should be implemented as speedily as possible to avoid any further confusion or alienation for the child.

290 To start with, the solution reached in mediation should be documented in writing and signed by both parties. Depending on the matters dealt with in the parties' agreement and depending on the applicable law, an agreement might constitute a legally binding contract between the parties from the moment of its conclusion. Many legal systems, however, restrict party autonomy in family law to a certain extent, particularly when it comes to parental responsibility.[349] Here, many States consider that the rights and welfare of the child concerned need to be safeguarded through the involvement of judicial or administrative authorities. Agreements concerning the exercise of parental responsibilities, which are nonetheless encouraged by most of these systems, might, for example, need court approval verifying that they comply with 'the best interests of the child' to obtain legal effect.[350]

347 An example of a regional network is the European Judicial Network in Civil and Commercial Matters, for further information see < http://ec.europa.eu/civiljustice/index_en.htm > (last consulted 16 June 2012).

348 See the Guide to Good Practice on Enforcement (*op. cit.* note 23), Principle 8.2.

349 See also the Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), para. 5.4, p. 23.

350 For example **France**, see Arts 376 and 373-2-7 of the Civil Code or **Germany**, see § 156, para. 2, FamFG (*supra* note 227); see also the responses to Questionnaire II of the Working Party on Mediation in the context of the Malta Process (*supra* note 42); see also M. Lloyd, 'The Status of mediated agreements and their implementation', in *Family mediation in Europe – proceedings*, 4th European Conference on Family Law, Palais de l'Europe, Strasbourg, 1-2 October 1998, Council of Europe Publishing, April 2000, pp. 87-96.

291 Furthermore, there may be restrictions to party autonomy regarding other family law matters such as child support. Some legal systems, for example, limit the ability of the parents to contract out of child support obligations arising under the applicable law.

292 It should also be noted that a situation may arise where among the different matters dealt with in the mediated agreement some are at the free disposal of the parties and some are not, and that according to the applicable law, the agreement becomes immediately binding on the parties in relation to the former matters, while the latter part of the agreement depends on court approval.[351] This can be an unfortunate situation if the court approval is not obtained (or obtainable) for the remainder of the agreement, since the parties will usually agree on a whole 'package' and the partially binding agreement might favour one of the parties.[352]

293 Since the legal situation in international family disputes is often complex, it is strongly recommended that, before the mediated agreement is finalised, there be a 'time-out' for the parties to obtain specialist legal advice regarding the full legal consequences of what they are about to agree on and whether the content of their 'provisional agreement' complies with the law applicable to these matters in the different legal systems concerned. It might be that a parent is not aware that he or she is agreeing to relinquish certain rights, or that the agreement or its practical implementation may lead to a (long-term) change in jurisdiction and the law applicable to certain matters. For example, where a left-behind parent agrees to the relocation of the child and taking parent, this will sooner or later bring about a change of the 'habitual residence' of the child,[353] which is likely to result in a change of jurisdiction and applicable law regarding a number of child related issues.[354]

294 If all or part of the agreement's validity depends on court approval, the terms of the agreement should include that its entry into force will be conditional upon the court's approval being successfully obtained. In these cases it may be advisable to refer to the outcome of mediation as a 'provisional agreement' and to reflect this in the title and wording of the document recording the agreed solution. In some legal systems, mediators refer to the immediate outcome of mediation as a 'memorandum of understanding' instead of 'agreement' to avoid any suggestion that the agreement is binding at that stage.

295 It should be emphasised that not every agreement which is legally binding on the parties in one legal system is also automatically enforceable in that legal system. However, in those legal systems where agreements relating to parental responsibility require the approval of judicial or administrative authorities to become legally binding, the measure granting the approval (for example, the inclusion of the terms of the agreement in a court order) will often be at the same time the measure rendering the agreement enforceable in that jurisdiction.[355] On the other hand, a parental agreement which is upon its conclusion legally binding in a legal system may require notarisation, or homologation by a court, in order to render it enforceable, unless the laws of that State regulate otherwise. For the formalities required to render mediated agreements enforceable by Contracting States to the 1980 Hague Child Abduction Convention, the Country Profiles under the 1980 Convention can serve as a useful source of information.[356]

---

351 See also para. 41 above.

352 Of course, problems will only arise where the favoured party would claim his / her rights out of the partial agreement and many legal systems would remedy such a situation but legal proceedings would be necessary.

353 Provided the child's habitual residence has not already changed; for further details on the meaning of 'habitual residence', see P. McEleavy, INCADAT-Case Law Analysis Commentary: Aims and Scope of the Convention – Habitual Residence, available at < www.incadat.com > under 'Case Law Analysis'.

354 See Chapter 13 below.

355 The details will depend on the relevant procedural law.

356 See section 19.5 b) of the Country Profiles under the 1980 Convention (*supra* note 121). In some States, more than one option exists. The following States indicated that a court approval is necessary to render the agreement enforceable: **Argentina**, **Australia**, **Belgium**, **Brazil**, **Burkina Faso**, **Canada (Manitoba, Nova Scotia)**, **China (Hong Kong SAR)**, **Costa Rica**, **Czech Republic**, **Denmark**, **Estonia**, **Finland** (by the Social Welfare Board), **France**, **Greece**, **Honduras**, **Hungary** (by the Guardianship Authority), **Ireland**, **Israel**, **Latvia**, **Lithuania**, **Mauritius**, **Mexico**, **Norway**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Sweden** (by the Social Welfare Board), **Switzerland**, the **United Kingdom (England and Wales, Northern Ireland)**, the **United States of America** and **Venezuela**; notarisation is an option in: **Belgium**, **Burkina Faso**, **Denmark**, **Estonia**, **Hungary**, **Romania**, **Slovenia** and registration with the court is an option in: **Australia**, **Burkina Faso**, **Canada (British Columbia, Nova Scotia, Saskatchewan)**, **Estonia**, **Greece**, **Honduras** (Country Profiles – as at June 2012).

296 As concerns rendering an agreement which has become enforceable (by embodiment in a court order or otherwise) in one legal system (State A), legally binding and enforceable in the relevant other legal system (State B), there are generally two paths which can be considered:

(1) The path of recognition and enforcement in State B:
A court order obtained in State A embodying the agreement may be recognised in State B, either because an international, regional or bi-lateral instrument provides for such recognition or because a foreign court order can otherwise be recognised in that legal system in accordance with State B's law. When it comes actually to enforcing the agreed solution, an additional declaration of enforceability or registration in State B may be necessary. Problems can arise in this scenario when the courts of State B consider that the courts of State A were lacking international jurisdiction to render a decision on the subject matter (for more on the jurisdictional challenges in international child abduction cases, see Chapter 13).
As another option, it is conceivable that rules between State A and State B apply which allow for the recognition in State B of an agreement enforceable in State A without it being embodied in a court order.[357]

(2) The path of taking the agreement itself to State B and making the necessary arrangements to render the agreement binding and enforceable in State B:
The parties could turn to the authorities of State B with their agreement requesting that it be rendered legally binding and enforceable under domestic procedures in State B. This means that they would then proceed regardless of the legal status their agreement has (obtained) in State A. Problems may arise regarding this solution due to jurisdictional issues. For example, it could be that the authorities of State B consider that they lack (international) jurisdiction to turn the agreement into a court order or take other necessary steps to render the agreement binding, because they regard the authorities of State A as having the exclusive jurisdiction to deal with the subject matter(s) covered by the agreement.

297 The ideal situation is one where an international, regional[358] or bi-lateral instrument provides for simplified recognition and enforcement of court orders from one State to the other. The 1996 Hague Child Protection Convention is such an instrument. Under the 1996 Convention, a court order embodying an agreement concerning custody or contact in one Contracting State, constitutes a 'measure of protection' and will as such be recognised by operation of law and enforceable in all Contracting States. This means 'that it will not be necessary to resort to any proceeding in order to obtain (...) recognition'[359] in other Contracting States. When it comes to the actual enforcement of the measure, however, a declaration of enforceability or registration becomes necessary (Art. 26(1)). But the 1996 Convention obliges Contracting States to apply '*a simple and rapid procedure*' in this regard (Art. 26(2), emphasis added). The declaration of enforceability or registration can only be refused when one of the restricted reasons for non-recognition listed in Article 23(2) applies. Reasons for refusal are, for example, that the 'the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for' in the 1996 Convention and that 'the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State'.

