

**NOTE RELATIVE AU DÉVELOPPEMENT DE LA MÉDIATION, DE LA  
CONCILIATION ET DE MOYENS SIMILAIRES EN VUE DE FACILITER LES  
SOLUTIONS NEGOCIÉES ENTRE LES PARTIES DANS LES CONTENTIEUX  
FAMILIAUX TRANSFRONTIÈRES IMPLIQUANT DES ENFANTS DANS  
LE CADRE DE LA CONVENTION DE LA HAYE DE 1980**

*établie par Sarah Vigers, ancienne Collaboratrice juridique au Bureau Permanent*

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**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 Sarah Vigers, Former Legal Officer of the Permanent Bureau*

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sur le fonctionnement de la Convention de La Haye du 25 octobre 1980  
sur les aspects civils de l'enlèvement international d'enfants  
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on the Civil Aspects of International Child Abduction  
(The Hague, 30 October – 9 November 2006)*

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**Appendix 2** A Selection of Resolutions and Conclusions and Recommendations from Some Regional and International Meetings.

## 1. INTRODUCTION

### 1.1 Mediation in International Child Custody and Contact Disputes

The use of mediation in domestic family law is on the increase in many States. There are perhaps two main reasons why there is a growing trend towards mediation: It is considered as a way to relieve the workload of courts and tribunals<sup>1</sup>; and it is seen as a particularly useful form of dispute resolution where the parties intend to have an ongoing relationship, which is almost always the case in family disputes involving children. The use of mediation in cross-border family disputes is also growing but development is proceeding at a slower pace. Different languages, different cultures and geographical distance add new and difficult dimensions that need to be taken into account when considering the methodology of mediation. Additionally, the involvement of more than one State and more than one legal system necessitates that any agreement reached through mediation must satisfy legal requirements in both States and be legally enforceable in both States.

States Parties to certain international and regional family law instruments find themselves obligated to the use of mediation in certain contexts. 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 Hague Child Protection Convention") is a comprehensive instrument dealing with a broad range of parental responsibility and child protection issues. This Convention contains the following provision:

*"The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall 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".*  
Article 31

The European Union instrument, 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 II bis Regulation") contains the following similar provision:

*"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: [...] facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end." Article 55*

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<sup>1</sup> Answers from the International Social Service to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 for the Special Commission of 2006, report prepared and compiled by International Social Services Germany, Berlin, August 2006.

The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "The Hague Child Abduction Convention" or "the Hague Convention") although containing no specific mention of mediation, 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".<sup>2</sup>

The existence of provisions such as these highlights the importance placed upon the use of mediation in international family disputes. However, being still in its infancy, the development and use of mediation in cross-border child custody and contact disputes requires careful nurturing so that it can mature into a healthy and beneficial tool, relieving overburdened court systems and more importantly empowering parents to make their own decisions in the interests of their children.

## 1.2 The Scope and Purpose of this Note

The scope of this Note is limited to mediation in a very specific context, that of an application under the Hague Child Abduction Convention. Initially it was intended to approach the subject of cross-border mediation more generally taking into account the use of mediation as a means to prevent abduction<sup>3</sup> and in the broader context of the Hague Child Protection Convention. However, the scope of this Note has been reduced to focus on mediation schemes in the context of an application under the Hague Child Abduction Convention for several reasons. First, there are some very interesting mediation initiatives in this context which are in process or under development and which merit discussion.<sup>4</sup> Second, mediation in the context of a Hague Child Abduction Convention application must take account of the particular legal framework of the instrument, not least that it must operate within a very contracted period of time.<sup>5</sup> And, thirdly, because the Special Commission on General Affairs and Policy of April 2006 invited the Permanent Bureau to prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject,<sup>6</sup> and this work is continuing in parallel and will address many of the broader issues.

The purpose of this Note is simply to compile information on the subject, in order to present a picture of developments in the area and to place information under specific headings to aid discussion at the Special Commission. The Note is intended to be introductory, not a thorough description or analysis of mediation in the context of the Convention but merely an overview of certain aspects to raise discussion. The Note draws heavily from information received from individuals and organisations working in this field and the Permanent Bureau would like to express its appreciation to individuals and organisations who have provided valuable information.<sup>7</sup>

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<sup>2</sup> Article 7 c). See also Article 10 which requires Central Authorities to "take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child".

<sup>3</sup> See the Guide to Good Practice – Part III – Preventive Measures at pp. 15-16.

<sup>4</sup> For some examples, see Appendix 1.

<sup>5</sup> See *infra* at Section 2.

<sup>6</sup> Recommendation No 3 of the Special Commission on General Affairs and Policy of April 2006: "*The Special Commission invited the Permanent Bureau to prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject. The Special Commission welcomed the research already being carried out in this area by the Permanent Bureau in preparation for the meeting of the Special Commission to review the practical operation of the Child Abduction Convention of 1980 and the implementation of the International Child Protection Convention of 1996, to be held in October / November 2006. In addition the Special Commission recommended that the matters raised by the Swiss delegation in Working Document No 1 be included in the agenda of that same meeting.*"

<sup>7</sup> The Permanent Bureau would particularly like to thank, Ms Julia Alanen, Judge Eberhard Carl, Ms Denise Carter, Ms Jessica Derder, Ms Lorriane Fillion, Judge Marc Juston, Mr Christoph Paul, Ms Lisa Parkinson, Ms Kathy Ruckman, Lord Justice Mathew Thorpe, Ms Gabrielle Vonfelt, the Argentine Central Authority and the International Social Service.

### 1.3 Terminology

There is no single established definition of mediation. In this Note the term is used to refer to a process in which a neutral third party seeks to assist the parents to reach their own agreement. One commentator has stated that, “[i]nternational family mediation can be defined as a process by which an impartial, independent and qualified third party, the mediator, helps, through confidential interview, the parents who live in different States and are in dispute to re-establish communication with each other and to find agreement themselves that are mutually acceptable, whilst considering the interests of the child.”<sup>8</sup> Another group define family mediation as “a process in which qualified and impartial third parties (mediators) assist the parties to negotiate directly or indirectly on the issues that need to be resolved and to reach considered and mutually acceptable decisions that reduce conflict and encourage co-operation for the well-being of all concerned.”<sup>9</sup> For the purposes of the European Code of Conduct for Mediators mediation is defined as “any process where two or more parties agree to the appointment of a third-party – hereinafter “the mediator” - to help the parties to solve a dispute by reaching an agreement without adjudication and regardless of how that process may be called or commonly referred to in each Member State.”<sup>10</sup>

The aim of mediation and one of the fundamental principles recognised across the world, is to empower the parties to reach their own decisions about their own affairs without interference from the State.<sup>11</sup> Mediation is short-term and is focussed on specific defined issues and can thus be differentiated from longer-term non-specific processes such as counselling. According to one leading commentator in the field, mediation seeks to help participants to work out practical decisions and concrete agreements rather than non-specific goals such as gaining more insight or coming to terms with something.<sup>12</sup>

Mediation is generally defined as a voluntary process and indeed many see the notion of compulsory mediation as a contradiction in terms. However, in Norway mediation is mandatory for all separating and divorcing parents in relation to their children and the results are said to be very positive.<sup>13</sup> In Malta mediation is also obligatory.<sup>14</sup> In the majority of States mediation is voluntary and participants are free to withdraw at any stage. Mediators are also free to end the mediation if they consider this appropriate.

