

Law and Practice of Cross-Border Family Mediation¹

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1. Legal Framework for Cross-border family cases and child abduction cases and Cross-border Family Mediation

Cross-border custody and contact disputes as well as parental child abduction cases are often characterized by sensitive conflict dynamics where the available legal instruments may prove to be too blunt. Mediation, by contrast, offers parents the possibility to address both the emotional as well as the legal aspects of their conflict. Mediation also provides a possibility for taking into account the cultural and linguistic particularities of the international family conflict in hand, as well as the geographic distances involved. In doing so it assists parents embroiled in highly escalated conflicts in finding solutions that are likely to be more sustainable and more amicable - and thus ultimately in the best interest of the child.

1.1. Key Legal Instruments Applicable in Cross-border Family Proceedings

Although mediators must not give legal advice to parents it is important that international family mediators have familiarized themselves with the following key legal instruments applicable in cross-border family cases:

□ Interactive: Participants could be asked to name relevant international/EU legal instruments applicable in cross-border family disputes

- ***United Nations Convention on the Rights of the Child (UNCRC, 1989)***

The UNCRC is an international treaty that recognizes the human rights of children (up to the age of 18 years). It sets out fundamental principles for the protection of children's rights and in particular also children's rights in cross-border family matters. The UNCRC is a global instrument and is the most widely ratified human rights treaty in the world. Nearly all States in the world have ratified the UNCRC, including all EU Member States.

- ***1980 Hague Child Abduction Convention (1980 HC)***

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

The 1980 HC is a procedural convention which seeks to protect children (up to the age of 16 years) from the harmful effects of being wrongfully retained or removed from their country of habitual residence. It establishes a legal mechanism for the prompt return of wrongfully removed or retained children. The 1980 HC thus aims to secure the child's right to a continuous relationship with both parents. The contracting state to which the child was wrongfully removed or in which the child is wrongfully retained may not take a decision on the merits of custody while Hague return proceedings are ongoing. The 1980 HC establishes a system of cooperation of signatory states through their Central Authorities assisting parents in abduction/retention cases but also in cross-border contact cases in which no wrongful removal or retention has occurred. The 1980 HC is a global instrument, currently in force in 98 Contracting States (April 2018) including in all EU Member States.

- **1996 Hague Child Protection Convention (1996 HC)**

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

The 1996 HC seeks to improve the protection of children (up to the age of 18 years) in international situations by providing for common rules on jurisdiction, applicable law, and recognition and enforcement in parental responsibility matters. The Convention also establishes a system of cooperation of signatory states through their Central Authorities, which assist parents in resolving cross-border family disputes. The 1980 HC is a global instrument, currently in force in 47 Contracting States including in all EU Member States. Inside the EU the European Brussels IIbis Regulation takes precedence over the 1996 Hague Convention with regards to matters dealt with by the Regulation.

- **Brussels II bis Regulation (BRII bis)**

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

In the field of parental responsibility, BRII bis creates common rules on jurisdiction and recognition and enforceability of decision and enforceable agreements within the EU. It establishes a system of administrative State cooperation of the EU Member States' Central Authorities which assist parents in cross-border family disputes concerning parental responsibility. The Regulation takes precedent over the 1996 HC in matters covered by BRII bis (jurisdiction, recognition and enforcement). Different to the 1996 the BRII bis Regulation also contains provisions on matrimonial matters. Inside the EU the Brussels IIbis Regulation provides for additional rules applicable in international child abduction cases falling within the scope of the 1980 Hague Child Abduction Convention. The BRII bis Regulation is only applicable between EU Member States (except Denmark).

A proposal for the recast of the Brussels II bis Regulation was published by the European Commission on 30th June 2016 identifying several areas in need of improvement. The review procedure for the Brussels II bis Regulation is still ongoing (status: April 2018).

1.2. The Legal Framework of Cross-border Family Mediation

The use of mediation in cross-border family disputes, such as in matters concerning parental responsibility and international parental child abduction cases, is encouraged by a number of the aforementioned key legal instruments applicable in cross-border children matters, such as:

- **1980 Hague Convention on Child Abduction, Art.7 (c):**

"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;"

- **Brussels II bis (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."