357 See for example Art. 46 of the European Brussels IIa Regulation, whereby 'agreements between the parties that are enforceable in the (European Union) Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments (under the Regulation)'. See also Art. 30(1) of the 2007 Hague Child Support Convention providing that '(a) maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision (...) provided that it is enforceable as a decision in the State of origin'.

358 Similarly to the 1996 Hague Child Protection Convention, the European Brussels IIa Regulation contains rules on a simplified recognition and enforcement of decisions in matters of parental responsibilities. In addition, Art. 46 of the Brussels IIa Regulation provides for the recognition and enforcement of agreements themselves, provided they are enforceable in the Member State in which they are concluded, see note 357 above.

359 See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (*op. cit.* note 80), p. 585, para. 119.

298 Possible doubts regarding grounds for non-recognition can be dispelled at an early stage by using the procedure of 'advance recognition' of Article 24 of the 1996 Hague Child Protection Convention. According to that Article, 'any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State'. (See the Practical Handbook for further details on the 1996 Convention.[360])

299 It needs to be emphasised that in child abduction cases the jurisdictional situation is very complex.[361] Both the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention are based on the idea that, in a child abduction situation, the authorities in the State to which the child was abducted (requested State) shall have the competency to decide on the return of the child but not on the merits of custody.[362] The court seised with the Hague return proceedings in the requested State will therefore have difficulties turning a mediated agreement into a court order if this agreement also covers, besides the question of return, matters of custody or other matters on which the court seised with the Hague proceedings lacks (international) jurisdiction (for further details on the special jurisdictional situation in international child abduction cases, see Chapter 13).

300 A further complication to the jurisdictional situation can result from the inclusion of additional matters, such as spousal and child support issues, in the agreement. As a result, the involvement of different authorities, possibly in different States, might become necessary to render the full agreement legally binding and enforceable in the legal systems concerned. Specialist legal advice on which steps to take and in which of the States involved may be needed in such cases.

301 Access to information on where to seek specialist legal advice and on steps that are required to render an agreement enforceable in the States concerned could be facilitated by the Central Authority or another body serving as Central Contact Point for international family mediation in the relevant jurisdictions.[363]

302 Co-operation between the administrative / judicial authorities of the different States concerned may be necessary when it comes to ensuring the enforceability of the agreement in the different jurisdictions.

303 The courts should, to the extent feasible, support the sustainability of the agreed solution by assisting the parties in their efforts to render the agreement legally binding and enforceable in the different legal systems concerned. This may include the use of mirror orders or safe-harbour orders.[364] Furthermore, the courts should, where feasible and appropriate, make use of existing judicial networks[365] and seek the assistance of Central Authorities. A judicial network of particular relevance in this regard is the International Hague Network of Judges specialising in family

360 *Op. cit.* note 223.

361 For further details see Chapter 13.

362 See Art. 16 of the 1980 Convention; Art. 7 of the 1996 Convention.

363 See the Principles for the Establishment of Mediation Structures in Annex 1 below, Part C (Rendering mediated agreements legally binding). See section 4.1 above for further information on the role of Central Contact Points for international family mediation.

364 The term 'mirror order' refers to an order made by the courts in the requesting State that is identical or similar to (*i.e.*, 'mirrors') an order made in the requested State. A 'safe-harbour order' is one made by a court in the requesting State often on the application of the left-behind parent with the aim of ensuring the terms of the return. For further details on the use of mirror orders and safe harbour orders in international child abduction cases, see the Guide to Good Practice on Enforcement (*op. cit.* note 23), Chapter 5 ('Promoting voluntary compliance') and Chapter 8 ('Cross-border co-operation to ensure safe return'). See regarding examples also, E. Carl and M. Erb-Klünemann, 'Integrating Mediation into Court Proceedings in Cross-Border Family Cases', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 59 *et seq.*, at p. 72; see also K. Nehls, 'Cross-border family mediation – An innovative approach to a contemporary issue', in S. Kiesewetter and C.C. Paul (Eds) (*ibid.*), pp. 18 *et seq*, at p. 27.

365 Regarding the use of direct judicial communications to ensure legal recognition and enforceability of agreements in international child abduction cases, see the report of two German judges, E. Carl and M. Erb-Klünemann, 'Integrating Mediation into Court Proceedings in Cross-Border Family Cases', in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 98), pp. 59 *et seq.*, at pp. 72, 73.

matters, which was created[366] to facilitate communications and co-operation between judges at the international level and to assist in ensuring the effective operation of international instruments in the field of child protection, including the 1980 Hague Child Abduction Convention.[367] Through the use of direct judicial communications a judge seised with Hague return proceedings may be able to co-ordinate the support for a parental agreement including matters of custody with the judge competent for custody matters in the State of return.[368]

304 States should facilitate simple procedures through which mediated agreements can, on the request of the parties, be approved and / or rendered enforceable by the competent authority.[369] Where no such procedures exist, States should examine the desirability of introducing regulatory or legislative provisions facilitating such procedures.[370]

13 Issues of jurisdiction and applicable law rules

→ Issues of jurisdiction and applicable law need to be taken into consideration when drawing up the mediated agreement.

→ The judicial and administrative authorities of the requested State and the requesting State should co-operate with each other as far as possible to overcome possible difficulties in rendering an agreement that amicably settles an international child abduction dispute legally binding and enforceable in both States. The use of direct judicial communications may be particularly helpful in this regard.

366 The network was created following a proposal at the 1998 De Ruwenberg Seminar for Judges on the international protection of children; for more information see < www.hcch.net > under 'Child Abduction Section'. For more information on the International Hague Network of Judges and the functioning of direct judicial communications, see note 128 above.

367 See the Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference, 15-16 January 2009, available at < www.hcch.net > under 'Child Abduction Section'; adopted by consensus by more than 140 judges from more than 55 jurisdictions.

368 See, for example, the statement from an Australian expert at the Sixth Meeting of the Special Commission, 'Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)', drawn up by the Permanent Bureau, Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (available at < www.hcch.net > under 'Child Abduction Section'), at para. 252; see also E. Carl and M. Erb-Klünemann (*op. cit.* note 364), pp. 59 *et seq.*, at p. 72.

369 Regarding the development in the European Union, see Art. 6 of the European Directive on mediation (*supra* note 5), according to which the European Union Member States are requested to 'ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.' Exceptions mentioned by Art. 6 are cases in which '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.' Art. 6 highlights that '(n)othing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with (this Article)'. Regarding the measures taken in the European Union Member States to comply with the Directive, see the European Judicial Atlas (*supra* note 60).

370 See also Council of Europe Recommendation No R (98) 1 on family mediation (*supra* note 52), IV (The status of mediated agreements):

'States should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law.'

305 As has been highlighted in Chapter 12, the consideration of jurisdiction and applicable law matters is crucial in international family disputes when it comes to securing the enforceability of mediated agreements in the different States concerned. It may well be that the scope of mediation has to be adapted following this consideration due to the complications which the inclusion of certain additional matters, such as maintenance, would bring.[371]

306 Regarding jurisdiction in cross-border family disputes the question of international jurisdiction (*i.e.*, which State has jurisdiction) needs to be distinguished from the question of internal jurisdiction (*i.e.*, which court or authority has jurisdiction on a certain matter within one State). Multilateral treaties containing rules on jurisdiction regularly address only international jurisdiction while leaving the regulation of internal jurisdiction to the individual States.