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<sup>8</sup> See Vonfelt, G., “International Mediation for Families and the Hague Convention of 25 October 1980” in *The Judges Newsletter on International Family Law*, Volume XI, 2006 at p. 55.

<sup>9</sup> ISS Family Mediation Trainers Group, Geneva, 2005. Taken from Parkinson, L., *Definitions of International Family Mediation*, 2005.

<sup>10</sup> The European Code of Conduct for Mediators was developed by a group of stakeholders with the assistance of the services of the European Commission and was launched at a conference on 2 July 2004 in Brussels. For more information see: < [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm) >.

<sup>11</sup> Parkinson, L., *Family Mediation in Europe – divided or united?* (updated paper given at European Masters in Mediation Seminar), Institut Universitaire Kurt Boesch, Sion, Switzerland, March 2003, at p. 2.

<sup>12</sup> Parkinson, L., *Young People and Family Mediation*, January 2002.

<sup>13</sup> See *ibid.*

<sup>14</sup> Parkinson, L., *supra* note 10 at p. 6.

## 2. MEDIATION IN THE CONTEXT OF THE HAGUE CHILD ABDUCTION CONVENTION

### 2.1 The Background

The majority of parents who abduct their children are mothers many of whom are the child's primary carer.<sup>15</sup> Many left-behind parents who make an application under the Convention, perhaps particularly, though not exclusively, the non-primary carer father do not necessarily desire that the child be returned but that guarantees are made to protect the left-behind parent's contact rights. A return order under the Convention means that the child will return to the State of habitual residence in order that decisions on contact, custody and / or relocation can be made and in many cases this may result in the original abducting parent being allowed to lawfully move away with the child so that the child is the subject of three relocations in a short space of time. It is particularly against this background that many consider mediation to be a useful tool in international child abduction. If mediation can help one parent to accept the relocation of the child and the other to grant firm guarantees that exercise of contact can occur, the child is saved from two subsequent relocations, much litigation in both States, and perhaps as a result a worsening of the relationship between the parents.

Another typical situation of child abduction is where the abducting parent is fleeing back to their home State because he or she feels isolated in the habitual residence State, perhaps through a lack of support, an inability to communicate due to language or cultural barriers or a sense of homesickness. In some of these cases the abducting parent may not want to relocate permanently to his or her home State but merely to spend some time there. Mediation in such situations may lead the left-behind parent to agree to organise more visits, or more lengthy visits to the abducting parent's home State, and the abducting parent faced with these guarantees may be quite willing to return the child voluntarily to the State of habitual residence. Such an agreement means that the child can be returned quickly to his or her State of habitual residence before having settled in the new State, but with guarantees as to a return visit in the near future.

The positive benefits, in certain cases, of mediated agreements over judicial decisions have been widely voiced. According to the French organisation MAMIF<sup>16</sup>, "mediation does not seek to avoid international instruments or national laws and in principle has longer lasting effects, is quicker, calmer and less expensive than the judicial process. It can better take into account the emotions of the parents and the interests of the child."<sup>17</sup> The United Kingdom based organisation reunite has stated that the benefits include: *"1) avoiding the cost to public funds of the Hague Convention proceedings, and the costs of proceedings in the other country (although a consent order would still be required); 2) avoiding the stress of contentious litigation in two countries; 3) avoiding the uplifting of the children from the requesting State to the home State, only for there to be a return later following disputed custody proceedings with all the attendant stress and further damage to the relationship between the parties; 4) avoiding a substantial delay in resolving the future of the family in its totality; 5) obligating and empowering parents to actively and purposefully address the issues affecting the future of their family"*.<sup>18</sup>

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<sup>15</sup> See Prel. Doc. No 3.

<sup>16</sup> *Mission d'aide à la médiation internationale pour les familles*.

<sup>17</sup> MAMIF response to Mediation Note. [Translation by the Permanent Bureau]

<sup>18</sup> Reunite – International Child Abduction Centre, *Mediation in International Parental Child Abduction – Draft Report 2006*. Hereinafter, "reunite Draft Report".

While mediation has generally been viewed positively as regards its use in Hague Convention applications it is not necessarily appropriate in all cases. Even where parents do agree to mediate it might be necessary to initiate some level of screening to ensure that cases are suitable for mediation. Caution has been expressed particularly in relation to the potential imbalance of power between abductors and left-behind parents and the possible bias inherent when an abductor has fled to his / her own jurisdiction,<sup>19</sup> and in this respect mediators should be suitably trained to deal with these situations.

## **2.2 Mediation within the Procedure for Dealing with a Hague Convention Application**

As the Hague Convention sets out a clear legal framework and expectation as to how a case should be decided it is very important that neither parent views the offer of mediation as diluting the legal process or as a derogation from the legal right to a court decision. Applicant parents are often advised not to talk to the other parent or to negotiate in case the court interprets this as acquiescence within the meaning of Article 13(1) a) of the Convention. Any mediation scheme set up in the context of a Hague Convention application must therefore operate in such a way as not to fall within the concept of acquiescence in the context of the Convention. The applicant parent should be aware that the willingness to negotiate and to enter into mediation does not derogate from his or her right to seek a return order. It is equally important to ensure that the abducting parent is aware that he or she still has a legal right to defend the application in court and that entering into mediation would not negate this right. Mediation should also not be seen as exclusive and it does not prevent the putting in place of protective measures or orders of non-removal if these are considered appropriate.

## **2.3 Time Frames**

Mediation in regard to a Convention application must take place within a limited time-period to take into account the six-week period suggested in Article 11. This is even more explicit in mediation between two European Union States under Article 11(3) of the Brussels II *bis* Regulation. The Swiss Branch of the International Social Service has stated that it is rare to have a successful mediation in the six-week time limit of the Convention.<sup>20</sup> However, there are some mediation projects, which are operating with success in this short-time period. Under the reunite pilot project, the legal process was frozen for a limited period while the mediation was undertaken. Three sessions of mediation were offered over a two-day period, each session lasting up to three hours.<sup>21</sup>

The drafters of the proposed US-German mediation project estimate that the duration of a successful family mediation will range from 12-16 hours spread across 2-4 days. Strict time limits will be applied to fit with Hague Convention proceedings (ideally 2-3 weeks but not more than 6 weeks).<sup>22</sup> In the bi-national professional German-French mediation

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<sup>19</sup> US State Department response to Mediation Note.