- **1996 Hague Child Protection Convention, Art.31 (b)):**
*“The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to (...)
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;*

- The **“EU Mediation Directive”** (*Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*) was an important step in assisting the promotion of the use of mediation within the EU. The Directive came into force in June 2008 requiring all EU Member States (except Denmark) to comply with it before 21st May 2011 through the implementation of national legislation and provisions. It applies in cross-border family matters and provides a framework for cross-border mediation, although under the Directive the Member States are not prevented from enacting legislation that will cover domestic cases also. Another aim of the Directive, in addition to the promotion of mediation, is to ensure the enforceability of cross-border mediated agreements within the EU. However in cross-border children matters and child abduction proceedings the applicable international legal framework needs to be taken into account. The issue of jurisdiction is particularly complex in such cases and specialist legal advice should be sought concerning the question of enforceability. Steps are usually required to give legal effect of the mediation agreement in the other jurisdiction. The Directive emphasizes the need for training of mediators as well as a code of conduct to ensure quality of mediation (Art.4). The Directive also provides a helpful definition of “mediation” - as opposed to other forms of Alternative Dispute Resolution, such as arbitration, negotiation and conciliation, as well as a definition of “mediator”:

- **Art. 3(a), EU Mediation Directive:**
“[Mediation is] a structured process...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.”

- **Art. 3(b), EU Mediation Directive:**
A mediator is defined as “any third person who is asked to conduct a mediation in an effective, impartial and competent way”.

- **Art. 1 and Art. 2, EU Mediation Directive:**
 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. (...)*

□ Interactive Exercise in Groups: Participants are asked to provide a definition for “mediation” and “mediator” before presenting the definitions of the Mediation Directive

□ Reference for Participants:

- **United Nations Convention on the Rights of the Child (UNCRC)**
 - <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>
- **1980 Hague Child Abduction Convention (1980 HC)**
 - <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>
- **1996 Hague Child Protection Convention**
 - <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>
- **Brussels II bis Regulation (BRII bis)**
 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>
- **EU Mediation Directive**
 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN>

1.3 The HCCH Guide to Good Practice and the MiKK Co-Mediation Model

The Hague Conference *Guide to Good Practice on Mediation in Child Abduction Cases* represents a comprehensive and essential guidebook for mediation in international family cases and child abduction cases in particular. The Guide to Good Practice recognizes the special characteristics of cross-border family matters and child abduction cases and the importance of specialist training for mediation in this field. For such cases the Guide recommends “bi-cultural, bi-lingual Co-mediators” (HCCH, Mediation Guide to Good Practice, pp.64-65) making specific reference to the “4 B” mediation model developed and practiced by MiKK e.V. – *International Centre for Family Conflict and Child Abduction*. Accordingly a Co-Mediator Team is matched specifically to suit the cultural and linguistic backgrounds of the parents and, in addition, the team usually consists of a male and a female mediator from a legal and a psycho-social background. The MiKK mediation model of bi-lingual, bi-cultural, bi-gender and bi-professional Co-mediation was laid down in the Wroclaw Declaration of 2007 resulting from a German-Polish mediation project (MiKK/DOM). Based on this mediation model a Training for Mediators from all EU member States was developed as part the EU co-financed TIM Project by Childfocus, MiKK and the Katholieke Universiteit Leuven in 2011. MiKK provides regular Cross-border Family Mediation Trainings in Berlin and abroad. Its International Network of Cross-border Family Mediators comprises more than 150 Mediators worldwide who mediate in 30 languages.

□ Interactive exercise for participants (in small groups):

- **Outline if/how mediation is practiced in family proceedings in different EU Member States?**
- **Is it practiced in cross-border family disputes?**
- **What training do mediators have to undergo to become qualified mediators/international family mediators in the different EU Member States?**

Results are collected in the plenary.

□ Reference for Participants:

- **HCCH Guide to Good Practice on Mediation in Child Abduction Proceedings**
https://assets.hcch.net/upload/guide28mediation_en.pdf
- **Wroclaw Declaration on Mediation concerning Bi-national Disputes on children's issues**
https://www.mikk-ev.de/s-content/uploads/2017/01/Wroclaw-Declaration_ENG.pdf
- **MiKK - International Center for Family Conflict and Child Abduction**
<https://www.mikk-ev.de/en/>

1.4 The Principles of Mediation

At the beginning of the mediation process the mediators explain the difference between mediation and other forms of dispute resolution. The mediator explains the four principles of mediation which are set out in the Agreement to Mediate which the parties sign before commencing the mediation process. Most of these principles are also reflected in the European Code of Conduct for Mediators.