307 With regard to international jurisdiction in international child abduction cases, particular attention needs to be paid to the implications that may result from the combination of the two matters regularly dealt with in mediated agreements in international child abduction cases, which are (1) the question of return or non-return of the child and (2) the regulation of custody and contact rights to be implemented following the return or non-return. It is the wrongful removal or retention itself which creates a special jurisdictional situation in international child abduction cases falling within the scope of the 1980 Hague Child Abduction Convention and / or the 1996 Hague Child Protection Convention. According to a widely applied principle of international jurisdiction it is the court of the child's habitual residence which has jurisdiction to take long-term decisions concerning custody of and contact with a child, as well as decisions on cross-border family relocation. This principle is supported by the 1996 Convention,[372] which works hand in hand with the 1980 Convention, as well as by relevant regional instruments.[373] The principle is based on the consideration that the court of the child's habitual residence is generally the most appropriate forum to decide on the issue of custody since it is the court with the closest connection to the child's regular environment, *i.e.*, the court which can easily assess the child's living conditions and is most suited to make a decision in the best interests of the child. In an abduction situation, the 1980 Convention protects the interests of the child by preventing a parent from establishing 'artificial jurisdictional links on an international level, with a view to obtaining ((sole)) custody of a child'.[374] In this spirit, Article 16 of the 1980 Convention ensures that 'after receiving notice of a wrongful removal or retention of a child', the courts in the requested State cannot 'decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following the receipt of the notice'.

308 In the same spirit, reinforcing the 1980 Hague Child Abduction Convention, Article 7 of the 1996 Hague Child Protection Convention provides that, in the case of the wrongful removal or retention of a child, the authorities of the State in which the child had his / her habitual residence before the removal or retention keep their jurisdiction on custody matters until a number of conditions are met.[375]

---

371 Nothing prevents the parties from returning to mediation once the child abduction case is settled to deal with these additional matters.

372 Habitual residence is the main connecting factor used in all the modern Hague Family Conventions, as it is in many regional instruments related to child protection such as the Brussels IIa Regulation.

373 For example, the Brussels IIa Regulation.

374 See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 93), p. 428, para 11.

375 According to Art. 7(1) of the 1996 Convention
'the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.'

309 As concerns the combination of matters in the parental agreement referred to above, the court seised with the Hague return proceedings will only have jurisdiction to deal with part (1) of this agreement, *i.e.*, the return or non-return, and will lack international jurisdiction to approve part (2) of the agreement on rights of custody and long-term contact. Should the court nonetheless include the full agreement of the parents in its court order with which it terminates the Hague return proceedings, the court order may not be binding on the courts in the requesting State (*i.e.*, the State from which the child was abducted) as far as long-term custody matters are concerned due to the lack of international jurisdiction on those matters.

310 An example illustrates the difficulties these jurisdictional issues may cause in practice:

■ *Following severe relationship problems, a young married couple, parents of an eight-year-old child, decide to divorce. The spouses, originally from State B, have been habitually resident in State A since their child's birth. While the divorce proceedings are ongoing in State A, the mother (M) wrongfully removes the child to State B (requested State), fearing she might lose the shared custody of the child. On the request of the father (F), return proceedings under the 1980 Convention are initiated in State B. Meanwhile F is granted the interim sole custody of the child by the court in State A (requesting State). While F is present in State B for the purpose of attending the court hearings, an attempt at mediation is successful. In the course of the mediation sessions the parents develop an elaborate agreement, according to which they agree to shared custody and an alternate residence of the child. They furthermore agree that they will travel back to State A and that M will cover the travel expenses.*

M and F want to render their agreement legally binding before its implementation. Particularly, since the father has been granted interim sole custody of the child in State A as a consequence of the wrongful removal, the mother wants to have some assurance that the courts in State A will respect the parental agreement.

They learn that the court seised with the Hague proceedings in State B can only include the part of the agreement dealing with the return and the modalities of the return into a court order but that the terms relating to the merits of custody cannot be included, or at least not in such a way that they would be binding on the authorities in State A. In particular M is not satisfied with a partial approval of the agreement. M and F therefore consider turning to the authorities in State A having international jurisdiction on the custody matters. However, they hear that the competent court in State A, although likely to approve a parental agreement, will generally insist on the presence of both parties and on hearing the child, as part of the statutory duty for a best interests of the child test in custody matters. But M is not willing to return to State A with the child until she is reassured that the agreement will be respected by the authorities of State A. ■

311 The practical difficulties that may result from the special jurisdictional situation in international child abduction cases were discussed in some detail at Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention in June 2011.[376] A further elaboration on the issue can also be found in Preliminary Document No 13 of November 2011,[377] drawn up in preparation for Part II of the Sixth Special Commission Meeting held in January 2012, where the matter was

376 See Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission, Prel. Doc. No 14 of November 2011 (*op. cit.* note 368), at paras 247 *et seq.*

377 See 'Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions', drawn up by the Permanent Bureau, Prel. Doc. No 13 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (available at < www.hcch.net > under 'Child Abduction Section'), in particular paras 29 *et seq.*

revisited in the greater context of discussing a possible need for a simplification of recognition and enforcement of agreements in family law.[378]

312 In the current legal situation, the sustainability of an agreed solution reached in an international child abduction case will to a large extent depend on co-operation among the judicial authorities in the requested State and those in the requesting State in assisting the parties in their efforts to render the agreement legally binding and enforceable in both States. As mentioned in Chapter 12, there are a number of measures that both the court seised with the return proceedings and the courts in the requesting State can take to support the agreement (for more on mirror orders and safe-harbour orders, etc., see above). The use of direct judicial communications can be of particular assistance in these cases.[379]

313 To overcome the jurisdictional problems described above, the transfer of jurisdiction under Articles 8 and 9 of the 1996 Hague Child Protection Convention can also be considered if the two States concerned are Contracting States to the 1996 Convention. (For further details on the transfer of jurisdiction, see the Practical Handbook on the 1996 Convention.)

314 In view of the complexity mentioned above of rendering agreements in international child abduction cases legally binding, it is highly recommended that the parents obtain specialist legal advice regarding their case. Central Authorities should support the parties and the courts as much as possible with information and support their efforts to overcome jurisdictional obstacles to rendering the mediated agreement legally binding and enforceable in both the requested and requesting States.

315 In addition to jurisdictional matters, questions of applicable law can play an important role in mediation in international family law. The agreement reached in mediation needs to be compatible with the applicable law in order to serve as a viable basis for the dispute resolution. The parties to an international family dispute have to be made aware that the law applicable to certain subject matters dealt with in the mediation is not necessarily the law of the State in which the mediation is taking place. They need to know that there is even a possibility that different States' laws will apply to the different subject matters discussed in mediation.

316 In an international child abduction case, for example, where the mediation is taking place in the requested State (*i.e.*, the State to which the child has been taken) alongside the Hague return proceedings, the substantive law applicable to the merits of custody will regularly not be the law of that State but quite likely the law of the requesting State (*i.e.*, the State of habitual residence of the child immediately before the abduction). Of course, a generalisation in this regard is difficult, since the applicable law situation in the particular case depends on international, regional or bilateral treaties in force in the relevant States and, in the absence of such treaties, the relevant national conflict of laws rules. If the 1996 Hague Child Protection Convention is applicable in the case, the court having jurisdiction on the merits of custody in the immediate child abduction situation (which, as discussed above, is a court in the requesting State) will in accordance with the 1996 Convention as a general principle apply its own law (see Art. 15 of the 1996 Convention). In this situation the provisions of the mediated agreement, in so far as they concern matters of custody and long-term contact, will therefore have to be compatible with the substantive law of the State of the child's habitual residence (see the Practical Handbook for further details on the 1996 Convention).

---

378 Following a Recommendation of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions (see Conclusions and Recommendations of Part II of the Sixth Meeting of the Special Commission, op. *cit.* note 320, Recommendation No 77), the 2012 Council mandated the Hague Conference to 'establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention' indicating that '(s)uch work shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area', see Conclusions and Recommendations adopted by the 2012 Council (op. cit. note 39), Recommendation No 7.

379 See note 368 above; for further information on direct judicial communications, see note 128 above.

317 As regards other matters dealt with in the mediated agreement, for example child support or spousal maintenance provisions, the rules concerning jurisdiction and applicable law may vary. Depending on the circumstances of the case and the private international law rules applicable to the case, it may be a court other than that competent for custody matters which has jurisdiction for maintenance matters and it may be a substantive law other than that applicable to the custody matters which governs questions of maintenance. This is an added complication, again pointing to the need for the parties to have specialist legal advice regarding their individual case.