<sup>20</sup> Swiss Foundation of the International Social Service, *Enlèvements internationaux d'enfants La pratique du Service social international dans l'application des Conventions de La Haye de 1980 et de 1996. Rapport de la Fondation Suisse du Service social international à la Commission fédérale d'experts pour la protection des enfants en cas d'enlèvement international, Octobre 2005.*

<sup>21</sup> Reunite Draft Report.

<sup>22</sup> ICMEC / NCMEC response to Mediation Note.

initiative the mediation take place in the form of “block-mediation” where possible, for example, over a weekend from Friday afternoon until Sunday.<sup>23</sup>

## 2.4 Referral to Mediation

Mediation may take place within the Hague procedure either at the Central Authority stage or the judicial stage. Some Central Authorities offer mediation in certain cases themselves or use the service of a local mediation provider.<sup>24</sup> Central Authorities are required to seek a voluntary return or an amicable agreement<sup>25</sup> and offering mediation may be considered as a means by which to fulfil this Convention obligation. The advantage of mediation at the Central Authority stage is that the application may thus avoid the court system altogether, saving time and costs. However, any agreement reached may need to be taken to court to become a legally binding consent order and parents would still benefit from legal representation to verify and advise on any agreements made.

In some States courts are able to refer parents to mediation either provided by the court or by another provider. Under the reunite pilot project, mediation may only commence after the court proceedings had begun, the child was secure and the parent’s positions were secure and controlled by the legal process. The legal process was then frozen for a limited period while the mediation was undertaken. If no agreement was reached the case moved back into the court process. The advantage of having mediation take place against the backdrop of a court process is that necessary protective orders can be made, the parents already have legal representation and if mediation is not successful the case can go back to court in a very short time frame. Additionally, funding may be available for court-referred mediation.<sup>26</sup>

## 3. LINKAGE WITH THE LEGAL SYSTEM AND LEGAL ASPECTS OF MEDIATION

In the context of a Hague Convention application, mediation not only needs to operate within the legal framework of the instrument but additionally the methodology used must fulfil any legal requirements in the States and any agreements reached must be legally enforceable in both States.

### 3.1 The Scope of the Mediation

An application under the 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 or to make arrangements to secure the effective exercise of rights of contact. 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. Consequently, the primary issue to be addressed in mediation is

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<sup>23</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>24</sup> See the description of mediation provided by the Argentine Central Authority in Appendix 1.

<sup>25</sup> Articles 7 c) and 10

<sup>26</sup> See *infra* at Section 5.3.

whether the child should be returned to the State of habitual residence or remain in the new State. Broader issues concerning ongoing contact arrangements and relating to the general upbringing or support of the child are not the subject of a Hague Convention application. However, it is recognised that in some cases certain broader issues are so strongly related to the issue of return that they may need to be addressed in the context of the Hague Convention application.

The extent to which mediation should address these broader issues needs to be carefully considered. Courts dealing with Convention applications are also regularly faced with broader issues so connected to the decision on return that they need to be addressed. Courts have used mechanisms such as undertakings, safe harbour orders and mirror orders in order to address concerns raised. To gain agreement through mediation on these issues discussion may need to be much more detailed than might be the case in court where ultimately the judge makes his or her own decision. Conditions placed upon court orders are often aimed solely at ensuring the safe return of the child and possibly the abducting parent and should cease to have effect once the court in the habitual residence has made its own decisions. On the other hand, decisions made between the parents and contained within a mediated agreement may have much longer-term implications. Where this is the case it is important to consider the legal aspects of making decisions or agreements on these matters which are not strictly in the scope of the application and which, particularly where mediation is taking place in the requested State, could be seen as usurping the jurisdiction of the State of habitual residence. In this regard one commentator has noted that the Brussels II *bis* Regulation inevitably has consequences, which need to be considered for mediation projects within the European Union. The provision in the Regulation granting continuing jurisdiction to the State of habitual residence after there has been a decision refusing the return of the child might have some impact on the perception of the appropriateness of mediation taking place in the requested State.<sup>27</sup>

On the other hand, some States already take a broad approach to mediation in the context of a Hague Convention application. The German Federal Ministry of Justice has commented that mediation frequently aims not to consider only one aspect, but rather to resolve the other problems (*i.e.* contact, parental custody, place of residence of the child, maintenance). The Ministry states that in Convention procedures it is not merely a matter of repatriation of the child but also of where the child is to have his or her habitual residence in future and how contact is to take place with the other parent. Holiday arrangements and contact with grandparents and other relatives as well as the desire of the left-behind parent that the child learns his or her language are also frequently covered by the mediation.<sup>28</sup> Additionally, ICMEC / NCMEC have stated that if the parties so desire and if the mediator is qualified, dissolution of marriage issues could be addressed and included in the agreement.

### 3.2 Independence

Mediators by definition are neutral third parties who seek to assist the parties to reach their own agreements and decisions. In order for mediation to be not only effective but also credible and accepted by both States mediators must remain independent as to the parents. The French organisation MAMIF stresses that where there is a doubt that the mediator may be in some way linked to a parent, this situation should be made clear to the parents who can then decide whether to continue or not.<sup>29</sup>

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<sup>27</sup> Hutchinson, A., "Can Mediation Play a Role in Cases of International Parental Child Abduction?" Paper presented at ERA conference, "Divorce Mediation" organised by Dr Angelika Fuchs, Trier, March 2005.

<sup>28</sup> German Federal Ministry of Justice response to Mediation Note.

Similarly mediators are not representatives of their States. Some mediation schemes are organised by State bodies such as Ministries, which might make it more difficult for the mediators to maintain the perception of independence. The International Social Service has stated that as it cannot be seen as an organ of any States' administration. It considers that its independent and impartial status is appropriate to mediation.<sup>30</sup> On the other hand MAMIF claims that it benefits from the fact that it is attached to the Ministry of Justice which at a national and an international level gives a "moral" authority which encourages parents to move away from their entrenched positions.<sup>31</sup> In establishing a mediation scheme States may wish to consider where to place the scheme and how to ensure mediators are not only independent but are seen to be independent.

### 3.3 Impartiality

As neutral third parties mediators must also be impartial as to the parents and the States. Mediators should not be seen to represent either parent and are in this way different from legal representatives. Neither should they be seen to represent either State. Some mediation schemes require that one mediator is male and one female and that one is from the requesting State and the other is from the requested State. While this may go some way to addressing parent's or State's concerns as to impartiality, it can also be argued that this could detract from a parent's perception of a mediator's impartiality as the parent may begin to see the mediator of their own gender or own State as their representative. This might be particularly the case where the female mediator is from the State of the female and *vice versa*, leaving the parents to feel naturally more warm towards one or other mediator.<sup>32</sup>

### 3.4 Confidentiality

Where mediation takes place as part of the court process, court rules as to confidentiality might apply. Even where mediation takes place outside of the court system, parents and mediators need to be fully informed as to confidentiality rules so that the contents of any agreements reached and the disclosure rules relating to those contents are legally acceptable in both States. Any commitments made as to confidentiality should be respected in both States.