- **Voluntariness:** The parties enter into mediation on a voluntary basis. Neither party has been coerced into participating in mediation. Any party is free to end the mediation process at any time.
- **Confidentiality:** The contents of the mediation are confidential and will not be shared with third parties, although parties are of course free to discuss the contents with their lawyers or therapists. The contents of the discussions during mediation cannot be used in court proceedings.
- **Impartiality:** Mediators must act impartial at any time. They do not take sides.
- **Self-Empowered:** The parties are in the “driving seat” when it comes to finding solutions. The mediators do not give advice or propose solutions to parents.

□ Interactive exercise for participants (in small groups):

- **Name some principles of mediation?**

1.5 The Stages of the Mediation Process

Mediation is a structured process divided into 5 distinct Stages

Stage 1: Introductions and Setting the stage. The parties are taken through the Agreement to Mediate which they received prior to the first session. The mediators explain the mediation process and set out any ground rules. The Agreement is signed by the parties and the mediators.

Stage 2: Identifying the issues. The parties are each given the opportunity to tell their story, i.e. to explain their positions. The mediators' role here is to listen actively, trying not to interrupt the parties, although the mediators should acknowledge both parties' feelings and concerns and reframe if necessary. The parties agree on an agenda and the mediators list the main issues to be settled in mediation on a flipchart.

Stage 3: Defining the Issues and Interests. Now that the parties have each set out their perspective the mediators help the parties to explore their needs and interests as well as the needs and interests of their child/ren. The parties are encouraged to speak directly to each other.

Stage 4: Examining and Clarifying Options. Different solutions and options are explored by the parties. The mediators help the parties evaluate and discuss different options which involve compromises and concessions on both sides leading towards reaching a final settlement.

Stage 5: Drafting the Agreement (Memorandum of Understanding). The mediators help formulate the agreement which is checked by the parties' respective lawyers before the parties sign it.

☐ **The following Handouts are to be read as homework in preparation Day 2:**

- **Case Study A**
- **Agreement to Mediate**
- **Role-play Guidelines and Feedback Rules for Players**

☐ **Reference for Participants:**

- **EUROPEAN CODE OF CONDUCT FOR MEDIATORS**
http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

2. Case Scenario – Anita and Giovanni

Anita (24) and Giovanni (26) meet in Amsterdam in 2007, where both study for one year under the Erasmus program. They fall in love and become a couple. They speak English with each other.

Giovanni is an Italian national who comes from a very traditional family in Sicily. He studies history and international politics at the University in Rome.

Anita grew up in Berlin, Germany; Both her parents are teachers who raised Anita and her older sister in a very liberal way. Anita, too, wants to become a teacher. She is studying Italian and English literature and linguistics at Berlin University.

After finishing his Erasmus year in 2008 Giovanni secures a position as lecturer in 19th century European history in his home town at the University of Palermo. Anita meanwhile returns to Berlin to complete her studies. A year later, in 2009, she joins Giovanni in Palermo. They rent a flat together and Anita starts working as an assistant English teacher. A few months later Anita discovers that she is pregnant and the couple decide to get married.

Their son Joseph is born in July 2010. Anita enjoys staying home to look after baby Joseph initially, but soon starts to feel isolated and longs to return to work. Giovanni meanwhile works very long hours. The week-ends are usually spend socializing with Giovanni's family. When Joseph enters primary school, Anita starts looking for part-time work as an English teacher. She makes enquiries with a number of schools but, much to her dismay, there are no suitable positions available. Giovanni would like his wife to be more active in the church community but Anita does not feel comfortable with this. She never cared much for her husband's religious values and refuses to attend social events organized by the church. Anita has very few social contacts in Palermo. She misses her family and feels increasingly isolated and frustrated. She and Giovanni argue frequently and the relationship deteriorates.

In the summer of 2017 Anita travels with Joseph to Berlin to visit her parents for three weeks during the summer holidays. At the end of the holidays, she decides not to return to Italy and enrolls Joseph in a German primary school. Anita's family assist her in securing a part-time teaching position at a language school in Berlin which she is due to start in February 2018. Anita calls Giovanni on the phone to tell him that she will remain in Berlin for good with Joseph. She is adamant that they will not be coming back to Italy. Giovanni is devastated and in complete shock at this news.