14 The use of mediation to prevent child abductions

→ **Promoting voluntary agreements and facilitating mediation in relation to issues of custody or contact / access may help to prevent subsequent abductions.**[380]

→ **The advantages of providing specialist mediation for couples in cross-cultural relationships may be considered.**[381]

318 Recognising that the breakdown of a relationship between persons from different States lies at the heart of many international child abduction cases, 'securing a voluntary agreement at a stage when parents are separating or discussing issues of custody or contact / access is a useful preventive measure'.[382]

319 For example, if one parent wishes to relocate to another State following separation from the partner, introducing mediation at an early stage may be particularly helpful. Specialist mediation can enable the parents to better understand each other's point of view and find an agreed solution taking account of their child's needs. The outcomes may be as varied as the circumstances of each individual case, including the relocation of both parents to the new State, both parents remaining in the same State or the relocation of one parent with the contact rights of the other parent being sufficiently secured.

320 At the same time, the use of mediation in securing that contact arrangements, both within the boundaries of one State or cross-border, are respected can assist in preventing situations that may lead to international child abduction. For further details regarding situations where there may be a heightened risk of child abduction, see the Guide to Good Practice on Preventive Measures,[383] at paragraph 2.1.

321 Facilitating the provision of information on mediation and the measures that are necessary to render a mediated agreement enforceable in the two jurisdictions in question through Central Authorities or Central Contact Points on international family mediation will help to promote mediation as a measure for the prevention of child abduction.[384]

322 Mediation of course remains just one of many possibilities. Access to judicial proceedings for relocation should not be made conditional upon attendance of the parties in mediation sessions.[385]

380 See Principles taken from the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), para. 2.1, p. 15.

381 See Principles taken from the Guide to Good Practice on Preventive Measures, *ibid.*

382 *Ibid.*

383 *Ibid.*

384 On the role of Central Authorities and other bodies in facilitating the provision of this information, see section 4.1 above.

385 See the Washington Declaration on International Family Relocation (*supra* note 160).

15 Other processes to bring about agreed solutions

→ **Aside from mediation, the use of other processes to bring about agreed solutions should be encouraged in international family disputes concerning children.**
→ **Processes to bring about agreed solutions available for national cases should only be considered for use in international family disputes if adaptation to the special needs of international disputes is possible.**
→ **States should provide information on the processes to bring about agreed solutions which are available in their jurisdiction for international child abduction cases.**

323 This Guide seeks to encourage the use of processes to bring about agreed solutions to settle amicably international family disputes involving children.

324 Aside from mediation, many other processes to bring about agreed solutions have been developed and are successfully applied to family disputes in different countries.[386] These include 'conciliation', 'parenting co-ordination', 'early neutral evaluation', and models of conflict resolution advocacy such as the 'collaborative law' or 'co-operative law' approaches.

325 '**Conciliation**', often conducted in the course of judicial proceedings by the sitting judge, is one of the more directive dispute resolution processes in this list. As pointed out above in the Terminology section, conciliation is sometimes confused with mediation. In mediation, the neutral third party cannot be a person who is in a position to make a decision for the parties; the mediator only facilitates the parties' communication, assisting them with finding a self-accountable resolution of their dispute. In contrast, in conciliation, the neutral third party regularly has a much greater influence on the solution of the conflict.[387] Conciliation is used on a regular basis in many countries in judicial proceedings concerning family disputes, especially in divorce proceedings and proceedings concerning parental responsibility.[388] Conciliation by the judge seised can easily be applied in Hague return proceedings, where considered appropriate and feasible, to bring about a court settlement, without risking delay.

326 In the United States of America, some jurisdictions offer programmes of '**parenting co-ordination**' for high-conflict custody and access cases where parents have, on a recurring basis, already demonstrated their inability or unwillingness to comply with court orders or parental agreements.[389]

> 'Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and / or the court, making decisions within the scope of the court order or appointment contract.'[390]

---

386 For more information on the alternative dispute resolution processes available in the different Contracting States to the 1980 Hague Child Abduction Convention, see Chapter 20 of the Country Profiles under the 1980 Convention (*supra* note 121).

387 For more details on the distinction between mediation and conciliation, see the Terminology section above, 'Mediation'.

388 For example, in **Morocco**, before a court decides on a divorce 're'-conciliation of the spouses needs to be attempted, see Arts 81 *et seq.* of the Moroccan Family Code (*Code de la Famille – Bulletin Officiel No 5358 du 2 ramadan 1426*, 6 October 2005, p. 667), available at < www.justice.gov.ma >. Similarly, in **Italy**, the attempt of reconciliation between spouses is compulsory in separation and divorce proceedings, see Art. 708 of the Code of Civil Procedure and Arts 1 and 4.7 of the Italian Divorce Act (*Legge* 1 December 1970, No 898, *Disciplina dei casi di scioglimento del matrimonio*, in *Gazzetta Ufficiale n. 306*, 3 December 1970).

389 See N. ver Steegh (*op. cit.* note 8), pp. 663, 664.

390 See 'Guidelines for Parenting Coordination', developed by the Association of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination, May 2005, available at < http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AFCCGuidelinesforParentingcoordinationnew.pdf > (last consulted 14 June 2012).

327 The parenting co-ordinator is appointed by the court competent for the custody proceedings. 'Parenting co-ordination' was established following a recommendation of an interdisciplinary conference on high-conflict custody disputes funded by the American Bar Association in 2000.

328 A further means encouraging the agreed solution of family disputes is '**early neutral evaluation**',[391] by which the parties receive a non-binding expert evaluation of their legal situation, subsequent to which they are given the opportunity to negotiate an agreed solution.[392] This process has become available, for example, in some jurisdictions of the United States of America, where the 'early neutral evaluation' sessions last two to three hours, are conducted by one or more experts and are confidential.[393]

329 The promotion of processes to bring about agreed solutions in different legal systems is also reflected in the changing approach of lawyers to family law advocacy. Today, lawyers tend to focus more on finding agreements as the best possible outcomes for their clients.

330 The first of two interesting processes that should be mentioned in this regard is the '**collaborative law**' model. According to this model, which is in use in a number of jurisdictions,[394] the parties are assisted by 'collaborative lawyers' who use interest based problem solving negotiation techniques to resolve the dispute without going to court.[395] Where no agreement is found and the matter has to be resolved in judicial proceedings, the collaborative lawyers are disqualified from continuing representation; the parties thus need new representation in such case. In some jurisdictions, such as in some states of the United States of America, the collaborative law model has successfully been used for quite some time. Some of these legal systems have meanwhile introduced legislation, or an 'ethical opinion' on 'collaborative law'.[396]

331 The second model of amicable conflict resolution advocacy is that of '**co-operative law**'. The 'co-operative law' model follows the principles of the 'collaborative law' model, except for the representatives' disqualification when the matter has to be brought before a court.[397]

332 The use of processes that are available to bring about agreed solutions of national family disputes should be considered in international family disputes. But these processes must be adapted to the special challenges of international family disputes, and in particular to the specific challenges of international child abduction cases, as set out above in relation to mediation. For example, the use of the collaborative law model in international child abduction cases might not be advisable, where the parties risk needing a second pair of representatives if rendering the agreement reached in this process binding includes going to court and their representatives being obliged to resign at that stage.

333 The good practices set forth in this Guide in relation to mediation should be adapted to these other processes.

334 States are encouraged to make available within their jurisdictions information on processes to bring about agreed solutions which can be applied in international child abduction cases. This information could be provided through the Central Authorities and the Central Contact Points for international family mediation.[398]

---

391 For further information see, *inter alia*, N. ver Steegh (*op. cit.* note 8), p. 663.

392 *Ibid.*

393 *Ibid.* Early neutral evaluation is also available in **Canada (Manitoba)**, see section 20 a) of the Country Profiles under the 1980 Convention (*supra* note 121).