In the reunite pilot project it was made clear to parents upfront that the contents of mediation remains confidential unless and until a fully concluded agreement was reached and submitted as a draft consent order in Hague Convention proceedings. If the mediation process failed, the Hague Convention application proceeded in the usual way. No reference to mediation or anything said in mediation was admissible in court, with the exception of child protection issues, and any report prepared as to the child's objections to return.<sup>33</sup>

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<sup>29</sup> MAMIF response to Mediation Note.

<sup>30</sup> ISS Switzerland *supra* note 20.

<sup>31</sup> See < [www.enlevement-parental.justice.gouv.fr/mamif.html](http://www.enlevement-parental.justice.gouv.fr/mamif.html) >.

<sup>32</sup> For further discussion see *infra* at Section 4.3.2.

<sup>33</sup> See reunite Draft Report.

According to MAMIF, the promise of confidentiality encourages parents to share their needs and to re-establish dialogue. Under French law mediators are bound by a duty of confidentiality to third parties such that the findings of the mediator may not be mentioned in the court seized of the dispute without the parents' consent and may not be used in any other proceedings. However, there are exceptions. For example the law requires disclosure of any ill-treatment, physical or sexual abuse inflicted on a child under the age of 15.<sup>34</sup> In Germany the confidentiality of mediation is not subject to statutory rules and therefore it is usually agreed in writing between the mediators and the parties that the parties and the mediators commit themselves to confidentiality. It is usually agreed that statements made in mediation cannot be used in a court procedure and mediators cannot be named as witnesses by parents in court.<sup>35</sup>

In the United States family law is a matter for each state and therefore local court rules apply. In some US states the contents of mediation is confidential between the mediator and the parties. In other states known as "reporting" jurisdictions the mediator is invited to testify before the judge and make a recommendation as to how the judge should rule, in the event that parties do not reach a complete agreement.<sup>36</sup> However, under the proposed US-German mediation project the contents of the mediation will remain strictly confidential and should not be used in any subsequent litigation should the mediation prove unsuccessful.<sup>37</sup>

In addition to ensuring the confidentiality of the contents of the mediation, reunite put procedures in place during its pilot project to ensure that staff mediators at reunite did not have contact with the parents involved in mediation in any of reunite's other capacities, for example, through the advice line. All information from within the mediation was kept confidential from other staff and other reunite functions.<sup>38</sup>

### 3.5 Enforceability

For mediated agreements to be enforceable in both States it is usually necessary that the contents of the agreement are turned into a consent order of the court, which can thus be enforced as any other court order. Enforceability is a key concern with regard to any decisions made under the Hague Convention and problems have developed in Convention cases where orders made in one State have not been enforced in the other State. For mediation to have a positive effect on Hague Convention applications it is vital that agreements reached are capable of being enforced in both States.

Parents involved in mediation are often advised to maintain legal representation so that if an agreement is reached lawyers can present the agreement as a document which can be either submitted to a court for recognition or enforcement or converted into a court order. In France, a judge can put an agreement reached into an order during the procedure or he or she can be seised at the end of the process to approve any agreement reached.<sup>39</sup> In Germany, for an agreement made by the parties to be legally binding it must be incorporated into a court ruling. To the extent that access rights are

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<sup>34</sup> Article 24 of Act NE 95-125 of 8 February 1995, as cited in MAMIF response to Mediation Note.

<sup>35</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>36</sup> ICMEC / NCMEC response to Mediation Note.

<sup>37</sup> ICMEC / NCMEC response to Mediation Note.

<sup>38</sup> Hutchinson, A., *supra* at note 27.

<sup>39</sup> MAMIF response to Mediation Note.

covered by mediation agreements, these arrangements need to be approved by a ruling of the family court. This ruling makes the agreed arrangements enforceable.<sup>40</sup>

Under the reunite pilot project any agreement reached was set down in writing in the form of a Memorandum of Understanding (MOU). Parents were encouraged to seek advice on the MOU from their UK and overseas lawyers. The UK lawyers then reduced the MOU to a lawfully binding consent order which was placed before the court. The overseas lawyers were asked to register / mirror the consent order made in the UK in the overseas jurisdiction. Particular attention was paid to ensure that the MOU and subsequent order were sufficiently formed and sufficiently specific to avoid unnecessary future litigation. It was emphasised during mediation that the MOU could not be treated as a completed and binding agreement in the child abduction proceedings, unless and until it had been submitted as a draft consent order in Hague proceedings.<sup>41</sup>

In the US agreements reached through mediation may be submitted to a state court in the form of a stipulated agreement which can be recognised and enforced in that jurisdiction as well as within other US states under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>42</sup> Each party should review the stipulated agreement with his / her lawyer prior to signing. The signed stipulated agreement should then be registered with one or both states' family law courts in order to render the agreement enforceable in both states and the stipulated agreement should specify who is responsible for registering the order with the court and impose a deadline for so doing.<sup>43</sup>

#### **4. MEDIATION METHODOLOGY**

In addition to ensuring that mediation schemes are set up and carried out in a way that takes account of relevant legal aspects, it is important to consider the methodology to be used. The brief description of some mediation projects in the context of the Convention, found in Appendix 1, highlights the diversity of styles and methodologies used.

##### **4.1 Direct or Indirect Mediation**

Direct mediation refers to mediation in which both parents directly participate in the mediation process. This may result in face-to-face meetings where mediators and parents are together at the same time in the same venue,<sup>44</sup> or through simultaneous meetings in two different States using video/teleconferencing facilities or communication over the Internet so that both parents and mediators are communicating with each other but are not necessarily in the same venue or even the same State.<sup>45</sup>

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<sup>40</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>41</sup> See reunite Draft Report.

<sup>42</sup> UCCJEA is in force in 45 US states and the District of Columbia and is pending adoption in 5 other states.

<sup>43</sup> ICMEC / NCMEC response to Mediation Note.

<sup>44</sup> For example the reunite pilot project.

<sup>45</sup> This type of meeting is envisaged as a possibility within German / US mediation. ICMEC / NCMEC response to Mediation Note.

Conversely, indirect mediation refers to mediation in which the parents do not directly meet each other during the mediation process but the mediator or mediators meet with each parent separately. This can take place across two separate States with one mediator and one parent in one State or in the same State with mediation taking place at different times or at the same time but in different rooms.<sup>46</sup>

A decision to opt for direct or indirect mediation may depend upon the parents, the circumstances of the situation or the geographical locations and time differences. Where there is a threat of violence or intimidation a parent may be happier to proceed with indirect mediation. Alternatively, some parents may find a face-to-face direct meeting whether in the same place if geographically possible, or by video / teleconferencing or over the Internet more beneficial.