Giovanni keeps hoping that Anita will come back to Italy and they argue for many months over the telephone about this. Giovanni eventually contacts a lawyer and files an application with the Italian Central Authority for the return of Joseph to Italy under the 1980 Hague Convention. The application is passed on to the German Central Authority and Hague Convention return proceedings are initiated in the court in Berlin.

Anita and Giovanni agree to try and find a solution by way of mediation, following their lawyers' advice. They contact MiKK who organize a multi-lingual, bi-cultural and bi-professional Co-mediator team - a female mediator from Italy (with a legal professional background) and a male mediator from Germany (with a psycho-social professional background) - to conduct the English language mediation. Because Anita lacks sufficient income, the German Central Authority funds her part of the costs of the mediation.

The date for the mediation is fixed for 24th and 25th January 2018, just a few days before the court hearing on 27th January 2018.

2.1 Separate Role-play Instructions: ANITA

After spending a week in Berlin during the summer holidays with your family and friends you felt like a different person! You have now realized what an isolated life you had been leading in Italy. Also, you cannot bear the arguments with Giovanni anymore. In fact, you think you were suffering from mild depression these past few years.

Giovanni has ensured that the family is financially secure but you feel completely isolated in Palermo. Giovanni rarely comes home from work before 8pm in the evening. He often continues to prepare his lectures until late into the night. The week-ends are spent with Giovanni's family or with his friends from church. You felt bored at these gatherings and wanted to spend more time with just the three of you. You often suggested going away for the week-end to visit other cities in Italy, but Giovanni insisted on seeing his family. There were frequent arguments about this. You feel that neither Giovanni's family nor the people from church have accepted you truly because of your liberal views. You have not made any real friends of your own in Palermo.

Career wise, Palermo has proved to be a dead-end for you. You had always dreamt of becoming a teacher, but you have found it impossible to find adequately paid part-time work in Palermo. While you sacrificed so much for the family, Giovanni has been able to advance his career. You are financially dependent on Giovanni which you do not like. You love being a mother but you feel that now that Joseph is older and in school it is your turn to advance your career!

Your parents have been always very supportive and understanding and have supported your decision to stay in Germany. When you heard about the job opening for a part-time English language teacher you could not resist applying. To your surprise you were offered the job starting in February 2018. You are so excited! The salary is good, too. You will be able to live with your parents for the time-being. Your parents and your sister have said will support you and Joseph in every way.

You have enrolled Joseph at a local primary school. He is having a great time in Berlin! His grandparents are spoiling him. He enjoys cycling around the neighborhood and loves playing with his cousin who is the same age as him.

Giovanni is most welcome to come and visit Joseph in Berlin and of course Joseph can visit Giovanni and his grand-parents and family in Italy during the school holidays.

Your lawyer has advised you that the Hague Judge is likely to order Joseph's return to Italy.

2.2 Separate Role-Play Instructions: GIOVANNI

You are still deeply shocked at what Anita has done and cannot believe that Anita could act so selfishly. She is not thinking about Joseph's well-being who needs both parents in his life and is missing out on school. His friends from school keep asking you when Joseph will be back. Your family and friends are telling you that they are not surprised by what Anita has done as she is not a "family person". You feel so embarrassed, humiliated and deeply sad. You miss Joseph so much and are in great pain. The house is so empty now and you find it hard to concentrate at work. You have worked day and night to make sure that the family has a comfortable life. You feel that Anita has just taken all this for granted. She is really difficult to please and never happy and content! Of course, you were aware that Anita had difficulties adjusting to life in Palermo. You tried your best to help by introducing her to your circle of friends, but Anita just did not seem to be able to connect with them. Family is very important for you but Anita never really enjoyed the big family events at the week-ends at your parents' home. You often fought about this. You know that

Anita has tried to return to work. You have no problem with Anita working as a teacher on a part-time basis. However, as always, Anita has been too picky and rejected some job offers, that you felt were good options. Despite all that has happened, you are willing to forgive Anita for trying to destroy the family. If Anita makes more of an effort to find friends and get on with your family and stops having such high expectations for a teaching job, life would improve for all of you in Palermo.