394 The collaborative law model is currently used, *inter alia*, in **Canada (Alberta, British Columbia, Manitoba, Nova Scotia, Saskatchewan)**, **Israel**, the **United Kingdom (England and Wales; Northern Ireland)** and the **United States of America**, see section 20 a) of the Country Profiles under the 1980 Convention (*supra* note 121).

395 For further details see, *inter alia*, N. ver Steegh (*op. cit.* note 8), p. 667.

396 *Ibid.*, pp. 667, 668.

397 *Ibid.*, p. 668.

398 On the role of Central Authorities and other bodies in facilitating the provision of this information, see section 4.1 above.

16 The use of mediation and similar processes to bring about an agreed resolution in non-Hague Convention cases

→ **The use of mediation and similar processes to bring about agreed solutions should also be encouraged in international family disputes concerning children, and especially cases of child abduction to which the 1980 Hague Child Abduction Convention or other equivalent instruments do not apply.**

→ **States should promote the establishment of mediation structures for such cases, as set out in the Principles for the Establishment of Mediation Structures in the context of the Malta Process.[399] In particular, States should consider the designation of Central Contact Points for international family mediation to facilitate the dissemination of information on available mediation and other related services, on the promotion of good practices regarding specialised training for international family mediation, and on the process of international mediation. At the same time, assistance with rendering mediated agreements binding in the legal systems concerned should be provided.**

→ **Where needed, countries should 'examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements'.[400]**

335 Where international family disputes concerning children involve two States between which the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention or another relevant international or regional legal framework is not in force, mediation or other processes to bring about agreed solutions may be the only recourse and the only way to help the children concerned 'to maintain on a regular basis (...) personal relations and direct contacts with both parents', a right promoted by the UNCRC.[401]

336 Of course, the non-applicability of relevant regional or international instruments does not prejudice the parents' legal remedies under national law. However, in cases where an international child abduction occurred or another cross-border dispute concerning child custody and contact is ongoing, the lack of an applicable regional or international legal framework regularly leads to conflicting decisions in the different jurisdictions concerned, which is often a dead-end for a legal solution to the conflict.

337 As set out above,[402] the Working Party on Mediation in the context of the Malta Process developed Principles for the Establishment of Mediation Structures in the context of the Malta Process. States should promote the establishment of mediation structures as set forth in these Principles. In particular, States should consider the designation of Central Contact Points for international family mediation to facilitate the dissemination of information on available mediation services and other relevant information. Furthermore, States should promote good practices regarding the training of mediators for international family mediation and regarding the process of international mediation.

338 The good practices set forth in this Guide regarding mediation in international child abduction cases under the 1980 Hague Child Abduction Convention are equally applicable to such cases. As in international child abduction cases within the scope of the 1980 Convention, mediation needs to be conducted with the greatest care and the mediated agreement needs to be drafted with a view to its being compatible with and rendered enforceable in the jurisdictions in question. Time is also of the essence where no regional or international legal framework is applicable in international abduction cases; contact between the child and the left-behind parent should be restored as quickly as possible to avoid alienation.

---

399 See Annex 1 below.

400 *Ibid.*

401 See its Art. 10(2).

402 See paras 14, 112 *et seq.*

339 On balance, mediation in international child abduction cases in the absence of an applicable regional or international legal framework is conducted under very special circumstances. There is no fall-back to a solution through judicial proceedings if mediation fails, or when the mediated agreement is rendered enforceable in the relevant jurisdictions but something goes wrong with its practical implementation. It is crucial, therefore, that any agreed solution arrived at in these cases be made legally binding and rendered enforceable in the different legal systems concerned before commencing its practical implementation. In this manner, mediation can overcome the conflicting situation of the different legal systems concerned; the mediated agreement itself then serves as a basis for establishing a uniform legal opinion on the case in the different legal systems concerned.

340 All possible assistance with rendering their mediated agreement binding and enforceable in the relevant legal systems should be given to the parties to a cross-border family conflict. The provision of information on what steps are needed to give legal effect to an agreement should be facilitated by a central body, such as a Central Contact Point for international family mediation.[403] Where needed, States should 'examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements'.[404]

341 Mediators in international family disputes on child custody and contact to which no international or regional legal framework applies should be aware of the extent of their responsibility. They must draw the parties' attention to the legal implications of non-applicability of relevant regional or international legal instruments, and to the need to obtain specialist legal advice as well as rendering the agreement enforceable in the relevant legal systems before commencing with its practical implementation. The parties need to be made aware of the special implications of the lack of supranational rules on recognition and enforcement regarding custody and contact decisions for the future. They have to understand that, even if their agreement has been rendered enforceable in both (all) jurisdictions concerned following the mediation, changes in circumstances may affect the agreement's enforceability in the future. Any adaptation of the agreement's content will have to be acknowledged by both (all) legal systems, a process which will require the parties' co-operation.

403 For further details on the role of Central Contract Points for international mediation, see the Principles for the Establishment of Mediation Structures in Annex 1 below and also section 4.1 above.

404 See the Principles for the Establishment of Mediation Structures (*ibid.*).

Annexes

Annex I

PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

drawn up by the Working Party with the assistance of the Permanent Bureau

A CENTRAL CONTACT POINT

States should establish / designate a Central Contact Point for international family mediation which should undertake, either directly or through an intermediary, the following tasks,

- Serve as contact point for individuals and at the same time as network point for mediators working in cross-border family disputes.

- Provide information about family mediation services available in that country, such as:
  > List of family mediators, including contact details and information about their training, language skills and experiences;
  > List of organisations providing mediation services in international family disputes;
  > Information on costs of mediation;
  > Information on the mediation models used / available; and
  > Information on how mediation is conducted and what topics may be covered in mediation.

- Provide information to assist with locating the other parent / the child within the country concerned.

- Provide information on where to obtain advice on family law and legal procedures.

- Provide information on how to give the mediated agreement binding effect.

- Provide information on the enforcement of the mediated agreement.

- Provide information about any support available to ensure the long-term viability of the mediated agreement.

- Promote cooperation between various experts by promoting networking, training programmes and the exchange of best practices.

- Subject to the principle of confidentiality, gather and make publicly available on a periodic basis information on the number and nature of cases dealt with by central contact points, actions taken and outcomes including results of mediation where known.

The information should be provided in the official language of that State as well as in either English or French.

The Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone-number, e-mail address and names of responsible person(s) as well as information on what languages they speak.

Requests for information or assistance addressed to the Central Contact Point should be processed expeditiously.

Where feasible, the Central Contact Point should display relevant information on mediation services on a website in the official language and in either English or French. Where a Contact Point cannot provide this service, the Permanent Bureau could make the information received by the Central Contact Point available online.

B MEDIATION

1 Characteristics of Mediators / Mediation Organisations identified by Central Contact Points

The following are among the characteristics the Central Contact Point should take into account when identifying and listing international family mediators or mediation organisations:

- A professional approach to and suitable training in family mediation (including international family mediation)
- Significant experience in cross-cultural international family disputes
- Knowledge and understanding of relevant international and regional legal instruments
- Access to a relevant network of contacts (both domestic and international)
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions
- Access to administrative and professional support
- A structured and professional approach to administration, record keeping, and evaluation of services
- Access to the relevant resources (material / communications, etc) in the context of international family mediation
- The mediation service is legally recognized by the State in which it operates, *i.e.* if there is such a system
- Language competency

It is recognized that, in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and can not, at this point, be realistically insisted upon.

2 Mediation Process

It is recognised that a great variety of procedures and methodology are used in different countries in family mediation. However, there are general principles, which, subject to the laws applicable to the mediation process, should inform mediation:

- Screening for suitability of mediation in the particular case
- Informed consent
- Voluntary participation
- Helping the parents to reach agreement that takes into consideration the interests and welfare of the child

- Neutrality
- Fairness
- Use of mother tongue or language(s) with which the participants are comfortable
- Confidentiality
- Impartiality
- Intercultural competence
- Informed decision making and appropriate access to legal advice

3 Mediated Agreement

When assisting the drafting of the agreements the mediators in cross-border family disputes, should always have the actual exercise of the agreement in mind. The agreement needs to be compatible with the relevant legal systems. Agreements concerning custody and contact should be as concrete as possible and take into consideration the relevant practicalities. Where the agreement is connected to two jurisdictions with different languages, the agreement should be drafted in the two languages, if that simplifies the process of rendering it legally binding.