#### 4.2 Single State or Bi-national Mediation

Whether mediation is to be direct or indirect it is also necessary to consider whether mediation is organised by one State or by both States together. Some mediation schemes operate within the requested State as part of that State's process for dealing with a Hague Convention application and use mediators from that State, such as the reunite pilot project. Where mediation is to take place in the requested State the left-behind parent, if not already there may be invited to attend in person which has the added advantage, where feasible and appropriate, of allowing the child to have contact with the left-behind parent. Where it is not possible or practical for the left-behind parent to travel to the requested State mediation might proceed by way of video / teleconferencing facilities where these are available or by using the Internet. A mediator from the requested State may travel to the left-behind parent's State or both mediators may remain in the requested State.

Other mediation projects have been established on the basis of bi-national mediation where mediators from both States work together in mediating a case, such as the Franco-German initiatives. Bi-national mediation, though involving mediators from both States, may take place in one State with both parents and mediators convening in one place. Alternatively, bi-national mediation may take place simultaneously in both States with one parent and one mediator in each State communicating through video, telephone or the Internet. In the context of Hague Convention proceedings bi-national mediation has tended to be established on a State-by-State basis with the two States devising the scheme together and providing mediators. In such cases mediation is only available in cases involving the two relevant States and the scheme is not universal for any Hague Convention application.

The French organisation MAMIF has been involved in both single State mediation in Convention cases where MAMIF mediators work together to mediate, and in bi-national mediation involving one MAMIF mediator and one mediator from the other State. Bi-national mediation has been used particularly in cases concerning the American and Asian continents.<sup>47</sup> MAMIF also relies on *magistrats de liaison*,<sup>48</sup> French consular officers and local authorities in the other State where necessary.

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<sup>46</sup> These definitions and examples are taken from Parkinson, L., Reduction and Resolution of Cross-Border Disputes.

<sup>47</sup> MAMIF response to Mediation Note.

<sup>48</sup> Liaison judges from foreign States who are based in France.

### 4.3 Selection of Mediators

#### 4.3.1 Single or Co-mediators

Part of the ethos of bi-national mediation projects is the involvement of at least one mediator from each State. Wherever mediation is to take place in different States simultaneously it is also necessary to have two mediators involved. Single State mediation projects often also rely on two mediators to mediate together though this may not always be necessary and requires more funding.

#### 4.3.2 Gender and Culture

Some mediation schemes apply strict criteria as to cultural origin and gender of the mediators. For example, some favour having one mediator from the requested State and one from the requesting State, one male and one female.<sup>49</sup> The schemes which favour this type of mediator selection do so in the hope that the parents will feel that the mediation is more impartial. It is hoped that the parents will feel more at ease having a mediator from their own country or culture, perhaps particularly where mediation is taking place in a foreign State. With regard to the proposed US-German initiative efforts are being made to locate German mediators living in the United States and American mediators living in Germany. It is thought that having mediators from one State who are already living in the other State will ensure that the mediators have a grasp of the culture and the language which will assist in the mediation. Using such mediators may also reduce costs. With regard to gender, having a mediator of each gender may assist parents to better recognise the role of the other parent.

On the other hand, other schemes have not used this kind of selection criteria recognising that in fact having this strict division by gender and by State may mean that the parents expect that the mediator from their own gender and/or State is there to represent them or their position as a legal representative would. Where these perceptions exist, having such criteria for mediators in mediation might in fact be seen as detracting from the notion of impartiality. Mediators are by definition neutral third parties and if properly trained there should be no impartiality or prejudice based on the gender, culture or State of origin of the mediator. However, some parents can become very negative towards the State of origin of the other parent and it is important that mediators are not only neutral third parties but that they are seen to be neutral third parties. Some parents may not be interested in pursuing mediation if both mediators are from the foreign State.

#### 4.3.3 Language

Whether mediation proceeds with one mediator from each State or one or two mediators from the same State, it is important that the language used in mediation is clearly understood by all concerned. The parents in many Hague Convention applications have a shared language. However, even where this is the case, it has been suggested that the ability to communicate in a mother tongue or preferred language can assist mediation.<sup>50</sup> Where issues are particularly emotional or a parent wants to be sure to be understood he or she might prefer to speak in his or her own language. While many mediation projects

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<sup>49</sup> For example the proposed US-German mediation initiative.

<sup>50</sup> Carl, E., Copin, J., and Ripke, L., "Le projet pilote franco-allemand de médiation familiale professionnelle, Un modèle de collaboration internationale dans le cadre de conflits familiaux" in *Kind-Prax Special* 2004, pp. 25-28.

favour using a mediator from each State it is of course necessary that the mediators can also communicate with each other. So they must have at least one shared language. Ideally it may be beneficial to have bilingual mediators so that one mediator is not also working as a translator. In bi-national projects where the two languages are known bilingual mediators may be sought. In broader initiatives professional translators could be used, although this would add to the expense of the mediation. The reunite pilot project relied on UK mediators and where necessary professional translators were used. The use of translators will however add to the expense of mediation. In the reunite pilot project cases from Germany involved one English and one German mediator.<sup>51</sup>

#### **4.3.4 Professional Background of the Mediators**

Mediation is not a protected term or profession and persons from different professional backgrounds and experience call themselves mediators.<sup>52</sup> Many mediators come from the psycho-social or legal fields and in some mediation schemes efforts are made to use one mediator from a psycho-social background and one from a legal background. Others suggest that where both mediators are trained in psycho-social techniques and are suitably knowledgeable regarding the relevant legal issues in both States, their professional backgrounds are not important. In this regard training for mediators is very important.<sup>53</sup>

Psycho-social skills may be particularly important where mediators are addressing children who might be involved in the mediation, or where there is a perceived imbalance of power between the parents. In most mediation schemes parents are advised to maintain legal representation so that they can receive advice as to their rights and their legal status and can ensure that any agreements reached can be turned into legally binding documents. Mediators themselves should sufficiently be aware of the legal position to ensure that agreements reached have a realistic chance of becoming enforceable legal documents. In the reunite pilot project it was initially envisaged that in each mediation one mediator would be from a legal background and one from a non-legal background. However over time it was decided that it was not necessary to have a lawyer-mediator provided both non-lawyer-mediators were suitably knowledgeable on the law in both States.

## **5. ACCESS TO MEDIATION**

### **5.1 Introducing Parents to Mediation**

How parents are approached to consider mediation is very important. According to the draft report on the reunite pilot project, “[i]t was recognised that the manner in which both parents were introduced to the scheme was critical to its prospects of success.”<sup>54</sup> As stated above at 2.2 in the context of an application under the Convention parents need to be informed that mediation is on offer but 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. A parent’s willingness or lack of willingness to enter into mediation should not be

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<sup>51</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>52</sup> ISS report *supra* at note 1.

<sup>53</sup> See *infra* at Section 7.

<sup>54</sup> Reunite Draft Report.

influential in any court decision. 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.