You have spoken to your lawyer who is fairly confident that the Judge will make a return order under the Hague Convention.

2.3 Input Solutions for Drafting a Memorandum of Understanding (MOU)

Solution A: Joseph returns to Italy

At the end of the two day mediation which took place in Berlin Anita and Giovanni came to the following agreement:

1. Anita will return to Palermo with Joseph.
2. The Hague case shall not be continued.
3. Giovanni and Joseph will have regular contact as often as possible.
4. Giovanni will move out of the flat the family has lived in together up until now.
5. Joseph can travel to Germany with his mother frequently.
6. The couple will apply for a divorce; they intend to continue to exercise joint custody.

Solution B: Joseph stays in Germany

At the end of the two day mediation which took place in Berlin Anita and Giovanni came to the following agreement:

1. Anita will stay in Germany with Joseph.
2. Joseph will visit his father as often as possible and will have regular contact between these visits.
3. Anita will have sole custody, but Giovanni will be involved in all important decisions concerning Joseph in advance.
4. Giovanni will pay child support for Joseph.
5. The Hague case shall not be continued.

3. Role-play Guidelines and Feedback Rules

Role-play guidelines for players

- Everybody receives the general role-play scenario.
- Anita and Giovanni receive separate role-play instructions. The trainers will talk the players through this beforehand.
- You will be able to improvise but you should try to stick to the script as much as possible.
- If you get stuck during the role play you may ask for a “time out” and halt the role-play to clarify questions you may have.
- The trainers will give instructions to the mediators and the observers about the time available for the role-play and the feedback. The observers and the mediators are responsible for the time management.

Feedback rules for players

- After the role play each player has the chance to describe briefly how they felt in their role
- Parties “de-role” by taking off their name tags
- The observers give feedback first
- Focus on positive feedback – what went well?
- Constructive feedback – what did not go so well and why?

4. Instructions for Trainers (Role-plays)

For the role-plays the participants are divided into groups of 6 players consisting of co-mediators, parents (Anita and Giovanni) and two observers. The role plays are carried out in parallel groups.

Over the course of the four training days there will be a total of three role plays carried out. For each role play the players stay in their group, but players swap roles, thereby giving as many participants as possible the chance to mediate.

It should be ensured that those participants who are trained mediators or have undergone mediation training are given the opportunity to mediate.

All players will have received the case scenario (para 2) as well as the Agreement to Mediate (para 5). Each player also receives the feedback rules. These should be handed out at the conclusion of Training Day 1 to be read as homework.

Before the start of the role plays on Day 2 only the players in the role of the parents receive additional separate role instructions for Anita and Giovanni (para 2.1 and 2.2).

For the final Role Play Session III there will be separate input instructions available (para 2.3) based upon which the parties should try to formulate a Memorandum of Understanding. A template version of the two versions of a Memorandum of Understanding for Anita and Giovanni will be distributed after the participants have attempted to draft this themselves in the role play.

Role-play Timeframe

Having received input on the legal landscape of cross-border children cases and an introduction to mediation and the mediation process, the participants will now have the chance to do a mediation role-play of a Hague child abduction case. The aim is to give the participants an idea of the different stages of the mediation process from the introduction session to the successful conclusion of the mediation where they will attempt to draft a Memorandum of Understanding.

Participants will receive some extra input for the different stages of the mediation process.

Each Role Play session lasts a total of **1 hour and 15 minutes**:

- **15 min - “Getting into the Role”/Preparation Time/Reading Role Instructions**
All Mediators, Anitas and Giovannis from the different groups prepare together. They have the chance to ask the trainers questions and get some extra input if necessary.
- **45 min – Role Play**
- **15 min – Feedback within Role Play Groups**

Plenary Feedback

There will also be a chance for a plenary feed-back session after the role plays giving participants the opportunity to ask questions and share observations across individual role play groups. What difficulties did parties encounter in respect of each mediation stage? How did they resolve these? What did they learn from each particular role play session?

4.1 Role Play Session I

(Stages 1 and 2: Introduction & Setting the Agenda)

Prior to starting the role-play the trainers should take the parties through the Agreement to mediate which forms the basis of the first role play. The principles of mediation need to be clearly set out for the parties by the mediators.