C RENDERING MEDIATED AGREEMENT BINDING

Mediators dealing with international family disputes over custody and contact should work closely together with the legal representatives of the parties.

Before starting the implementation of the agreement, the agreement should be made enforceable or binding in the relevant jurisdictions.

The Central Contact Points in the jurisdictions concerned should assist the parties with information on the relevant procedures.

Where needed, countries may examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements.

Annex II

EXPLANATORY MEMORANDUM ON THE PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

drawn up by the Working Party with the assistance of the Permanent Bureau

BACKGROUND

At its meeting held on 31 March – 2 April 2009, the Council on General Affairs and Policy of the Hague Conference on Private International Law authorised, in the context of the Malta Process, the establishment of a Working Party to promote the development of mediation structures to help resolve cross-border family disputes concerning custody of, or contact with, children, including cases of unilateral removal of a child to another State, where the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *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* do not apply.

The recommendation to establish such a Working Party derived from the Third Judicial Conference on Cross-Frontier Family Law Issues held in St. Julian's, Malta, 23–26 March 2009.

In June 2009, a small number of Contracting States to the 1980 Hague Child Abduction Convention and non-Contracting States, selected on the basis of demographic factors and differing legal traditions, were invited to designate an expert. These States were Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. In addition, a small number of independent mediation experts was invited to join the Working Party.

The Working Party held two telephone meetings, one on 30 July 2009 and one on 29 October 2009, as well as one in-person meeting on 11-12 May 2010 in Ottawa, Canada. The meetings were co-chaired by Ms Lillian Thomsen from Canada and Justice Tassaduq Hussain Jillani from Pakistan. At all these meetings simultaneous interpretation between English, French and Arabic was available. Two questionnaires on existing mediation structures and on enforceability of mediated agreements were circulated in preparation of the Working Party telephone meetings, responses to which are available on the Hague Conference website at < www.hcch.net > under 'Work in progress' then 'Child Abduction'.

In the first telephone meeting, the Working Party concluded that the establishment of Central Contact Points in each country facilitating information on available mediation services in the respective jurisdictions would be important. Following the second telephone meeting, the Working Party commenced work on 'Draft Principles' for the establishment of mediation structures which were concluded after an in depth discussion at the in-person meeting in Canada on 11-12 May 2010 and subsequent consultations with the experts who could not attend the meeting in Canada.

The Principles for the establishment of mediation structures in the context of the Malta Process

The 'Principles' were drawn up to establish effective mediation structures for cross-border family disputes over children involving States that are not a party to the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention or other relevant instruments. In the absence of an applicable international or regional legal framework, mediation or similar means of consensual dispute resolution are often the only way of finding a solution enabling the children concerned to maintain continuing contact with both their parents.

It has to be noted that the establishment of structures for cross-border family mediation will be equally relevant for cross border family disputes falling within the scope of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. Both Conventions promote the amicable resolution of the family conflict through mediation or similar means. The Principles may therefore also be useful in supplementing the international legal framework established by the Conventions.

The 'Principles'

The 'Principles' call for the establishment of a Central Contact Point, which facilitates the provision of information, *inter alia*, on available mediation services in the respective jurisdictions, on access to mediation and on other important related issues, such as relevant legal information.

PART A

Part A of the 'Principles' states which information should be provided and how the information should be made accessible through the Central Contact Points.

The information on mediation services in international family law should include, first of all, lists of mediators or mediation organisations providing such services. The lists should contain information on the mediator's training, language skills and experience, as well as the contact details. The Central Contact Point should furthermore facilitate information on costs of mediation, which should include mediation fees as well as other connected costs. In addition the Central Contact Point should make information available on the mediation process itself, *i.e.*, the mediation models used / available, how mediation is conducted and what topics may be covered in mediation. The information should be as detailed as possible; information on the availability of co-mediation, as well as that of specific forms of co-mediation, such as the bi-national mediation, should be included.

The Central Contact Point should further provide information to assist with locating the other parent / the child within the country concerned. Likewise information should be provided on where to obtain advice on family law and legal procedures, on how to render a mediated agreement binding and how to enforce it. In view of the often limited means of the parties to a family dispute, details on costs should be included; attention should be drawn to pro-bono services or services offering low cost specialist legal advice, where available. The Central Contact Point should also provide information about any support available to ensure the long-term viability of the mediated agreement.

The Central Contact Point should improve and consolidate cross-border co-operation regarding the amicable settlement of international family disputes by promoting co-operation between various experts through networking, training programmes and the exchange of best practices. Finally subject to the principle of confidentiality, the Central Contact Point should gather and make publicly available detailed statistics on the cases dealt with.

PART B

In Part B, the 'Principles' refer to (1) certain standards regarding the identification of international mediation services by the Central Contact Points, (2) the mediation process and (3) the mediated agreement.

Under Point B (1) the 'Principles' set out a number of characteristics of mediators or mediation organisations, which Central Contact Points should consider, when identifying and listing international mediation services. At the same time, the 'Principles' recognise that many States are still in an early stage of the development of international mediation services in family matters and that some of the characteristics listed are aspirational. It is, however, hoped that the States implementing the 'Principles' will encourage the incremental development of mediation services complying with these characteristics.

Point B (2) lists a number of broad general principles, which, subject to the laws applicable to the mediation process, should be adhered to in international family mediation. Recognising that these principles may have a slightly different interpretation in different legal systems and with a view to allowing for the development of good practices, the document refrains from attaching fixed definitions to these general principles. It should be noted that the Guide to Good Practice under the 1980 Hague Child Abduction Convention, which is currently being prepared, will deal in much greater detail with good practice regarding these general principles.

Point B (3) highlights certain important aspects to be taken into consideration, when it comes to the mediated agreement, in order to allow for it to be rendered binding in the legal systems concerned. For details on good practice regarding the drafting of mediated agreement reference is again made to the forthcoming the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention.

PART C

Part C recognises the importance of rendering a mediated agreement binding or enforceable in all the legal systems concerned before its implementation. It also highlights the need for close co-operation with the legal representatives of the parties. At the same time, the Central Contact Point is requested to support the parties with information on the relevant procedures.

Final Note

The Working Party wished to have included in this Explanatory Memorandum a statement of its view that Non-Party States should give careful consideration to the advantages of ratification of, or accession to, the *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* and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

The Hague Conference on Private International Law
Permanent Bureau
6, Scheveningseweg
2517 KT The Hague
The Netherlands

Telephone: +31 70 363 3303
Fax: +31 70 360 4867
E-mail: secretariat@hcch.net
Website: www.hcch.net

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

Wrocław Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues

German and Polish mediators met for the first time in Berlin in May 2007, and again for a second mediation seminar in October 2007 in Wrocław. We intend to continue this valuable exchange and cooperation.

The topic of both seminars, in addition to an exchange of views and an opportunity to get to know each other, was the preparation of basic principles for resolving bi-national disputes over parents' and children's issues through mediation. In doing so, particular attention was paid to making mediation proceedings conform to the framework of international agreements and conventions such as the Hague Child Abduction Convention and the Brussels IIa Regulation. Based on our discussions and the German experiences gained from German-French and German-American mediation projects on the implementation of such bi-national mediations, we, the participants in today's' seminar, make the following recommendations:

1. The mediation should be conducted as a **bi-national co-mediation**.
2. The mediators should have the same national origin as each party in the mediation. For example, in the case of a German-Polish abduction there should be one mediator from Poland and one from Germany. **In this way mediators reflect the different cultural backgrounds of the parents.**
3. One mediator should be female and the other should be male. In this way the genders of both the mother and father are represented by the two mediators.
4. One mediator should have a psychological/pedagogical professional background and the other should have a legal background. These high-conflict proceedings require one mediator to have particular psychological-communicative abilities. The other mediator should have additional training in the legal particularities of international child abduction proceedings and other international parents' and children's issues (e.g., custody and contact/visitation rights proceedings).
5. In abduction proceedings, both mediators should be available to conduct mediation preferably within one to two weeks of the assignment.