Additionally, mediation is to many people a relatively new concept unlike a judicial process which is likely to be something more familiar. Consequently, 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. It has been suggested that for some people the notion of mediation has a negative connotation and may be seen as second-class justice,<sup>55</sup> and such notions need to be countered if mediation is to be successful. Mediation should be introduced to parents as a positive alternative to the court process which if unsuccessful has not negated the possibility of having a judge decide the case in court.

## 5.2 Pathways to Mediation

As mentioned above at 2.4, some Central Authorities offer mediation or can direct parents to organisations able to offer mediation<sup>56</sup> when a parent makes an application. In other States the court hearing the case can refer the parties to mediation which might then take place during an adjournment in court proceedings.<sup>57</sup> In some States a court can order that parents attend a mediation meeting and then the parents decide whether they wish to participate in mediation.<sup>58</sup>

Some mediation schemes have been particularly focussed on difficult more protracted Convention applications, perhaps cases where court decisions have already been made but not enforced or have been appealed and re-appealed.<sup>59</sup> Many of these cases involve applications for access. In such cases mediation may be offered to seek to resolve an impasse. While this may be beneficial and may prove more successful than ongoing litigation, it may also be harder for the parents to agree to mediate together with so much negative history surrounding their case. The German Federal Ministry of Justice has commented that with regard to the Franco-German Parliamentary Mediation finding solutions was "rendered more difficult by the fact that a considerable period elapsed between the time when the appeal to the group was made and the time when, following clarification of the facts the meetings were held with the parents."<sup>60</sup> As one commentator has put it, "mediation should be to family matters as diplomacy is to war: a first step and not a last chance solution when everything else has failed and it is really too late".<sup>61</sup> How and when parents are offered mediation may have a significant impact on its prospects of success.

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<sup>55</sup> Hutchinson, A., information taken from transcripts of presentations at the Second Malta Judicial Conference on Cross-Frontier Family Law Issues, March 2006.

<sup>56</sup> For example the Central Authority of Argentina.

<sup>57</sup> For example the reunite pilot project.

<sup>58</sup> Articles 373-2-10 and 255 of the French Civil Code.

<sup>59</sup> For example many of the cases addressed by the Franco-German Parliamentary Mediation Commission.

<sup>60</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>61</sup> Ganancia, D., « *La médiation familiale internationale : une solution d'avenir aux conflits familiaux transfrontaliers ?* » in Fulchiron, H. Ed. *Les Enlèvements d'enfants à travers les frontières*. Lyon, France November 2003. [Translation by the Permanent Bureau].

### 5.3 Costs and Sources of Funding

Some States bear all costs of Hague Convention applications for the applicant parent. Other States have made an exception to Article 26 of the Convention and the costs of proceedings brought under the Hague Convention are subject to normal legal aid rules in the State where the proceedings will take place. Where a State would fully fund an applicant parent bringing a Hague application to court, it is very unattractive to that parent if mediation was offered at a price.

While mediation will create new costs many commentators believe that if mediation schemes were to be properly established and executed the saving of court costs, not to mention court time, would be significant. In this regard the German Federal Ministry of Justice has decided to undertake research over a five-year period to look at the costs of the mediation process compared with the costs of the court process, to see if mediation would be a more cost-effective approach. According to reunite on the basis of their pilot project, if a successful mediation is achieved in "even a small proportion of cases, the saving in human and financial terms would be significant".<sup>62</sup>

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. This compares with the court process in the UK where full legal aid is given to all applicant parents regardless of means or merits, while abducting parents are eligible for legal aid on a means and merits test.

In some States where mediation is considered as part of the court process costs of mediation are covered for publicly funded litigants. In Germany, to the extent that the court, with the approval of the parties, issues a ruling pursuant to Section 278(5) of the Code of Civil Procedure, according to which internal court mediation or close-to-court mediation is held by a commissioned / requested judge, the costs of this are court costs and are assumed by the State where the party is being granted legal aid for the court procedure.<sup>63</sup> Equally in England and Wales where parents are referred to mediation under the Court of Appeal Alternative Dispute Resolution Scheme the Legal Services Commission, which is responsible for legal aid funds will cover the cost of this mediation for publicly funded litigants.<sup>64</sup> Additionally in France, *médiation judiciaire*<sup>65</sup> is free of charge if the parties have been granted legal aid. Where the parties are not publicly funded, the court sets the mediators' costs and allocates this between the parents.<sup>66</sup>

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<sup>62</sup> Reunite Draft Report.

<sup>63</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>64</sup> Information received from Lord Justice Mathew Thorpe.

<sup>65</sup> This is mediation which is ordered by the judge on the agreement of the parties. See, Articles 131-1 *et seq* of the New Code of Civil Procedure.

<sup>66</sup> MAMIF response to Mediation Note.

On the other hand where mediation is provided outside of the court process it is often not possible for costs to be covered by legal aid, as out of court costs are not within the remit of legal aid boards.<sup>67</sup> In France, the costs of mediation outside of court are borne by the parties. Many non-profit organisations set scales of charges according to parents' income. These organisations are subsidised by public authorities. An allowance for family mediation is currently being established in France. It will mean that the national family benefit fund and public authorities will fund a large part of family mediation organisations operating costs.<sup>68</sup> The Franco-German Parliamentary Mediation Commission and the Franco-German project of bi-national professional mediation, which superseded it were both publicly funded. The respective ministries of justice in the two States covered the costs of the mediators, for these specific projects. Now that these projects have ceased attempts are being made to show needy parties other possibilities for covering costs.<sup>69</sup>

In the United States the organisation NCMEC has partnered with a non-profit organisation,<sup>70</sup> which maintains a roster of trained mediators who provide their services free of charge to families involved in international child abduction cases involving the US and another State. Parents are however responsible for covering the costs of travel and international phone calls. NCMEC is also exploring the possibility of tapping into a nationwide network of video teleconferencing facilities that may be willing to offer its technology to parents for little or no charge in order to enable them to participate in mediation without leaving the State.<sup>71</sup>

## **6. INVOLVEMENT OF THE CHILD IN MEDIATION**

### **6.1 Arrangements for Contact with the Child During Mediation**

Where mediation takes place with both parents convening in the State where the child is located it might be possible to organise a contact meeting between the child and the travelling parent. Having mediation take place in the location of the child is also beneficial where the child is to be involved in the mediation.

### **6.2 Listening to the Child in Mediation**

Some mediation providers hold the view that where a child is of a particular age and maturity, and the parents are in agreement, he / she should be given the opportunity to be heard by the mediators if the mediators consider the involvement of the child as beneficial to the mediation process.<sup>72</sup> The child's objections to return are relevant under Hague proceedings (Article 13). In cases involving European Union States, Article 11(2) of the Brussels II *bis* Regulation provides that if the child is of a suitable age and maturity he/she should be given the opportunity to be heard in proceedings under Article 12 and 13 of the Hague Convention. According to the Germany Ministry of Justice to the extent that children were involved in the mediation process, with the approval of their parents, this was generally regarded positively. Where children are to be heard in mediation, mediators may require specific training in how to listen to and interact with children. It has been suggested that mediators should ensure the child recognises that

<sup>67</sup> For example, mediation by the German courts, see Appendix 1.