□ Materials/Input prior to Role Play:

- Agreement to Mediate
- Case Study A
- Guidelines to Role-play and Feedback Rules for Players
- Separate Role Instructions Anita & Giovanni

4.2 Role Play Session II

(Stage 3: Defining the Issues and Interests).

Now that the parties have each set out their perspective the mediators help the parties to explore their needs and interests as well as the needs and interests of their child/ren. The parties are encouraged to speak directly to each other.

Input **prior** to Role Play II (Stage 3):

□ Input prior to Role Play:

- The Iceberg Model is introduced by the trainers
- Hearing Children in Mediation: “Pro and Contra” (Interactive Exercise)
- Interactive Exercise: “Tools in Mediation”
Small group work, then collect results in plenary (i.e. reframing, paraphrasing, circular questions, reflecting team). Trainers will help explain the meaning of these tools.

4.3 Role Play Session III

(Stages 4 and 5: Examining and clarifying options and drafting a Memorandum of Understanding)

□ Input prior to Role Play III:

- Interactive Exercise: Checklist of what needs to be covered in the MOU
- Input Solutions A and B are handed out
(if groups have reached a different solution already, they may work with that solution)

5. Agreement to Mediate

Agreement to Mediate between Anita and Giovanni

We, the mediators, are pleased that you have decided to enter into mediation. We hope that we can help you and the other party settle the questions that need to be addressed in a way that you both find acceptable and manageable. Our role as mediators is to help you consider the options that are available to you and possible terms of agreement, without putting you under pressure to reach an agreement. Any arrangements you work out for the present or the future need to be based on full consideration of both party's positions and needs. Mediation helps parents give full consideration to their children's needs as well.

We would like to explain the basis on which we work as family mediators:

1. Our role as mediators

(a) As mediators, we are impartial. We do not make judgments or take sides. We seek to help you both, jointly and as equally as possible.

(b) Our goal is to help you both gain clarity about the issues that need to be settled, to deal with these questions according to the priority you choose to give them, to collect all the financial information that is needed and to consider the options open to you both.

(c) We can provide legal information about relevant aspects of the law and we can explain the ways in which a settlement could be made legally binding, but we will not advise you as to the course of action you should take.

(d) The decisions remain yours. We seek to help you find a common basis on which to make your decisions without urging you in one direction or another.

(e) At the end of the mediation, we normally draw up a summary of the proposals or provisional arrangements that have been worked out. This summary is intended to help you in obtaining counsel from your legal adviser on the proposed terms of any agreement before you make it legally binding.

2. Willingness to take part in mediation

(a) As you know, both parties need to be willing to take part in mediation. Its progress depends greatly on your efforts to work out arrangements in a co-operative way.

(b) Either or both of you can decide to call a temporary halt to mediation. This may happen for a number of reasons. You may also withdraw from mediation at any stage, although we hope that before doing so, you would be willing to explain your reasons or concerns in the course of a mediation session so that every effort can be made to address these concerns more satisfactorily.

(c) If it appears to us that mediation is not appropriate under the given circumstances or that no further progress can be made, we would explain that mediation should be ended at the earliest opportunity.

3. Full financial information

If the mediation includes financial aspects, the discussions that take place need to be based on both of you having full knowledge and understanding of your financial and other circumstances.

4. Confidentiality

(a) All information and correspondence from either of you is shared with you both.

As mediators, we cannot receive any information or correspondence on a confidential basis from one of you without sharing it with the other party.

(b) We ask you to agree that – in the event of contested court proceedings taking place – neither of you would call on us to give evidence in court.

(c) We treat the content of our discussions and the information you provide as confidential. We will not provide information to legal advisers or to any other third party, except at the written request of both parties.

5. No prejudice

It is declared that, if prior to the substantive court hearing of the application, the parties agree to attempt to resolve the issues between them (or some of those issues) through mediation, nothing said or done by either party agreeing to make such an attempt or in the course of the mediation will be admissible in evidence herein (whether as evidence of acquiescence on the part of the plaintiff or otherwise); and that the court will draw no inference about the strength or otherwise of a party’s case in the proceedings from his or her agreement to make such an attempt.

6. Mediation appointments and fees

(a) Mediation appointments are scheduled ahead of time and are binding. Mediation sessions have been arranged for **24th-25th of January 2018 in Berlin.**

(b) Since the mediator XXX from Italy will be travelling to Berlin from Italy for the mediation she must charge for travel and hotel expenses.