The described approach may require more time and higher costs. This is justified for the following reason: in mediation proceedings, in addition to return, questions of parental custody, contact, and other issues, e.g., of a financial nature, can be resolved more sustainably.

Bi-national mediation proceedings are a sensible complement to existing international legal instruments. Through such proceedings, international disputes over parents' and children's issues can be settled in a way that is oriented toward the needs and interests of the children and parents concerned.

Wrocław, October 8, 2007

Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

27 June 2013*

(Judicial cooperation in civil matters — Mediation in civil and commercial matters — Directive 2008/52/EC — National legislation providing for a compulsory mediation procedure — No need to adjudicate)

In Case C-492/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Giudice di pace di Mercato San Severino (Italy), made by decision of 21 September 2011, received at the Court on 26 September 2011, in the proceedings

Ciro Di Donna

v

Società imballaggi metallici Salerno srl (SIMSA),

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader (Rapporteur) and C. G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

— the French Government, by G. de Bergues and J.-S. Pilczer, acting as Agents,

— the Austrian Government, par A. Posch, acting as Agent,

— the European Commission, by F. Moro and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2013,

gives the following

* Language of the case: Italian.

Judgment

1 The request for a preliminary ruling concerns the interpretation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ 2008 L 136, p. 3), Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and Article 47 of the Charter of Fundamental Rights of the European Union.

2 This request has been made in proceedings between Mr Di Donna and the Società imballaggi metallici Salerno (SIMSA) srl ('SIMSA') concerning compensation for the damage caused to his motor vehicle and in respect of which the Giudice di pace di Mercato San Severino intends to apply the compulsory mediation procedure provided for under Italian law.

Legal context

European Union legislation

3 Recitals 8 and 10 in the preamble to Directive 2008/48 are worded as follows:

'(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

…

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. ...'

4 Article 1(1) of Directive 2008/52/EC provides:

'The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.'

5 Article 3(a) of Directive 2008/52/EC states:

'… the following definitions shall apply:

(a) "Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

…'

6 Article 5(2) of Directive 2008/52 provides:

‘This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.’

7 Article 7(1) of Directive 2008/52 is worded as follows:

‘Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person: or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

…’

Italian law

Legislative Decree No 28/2010

8 Legislative Decree No 28 of 4 March 2010 implementing Article 60 of Law No 69 of 18 June 2009 on mediation for the purposes of conciliation in civil and commercial litigation (GURI No 53 of 5 March 2010; ‘Legislative Decree No 28/2010’) was communicated to the European Commission as a national measure implementing Directive 2008/52.

9 Article 5(1) of Legislative Decree No 28/2010 provides:

‘Any person who intends to bring legal proceedings concerning a dispute over joint ownership, property rights, division, inheritance rights, family contracts, leases, loans-for-use, leases of businesses, compensation for damage resulting from vehicle and boat traffic, medical liability and defamation through the press and other media, or insurance, banking and financial contracts, shall be required, as a preliminary step, to use mediation within the meaning of the present decree … The carrying out of mediation shall be a precondition for bringing legal proceedings. Any objection of inadmissibility on this ground must be raised by the defendant, failing which it shall be barred, or may be raised by the court of its own motion, before the conclusion of the first hearing. Where a court finds that mediation has been initiated but not concluded, it shall fix a further hearing after the period referred to in Article 6 has expired. It shall do likewise where mediation has not been initiated, granting the parties, at the same time, a period of 15 days within which to submit the request for mediation.’

10 Article 6 of Legislative Decree No 28/2010 reads as follows:

‘1. A mediation procedure shall last no longer than four months.

…’

11 Article 8 of Legislative Decree No 28/2010, as amended by Law No 148 of 14 September 2011 (GURI No 216 of 16 September 2011, p. 1), governs the carrying out of the mediation procedure. That article lays down as follows:

‘1. On submission of a request for mediation, the person responsible within the relevant body shall designate a mediator and shall arrange a first meeting between the parties within 15 days of the submission of the request. …

…’

12 Article 11 of Legislative Decree No 28/2010 states:

‘1. Where an amicable settlement has been reached, the mediator shall draw up a record to which the text of the agreement shall be annexed. Where no agreement is reached, the mediator may draw up a proposal for conciliation. In any event, the mediator shall draw up a proposal for conciliation where the parties make a joint request for him to do so at any point during the mediation process. Before drawing up the proposal, the mediator shall inform the parties of the possible consequences referred to in Article 13.

...

4. Where the attempt at conciliation is unsuccessful, the mediator shall draw up a report setting out the proposal, which shall be signed by the parties and by the mediator, who shall certify the signatures of the parties so signing, or their inability to sign. The mediator shall also mention in his report the failure of any party to participate in the mediation.’

13 Article 13 of Legislative Decree No 28/2010, concerning the costs of the procedure, provides:

‘1. Where the order made in the judgment concluding the proceedings corresponds entirely to the content of the proposal, the court shall disallow recovery of the costs incurred by the successful party who has rejected the proposal, in respect of the period following the drawing up of the proposal, and order that party to reimburse the costs incurred by the unsuccessful party in respect of that period and also to pay to the State treasury a further sum equal to the single payment due. Articles 92 and 96 of the Code of Civil Procedure [Codice di procedura civile] continue to apply. The provisions of this paragraph shall also apply to the remuneration paid to the mediator and to the fees of any expert as referred to in Article 8(4).

2. Where the order made in the judgment concluding the proceedings does not correspond entirely to the content of the proposal, the court may, if there are serious and exceptional reasons for doing so, none the less disallow recovery of the costs incurred by the successful party in respect of the remuneration paid to the mediator and the fees of any expert as referred to in Article 8(4).’

Ministerial Decree No 180/2010

14 By legislative act, the Italian Government adopted Ministerial Decree No 180 of 18 October 2010, as amended by Ministerial Decree No 145 of 6 July 2011 (‘Ministerial Decree No 180/2010’). For the purposes of the present case, Article 16 of Ministerial Decree No 180/2010 provides:

‘1. The fees shall include the cost of initiating the mediation procedure and the costs of the mediation.

2. A mediation initiation cost of EUR 40, which is part of the overall fee, shall be paid by each party requesting the mediation on lodging an application for mediation, and by any other party who joins mediation when joining that procedure.

3. Each party shall be liable to pay the costs of the mediation as set out in Table A annexed to this decree.

4. The maximum costs of mediation for each reference category, as set out in Table A:

(a) may be increased by up to one-fifth to take account of the particular importance, complexity or difficulty of the matter;

(b) shall be increased by up to one-quarter in the event of a successful outcome to the mediation;

(c) shall be increased by one-fifth in the event that a proposal is formulated within the meaning of Article 11 of Legislative Decree [No 28/2010];

(d) as regards the matters referred to in Article 5(1) of Legislative Decree [No 28/2010], shall be reduced by one-third for the first six categories and by half for the remaining categories, without prejudice to the reduction contemplated under point (e) of the present paragraph, and no other increase provided for in the present article shall be applied except for that referred to in point (b) of the present paragraph;

(e) shall be reduced to EUR 40 for the first category and EUR 50 for all other categories, without prejudice to the application of point (c) of the present paragraph, when none of the opponents of the party who has requested the mediation participates in the mediation procedure.

…

14. The minimum fee amounts indicated for each of the reference categories as set out in Table A annexed to this decree may be varied.'