<sup>68</sup> MAMIF response to Mediation Note.

<sup>69</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>70</sup> The Key Bridge Foundation in Washington, D.C. maintains a roster of more than 580 trained mediators (many of them family mediators) across the 50 US states. Key Bridge Foundation has established strict minimum qualifications for membership in their roster. Information received from the ICMEC / NCMEC response to Mediation Note.

<sup>71</sup> ICMEC / NCMEC response to Mediation Note.

<sup>72</sup> German Federal Ministry of Justice response to Mediation Note and MAMIF response to Mediation Note.

his or her opinions are important but that the issues in dispute must ultimately be decided by the parents and the child should not be made to feel responsible for the adult's decisions.<sup>73</sup>

In the context of an application under the Hague Convention, a child's objections to return can be taken into account by a judge in deciding against issuing a return order (Art. 13). The use of mediation should not deny the child the opportunity to object to return as specified in the Convention. Under the reunite pilot project where a defence of child's objections under Article 13 was raised in respect of an age appropriate and competent child, a CAFCASS<sup>74</sup> officer was appointed to carry out an interview with the child and to prepare a report to the parents and to the mediators. Thus a report on the child's views, wishes and feelings and, if they met the pre-requisite test, objections, was available within the mediation process to inform the parents and to assist the mediation process.

## 7. TRAINING FOR MEDIATORS

As previously stated, mediation is often not seen as a profession in its own right and many mediators are trained as lawyers, social workers or psychologists. As one commentator has said: "Sometimes family mediation has seemed like the child of warring parents. Rivalry between members of the legal profession and members of human science professions as to who should have custody, care and control of family mediation resembles the struggles of divorcing parents to win sole custody of their children. Joint custody – or shared parental responsibility – should apply to mediation practice and training, as well as to children in divorce!"<sup>75</sup>

For mediation in international cases to develop in a way that is acceptable to all States, training for mediators is very important. One leading commentator has stated that European States are at very different stages in developing family mediation and that there needs to be a reasonable degree of consistency in relation to the following: the philosophy, definition and principles of family mediation; the legal framework or frameworks that apply to mediation; the training and qualifications of family mediators; quality control standards for family mediation practice; and, the means by which mediated agreements can be legally binding and enforceable.<sup>76</sup> Harmonised training for mediators involved in international family law including in the specific context of the Hague Convention would be greatly beneficial to ensure the quality of mediators involved in this work and to ensure international acceptability of mediation projects.

### 7.1 Training in Family Mediation

The European Forum Training and Research in Family Mediation has designed some basic standards for family mediation training. The European Forum considers an interdisciplinary approach to family mediation training and practice as essential. Some mediation associations offer training only to specific professionals. For example, in Denmark and the Netherlands some mediation training is confined to family lawyers. In Norway and Sweden, mediators tend to be counsellors and social workers not lawyers. In Poland the first national training programme trained only counsellors and family

<sup>73</sup> German Federal Ministry of Justice response to Mediation Note.

<sup>74</sup> Child and Family Court Advisory and Support Service.

<sup>75</sup> Parkinson, L., *Training and Assessment of Family Mediators in the U.K.*, 2005.

<sup>76</sup> Parkinson, L., *supra* note 11, at p. 2.

therapists but future training will be open to family lawyers as well. The European Forum only accredits training programmes that are open to candidates from legal *and* psycho-social backgrounds, not one *or* the other.<sup>77</sup> There are now 14 European countries with one or more family mediation training programmes accredited by the European Forum: Austria, Belgium, England, France, Germany, Ireland, Israel, Italy, Malta, Poland, Portugal, Scotland, Spain and Switzerland.<sup>78</sup> The European Forum also emphasises that it is important to distinguish between mediation awareness training and a full course of training leading to a recognised qualification to practice family mediation.<sup>79</sup>

Training in family mediation varies from State-to-State with some systems providing a largely academic training and others much more practical. In France there is a State diploma in family mediation, largely inspired by the *Conseil national consultatif de la médiation familiale*. The diploma is delivered by the *préfet de région*. The training is open to holders of the *bac* with 2 years experience in the social or health sectors, or to holders of the *bac* with 4 years of experience in legal, psychological or sociological fields. The length of training is 560 hours of which only 70 must be practical, and therefore it is quite an academic training. It comprises law, psychology and sociology. The diploma may also be obtained through recognition of professional experience in two stages: the public authorities first assess the applicant's admissibility and then a panel of examiners assess the development of skills acquired through experience.<sup>80</sup>

Before undertaking the reunite pilot project two individuals from reunite who had considerable experience in the field were identified to complete the National Family Mediation training in the UK. In addition a pool of mediators and lawyer-mediators who held relevant experience was identified to assist the reunite team.

## 7.2 Specific Training in International Family Mediation

In France, training as an international mediator can be followed through a university masters degree or at seminars for mediators already working in the international field. The specificities of international mediation are considered. Various non-profit mediation entities can provide international family mediation together with certain mediation services in the family-benefit funds. The US-German mediation task force has agreed that a successful mediation team would ideally be trained in the 1980 Convention including the necessity for expedited resolution; family law and custody matters; domestic violence; cultural sensitivities; the importance of reunification services and post-reunification therapy; enforceability issues and numerous other topics. A national German association *Bundesarbeitsgemeinschaft für Familienmediation* (BAFM)<sup>81</sup> was founded in 1992 to establish and maintain standards in family mediation practice and

<sup>77</sup> Parkinson, L., *supra* note 11, at p. 11.

<sup>78</sup> Parkinson, L., *supra* note 11 at p. 5.

<sup>79</sup> Parkinson, L., *supra* note 11 at p. 11.

<sup>80</sup> MAMIF response to Mediation Note.

<sup>81</sup> Federal Working Group for Family Mediation.

mediators' training. 50% of BAFM members come from psycho-social backgrounds and 50% from legal backgrounds.<sup>82</sup> BAFM handles the training for family mediators in bi-national cases and will handle training for mediators in the US-German proposed mediation scheme.

Since Autumn 2005 the *Association Internationale Francophone des Intervenants auprès des familles séparées* (AIFI), an association of French speaking mediators with its seat in Quebec, Canada, has been working to put in place specialist training in international family mediation. The training will be based on that offered for European mediators by the Kurt Bosch Institute in Switzerland, which will be adapted for the North American context. Pluri-disciplinary training will first be offered in French to mediators in the Province of Quebec and then mediation in English for the other Canadian Provinces will be explored.

Reunite would like to devise a mediation training module for mediators within Contracting States. The module would provide the infrastructure for the mediation process and the training of identified specialist family mediators, based on the findings from the pilot project.