(c) The cost of the mediation will be paid by the parents on a 50/50 basis. In addition to the time spent in the actual mediation we charge 2 hours preparation time. The cost of the mediation is **120 Euro per hour per mediator.** We will invoice you at the end of the mediation.

Family mediator

Family mediator

I have read the above and I accept the terms of the mediation:

Signed:

Signed:

Date:

Date:

*Adapted from: MiKK e.V., International Mediation Centre for Family Conflict and Child Abduction;
Authors: Eberhard Carl, Sybille Kiesewetter, Christoph C. Paul, Jamie Walker*

6. Memorandum of Understanding (MOU)

6.1 Memorandum of Understanding (MOU) – Solution A

We, Anita Ferrari and Giovanni Ferrari are the parents of Joseph Ferrari, born 1st July, 2010 in Palermo.

In the context of mediation sessions with xxx and yyy held in January 2018 in Berlin we considered our own interests and those of our son and came to the following agreements.

1. Return to Palermo, Italy and habitual residence

Anita will return to Palermo with Joseph by 15th February 2018 – assuming that this agreement has become legally binding in Italy and in Germany by then.

2. Living arrangements in Palermo

Giovanni will move out of the family flat we lived in together as a family up to now. Giovanni will rent an apartment for himself in the vicinity where Joseph will have his own room. Anita and Joseph will live in the former family flat by themselves.

3. Support

Giovanni will pay child support and will support Anita financially for a period of up to two years or until she has found a paid position.

4. Contact between Giovanni and Joseph

Joseph will spend every other weekend from Friday after school to Monday morning with his father. On these weekends Giovanni will pick Joseph up from school on Friday and take him to school on Monday. Giovanni and Joseph are free to speak to each other over the telephone/Skype as often as they want when Joseph is with Anita. Anita and Joseph are free to speak to each other over the telephone/Skype as often as they want when Joseph is with Giovanni.

5. Divorce

We plan to get a divorce and seek a settlement that is fair to both of us and especially one that reflects Joseph's needs. In any case we intend to continue to exercise joint custody for Joseph.

6. Travel to Germany

Anita is free to travel to Germany with Joseph up to three times a year for up to four weeks at a time, depending on school holidays. Joseph will spend every other Christmas in Italy and every other Christmas in Germany. This Christmas he will be in Italy. We will work out a detailed schedule that allows us both ample time for vacations with our son. Anita will pay for flights to and from Germany and Giovanni will pay for his vacations with Joseph.

7. Repeal of the 1980 Hague case

We agree to end the pending Hague Convention case by way of a court settlement on the basis of this mediation agreement.

8. Legal status of this agreement

We regard this as a binding agreement.

We are aware that this agreement must be checked by our lawyers under Italian and German law. If our lawyers are of the opinion that anything should be added, we will seek a fair solution on the basis of this agreement. If need be, we or our lawyers will consult the mediators in this process.

We request that our lawyers shall turn this agreement into a legally binding agreement (e.g. by mirror orders or any other necessary steps) within Italian and German jurisdiction as quickly as possible.

9. Costs

We will each pay for half of the court costs in both countries. Each of us will cover the expenses for our lawyers by ourselves.

10. Mediation clause

If we have any problems communicating or making joint decisions in the future we will try to solve them through mediation before going to court.

Date, Signature

Date, Signature

Adapted from: MiKK e.V., *International Mediation Centre for Family Conflict and Child Abduction*;
Authors: Eberhard Carl, Sybille Kieseewetter, Christoph C. Paul, Jamie Walker

6.2 Memorandum of Understanding (MOU) – Solution B

We, Anita Ferrari and Giovanni Ferrari are the parents of Joseph Ferrari, born 1st July, 2010 in Palermo.

In the context of mediation sessions with xxx and yyy held in January 2018 in Berlin we considered our own interests and those of our son and came to the following agreements.

1. Habitual residence

Anita will remain in Berlin with Joseph. She will move out of her parent's house and into her own flat with Joseph as soon as possible, at the latest by March 2018.

Giovanni will remain in Palermo and continue to live in the house they have occupied together up to now. Joseph's room will remain as it has been for when Joseph comes to stay.

Anita will move her personal belongings out of the house by March 2018 at the latest.