15 Table A, referred to in Article 16(4) of Ministerial Decree No 180/2010, states as follows:

Value of the claim	Costs (for each party)
Up to € 1 000	€ 65
From € 1 001 to € 5 000	€ 130
From € 5 001 to € 10 000	€ 240
From € 10 001 to € 25 000	€ 360
From € 25 001 to € 50 000	€ 600
From € 50 001 to € 250 000	€1 000
From € 250 001 to € 500 000	€2 000
From € 500 001 to € 2 500 000	€3 800
From € 2 500 001 to € 5 000 000	€5 200
Over € 5 000 000	€9 200

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 Mr Di Donna instituted legal proceedings against SIMSA seeking compensation from it for the damage caused to his motor vehicle by a fork-lift truck belonging to that company. According to the file, SIMSA did not contest the facts but requested that the first hearing be adjourned so that the insurance company with which it has a policy insuring covering it for delictual liability could be

joined in the proceedings. It however argued, in that regard, that it was necessary, before that insurance company could be joined in proceedings, to submit the case to the compulsory mediation procedure provided for under Legislative Decree No 28/2010.

17 The referring court considers that that decree is applicable to the facts in the main proceedings to the extent that the contractual link between SIMSA and the insurance company called upon to join the proceedings falls within the scope of insurance matters for which the mediation procedure is, applying Article 5(1) of that decree, compulsory and in the absence of which any court action will be rendered inadmissible. The Giudice di pace di Mercato San Severino nevertheless raises the question whether, for the purposes of fixing the date of the next hearing, it is necessary to take into account the 45-day period allowed for the insurance company to submit to the court's jurisdiction or also the four-month period necessary for the attempt at mediation. In addition, the referring court shares SIMSA's doubts concerning the compatibility of the provisions of Legislative Decree No 28/2010 with European Union law.

18 It was in that context that the Giudice di pace di Mercato San Severino decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Do Articles 6 and 13 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the European Union …, Directive 2008/52/EC …, the general European Union law principle of effective judicial protection and, in general, European Union law as a whole preclude the introduction in a Member State of the European Union of a set of rules [such as] Legislative Decree No 28/2010 and Ministerial Decree No 180/2010 … which provide that:

1. a court hearing subsequent legal proceedings may infer evidence against a party who, without valid reason, has failed to participate in compulsory mediation;

2. where legal proceedings brought after the rejection of a conciliation proposal are concluded by a judgment in precisely the same terms as those of the rejected proposal, the court must disallow recovery of the costs sustained by a successful party who rejected the conciliation proposal in respect of the period following the making of the proposal and must order that party to pay the costs of the unsuccessful party in respect of the same period and to make a further payment to the State treasury in the same amount as that already paid in respect of fees (single payment);

3. where there are serious and exceptional reasons, a court may disallow recovery of the costs incurred by the successful party in respect of the remuneration paid to the mediator and the fees of any expert, even where the judgment concluding legal proceedings is not in exactly the same terms as those of the conciliation proposal;

4. the court must order any party who has failed without valid reason to participate in mediation to pay to the State treasury a sum equal to the single payment in respect of the proceedings;

5. the mediator may, or must, make a proposal for conciliation even in the absence of any agreement between the parties and even where the parties fail to participate in mediation;

6. the period within which the attempt at mediation must be completed may be up to four months;

7. an action may be proceeded with, even after expiry of the period of four months from the commencement of the mediation procedure, only after a report confirming that no agreement has been reached has been obtained from the secretariat of the mediation body concerned, drafted by the mediator and setting out the proposal that has been rejected;

8. there may be more than one attempt at mediation – and the period allowed for resolving the dispute will be multiplied accordingly – whenever a new application is legitimately made in the course of legal proceedings that have, in the meantime, been instituted;

9. the costs of compulsory mediation are at least twice those of the legal proceedings that mediation is designed to avoid, a disparity which increases exponentially as the amount involved in the case increases (to such an extent that the costs of mediation may reach more than six times those of legal proceedings) and the complexity of the case increases (such as to require the appointment of an expert, paid by the parties to the mediation, to assist the mediator in disputes that call for specific technical knowledge, even though any technical report prepared by the expert [or] the information he has obtained may not be used in any subsequent legal proceedings)?'

Developments since the making of the request for a preliminary ruling

19 Following a request for clarification by the Court of the grounds justifying the necessity of the present request for a preliminary ruling in order to decide the case in the main proceedings, the referring court, in its reply of 9 March 2012, stated that, were the Court to decide that the national legislation was incompatible with European Union law, it would be obliged not to refer the dispute in the main proceedings to mediation, with consequences for the calculation of the time-limits applicable to the fixing of the hearing.

20 By judgment No 272/2012, delivered on 24 October 2012, the Corte costituzionale (Constitutional Court) declared certain articles of Decree No 28/2010 unconstitutional, including Articles 5(1), 8(5) and 13, with the exception, regarding the latter article, of the reference to Articles 92 and 96 of the Italian Code of Civil Procedure, which are however irrelevant to the case in the main proceedings.

21 It follows from that judgment, inter alia, that, following the finding that Article 5(1) of Legislative Decree No 28/2010 is unconstitutional, the prior initiation of mediation in Italy is no longer a precondition for the admissibility of legal proceedings and the parties are henceforth no longer bound to resort to mediation.

22 By letter of 14 December 2012, the Registry of the Court requested the referring court to inform it of the consequences of judgment No 272/2012, both on the national proceedings pending before it and on the request for a preliminary ruling.

23 By letter of 17 January 2013, that court replied that it would maintain its request for a preliminary ruling but it did not take a position on the bearing of that judgment on the decision in the main proceedings or on the relevance of the questions referred to the Court for a preliminary ruling.

Consideration of the request for a preliminary ruling

24 According to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of European Union law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; and Case C-241/09 *Fluxys* [2010] ECR I-12773, paragraph 28).

25 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court in order to establish whether it has jurisdiction. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, *PreussenElektra*, paragraph 39; Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 38; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 42; and Case C-399/11 *Melloni* [2013] ECR, paragraph 29).

26 Thus, on the basis of settled case-law, it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (see to that effect, inter alia, Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 27 and case-law cited).

27 In the case in the main proceedings, following the judgment of the Corte costituzionale of 24 October 2012, the national legislation applicable to the dispute in the main proceedings is no longer that under consideration in the context of the request for a preliminary ruling (see, by analogy, *Fluxys*, paragraph 32). That judgment, declaring some of the provisions of Decree No 28/2010 incompatible with the constitution, has the effect of removing them from the national legal system.

28 While the referring court, in its letter of 17 January 2013, admittedly stated that it wished to maintain its request for a preliminary ruling, it did not however indicate in what way the questions referred by it remained relevant for the decision in the main proceedings.

29 As stated by the Advocate General in points 20 and 23 of her Opinion, the nine questions referred to the Court have now become hypothetical.

30 The first four questions refer to the compatibility with European Union law of national legislation which entitles the court, first, to infer evidence against a party who, without valid reason, has failed to participate in compulsory mediation and to order any party who has failed without valid reason to participate in mediation to pay to the State treasury a sum equal to the single payment payable in respect of the costs (Article 8(5) of Legislative Decree No 28/2010) and, second, to disallow recovery of the costs sustained by a successful party who rejected the conciliation proposal and to order that party to pay the costs of mediation (Article 13 of that decree). Thus, those questions refer exclusively to provisions which were declared unconstitutional. Accordingly, those questions have become devoid of purpose as a result of the changes which have occurred concerning the applicability of the national legislative provisions.

31 With regard to the final five questions concerning the carrying out of the mediation procedure, the time-limits for the procedure and its cost, it must be observed, as stated in paragraph 27 above, that the national legal context of the dispute in the main proceedings is no longer that described by the national court in its order for reference. Following the finding that Article 5(1) of Legislative Decree No 28/2010 is unconstitutional, the parties are henceforth no longer bound to participate in mediation. Consequently, as stated by the Advocate General in point 29 of her Opinion, those questions are no longer of any relevance for the purposes of the decision in the main proceedings.

32 It follows that, taking into account the development of the dispute before the referring court from the point of view of the applicable law, the Court is no longer in a position to give a ruling on the questions which have been referred to it (see, to that effect, *Fluxys*, paragraph 34).

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

There is no need to answer the question referred by the Giudice di pace di Mercato San Severino (Italy) by decision of 21 September 2011 for a preliminary ruling in Case C-492/11.

[Signatures]