2. Visits to Italy

Joseph will visit his father three times a year for extensive periods of up to four weeks, depending on the school vacation schedule. Until he is old enough to fly by himself, Anita will accompany Joseph to Italy and pay for her own flights. Giovanni will pick up Joseph up at the airport and Joseph and Anita will only be in contact by phone while Joseph is with his father. Giovanni will bring Joseph back to Germany at the end of his visits and pay for his own flights. We will share the cost of Joseph's flights on a 50/50 basis.

Joseph's first visit back to Palermo will be for two weeks over Easter in 2018. He will return for 4 weeks for the first half of the school summer holidays 2018. He will return again over Christmas and New Year from Dec. 20, 2018 to Jan. 3, 2019. Giovanni is free to travel wherever he wants with Joseph. Anita is also free to travel anywhere she wants with Joseph.

Every year in October we will agree on a visitation schedule for Joseph for the next year, recognizing that both of us wish to spend important holidays and birthdays with him on a regular basis.

3. Contact between visits

Joseph will have regular contact with his father between visits. They will skype at least three times a week on Tuesdays, Fridays and Sundays at 6 p.m. If there is a problem with this schedule we will let each other know at least 24 hours ahead of time and agree to postpone the appointment. Anita will not be in the room when Joseph is skyping with his father. In addition, Anita agrees to write a detailed email to Giovanni every weekend reporting on how Joseph is doing and passing on any important information or news.

4. Passports

Giovanni will keep Joseph's Italian passport and Anita will keep his German passport. We agree to cooperate in providing documentation, signatures or whatever is required when a passport must be renewed.

5. Support

Giovanni will pay child support for Joseph and will finance 50% of the costs of sending Joseph to an international school where he can keep up his English. In addition, he will pay for an Italian tutor for regular language lessons.

6. Custody

Anita and Giovanni will continue to exercise joint custody and Anita will involve Giovanni in all important decisions concerning Joseph in advance.

7. Repeal of the 1980 Hague case

We agree to terminate the pending Hague Convention case by way of a court settlement on the basis of this mediation agreement.

8. Legal status of this agreement

We regard this as a binding agreement.

We are aware that this agreement must be checked by our lawyers under Italian and German law. If our lawyers are of the opinion that anything should be added, we will seek a fair solution on the basis of this agreement. If need be, we or our lawyers will consult the mediators in this process.

We request that our lawyers shall turn this agreement into a legally binding agreement (e.g. by mirror orders or any other necessary steps) within Italian and German jurisdiction as quickly as possible.

9. Costs

We will each pay for half of the court costs in both countries. Each of us will cover the expenses for our lawyers by ourselves.

10. Mediation clause

If we have any problems communicating or making joint decisions in the future we will try to solve them through mediation before going to court.

Date, Signature

Date, Signature

Adapted from: MiKK e.V., *International Mediation Centre for Family Conflict and Child Abduction*;
Authors: Eberhard Carl, Sybille Kieseewetter, Christoph C. Paul, Jamie Walker

7. Enforceability and Recognition of Mediated Agreements

The Memorandum of Understanding is drafted by the Mediators together with the parties (in both languages). It should be checked by the parties' respective lawyers and it is then signed by the parties.

The advantage of mediation is that a whole range of issues (financial, custody, contact) can be resolved in together in a so called "package agreement".

The following issues can be covered in a Memorandum of Understanding

- Child's future place of residence (return/no return)
- Child's and parents habitual residence
- Custody and contact arrangements
- Living arrangements
- Financial support
- Travel and passport matters
- School arrangements
- Bi-lingual and bi-cultural upbringing
- Religious upbringing
- Withdrawal of criminal charges (as far as possible)

However the Parties need to be made aware of the fact that a Memorandum of Understanding is not automatically legally binding or enforceable in the other jurisdiction. It should be drawn to the parties attention by the mediators that specialist legal advice is required. Ideally the parties should be able to contact their lawyers for questions throughout the mediation process.

The EU Mediation Directive states as follows concerning the issue of enforceability:

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.

The Hague Guide to Good Practice on Mediation (pp.30-31, footnotes excluded here) states as follows:

"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.

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.

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.

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.

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.

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."

□ Interactive Exercise/Discussion

- The issue of jurisdiction in Hague Cases**
- Implications for the enforceability and recognition of mediated agreements**