### **7.3 Some International and Regional Associations and Organisations Offering Mediation**

#### ***Association Internationale Francophone des Intervenants auprès des familles séparées (AIFI)***

The AIFI is an organisation of French-speaking mediators. The administrative counsel of AIFI on 7 December 2003 pronounced on the importance of developing a network of international family mediators who could seek to prevent the escalation of conflicts thus avoiding and preventing international child abduction. The aim was not to create a new international association but to put in place a network for communication and information.

#### **International Social Service (ISS)**

The ISS is currently seeking to constitute a network of mediators at the international level. The ISS believes that it could either intervene as a mediator or pass the parents to a third organisation it could equally have a coordinating role between the two States involved and transmit information from one mediation organisation to another.

#### **The European Forum for Family Mediation Training and Research**

This forum was established because of a recognised need to have agreement on standards of training and practice and to have a forum for exchanging information and debating issues. Jocelyne Dahan of the French organisation *Association Pour la Médiation Familiale* (APMF) invited family mediation trainers from several European countries to draft standards and a series of meetings were held in Paris, Geneva and Brussels. In 1992 the work resulted in the publication in English and French of a European Charter on training for family mediation. The European Forum for Family Mediation Training and Research was formally constituted and the Standards were revised at a two-day meeting held in Hamburg in 2000. They were further updated at a meeting in Paris in January 2003.

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<sup>82</sup> Parkinson, L., *supra* note 11 at p. 11. See also <[www.bafm-mediation.de](http://www.bafm-mediation.de)>.

***Médiation familiale binationale en Europe (MFBE)***

The professional mediators involved in the Franco-German initiative established this association for bi-national family mediation in Europe in 2005. The website of the organisation is: < <http://pageperso.aol.fr/frdemed/index.html> >.

**ANNEXES / APPENDICES**

## **A BRIEF DESCRIPTION OF SOME MEDIATION INITIATIVES IN THE CONTEXT OF THE HAGUE CHILD ABDUCTION CONVENTION**

There are several mediation projects or initiatives which have been taking place, are taking place or are proposed to take place in the context of an application under the 1980 Hague Convention. Some of these initiatives are described briefly below.<sup>1</sup>

### **Argentine Central Authority<sup>2</sup>**

The Argentine Central Authority considers that in family matters, it is more convenient to arrive at solutions without the intervention of the court if possible. Consequently, the Central Authority always offers the applicant parent the possibility to attempt an amicable solution prior to presenting the case to the court, provided the Central Authority is satisfied that there is no flight risk regarding the child. Where the applicant agrees to mediation the Central Authority usually sends a note to the abductor inviting him/her to return the child voluntarily, or to arrive at an agreement regarding contact. The abductor is given ten days to respond to the request. If the abductor agrees to mediation or agrees to attend a meeting to explain the procedure, he/she is invited to the office of the Central Authority. The Central Authority office is chosen as it is considered to be a neutral venue in which to conduct negotiations. The Central Authority will host as many meetings as necessary until a solution is agreed, unless the Central Authority feels that mediation is being used as a delaying tactic or to prevent the case reaching court. The Central Authority continues to offer its services to help the parents to reach an amicable agreement at any time in the Convention proceedings. Any agreements reached by the parents are usually presented to the courts so that they can become enforceable.

In outgoing applications the Central Authority also seeks to support the parents to reach amicable solutions. The Central Authority has been involved in conference calls with parents and lawyers. If necessary the Central Authority can also ask for the co-operation of Argentine Consulates to help to reach an amicable solution.

### ***Mission d'aide à la médiation internationale pour les familles (MAMIF)*<sup>3</sup>**

In France a court dealing with a Hague Convention case may refer parents to mediation in two distinct ways. The court can deliver an injunction to the parents requiring them to meet with a mediator (Articles 373-2-10 and 255 of the Civil Code). The mediator is responsible for explaining the purpose and course of mediation and at the end of the information meeting the parents can choose whether or not to initiate mediation. Alternatively, the court can, with the parents' approval, order that the parents attend mediation. This is known as *médiation judiciaire* (Articles 131-1 *et seq* of the New Code of Civil Procedure).

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<sup>1</sup> Some of these initiatives may be described in more detail by participants at the Special Commission.

<sup>2</sup> Information provided by the Argentine Central Authority.

<sup>3</sup> Information provided by MAMIF. For more information see:  
< [www.enlevement-parental.justice.gouv.fr/mamif.html](http://www.enlevement-parental.justice.gouv.fr/mamif.html) >

In either case French courts often refer the parents to MAMIF. MAMIF was created in 2001 within the Ministry of Justice of France. MAMIF has a juridical and a social arm and its aim is to help to provide parents with assistance to appease family conflicts. MAMIF can intervene in disputes involving France and another State outside of the European Union (also including Denmark). Specifically MAMIF can intervene in international child abduction and contact disputes either pursuant to the Hague Convention or outside its scope.

MAMIF mediators sometimes engage in bi-national mediation where they work with a mediator from the other State. This has been used particularly in cases concerning the American and Asian continents.

Since 2001 MAMIF has processed 454 cases, most of these relating to international child abduction, concerning 77 different States. According to MAMIF the rate of successful mediation is about 86%.

### **Reunite Pilot Project<sup>4</sup>**

Reunite – international child abduction centre, a UK based non-governmental organisation has recently undertaken a pilot mediation project in Hague Convention applications and has produced a comprehensive draft report on the findings. The specific aims of the pilot project were: 1) to establish how mediation could work in legal conformity with the principles of the Hague Convention; 2) to develop a mediation structure that would fit in practically with the procedural structure of an English Hague Convention case; and 3) to test whether such a model would be effective in practice.

The pilot project commenced in 2003 and mediation was offered in cases where a child had been abducted to, or retained within, the UK, and where the applicant parent was pursuing a Hague application for the return of the child. The mediation took place during a court-endorsed adjournment of the proceedings and consequently ran in parallel to the court case. Mediation was fully funded, up to an upper limit by a research grant. Over the duration of the pilot project 80 cases were referred to reunite as potentially suitable for mediation. Thirty-six of these cases were accepted for mediation.

The mediation itself took place in three sessions of up to three hours over a two-day period and was conducted by two mediators. The parents were free to consult their legal representatives, and any other person they wished to consult, throughout the process both in the UK and in the other jurisdiction. Any agreement reached was set down in writing in the form of a Memorandum of Understanding (MOU). Parents were encouraged to seek advice on the MOU from their lawyers in both jurisdictions. The UK lawyers would then reduce the MOU to a lawful binding consent order which was placed before the court. The overseas lawyers were asked to register/mirror the consent order made in the UK in the overseas jurisdiction. Particular attention was paid to ensure that the MOU, and subsequent order was sufficiently formed and sufficiently specific to avoid unnecessary future litigation.

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<sup>4</sup> Information provided by reunite. For more information see < [www.reunite.org](http://www.reunite.org) >.

It was emphasised during mediation that the MOU could not be treated as a completed and binding agreement in the Hague Convention proceedings, nor could it be disclosed in the proceedings, nor could it constitute acquiescence pursuant to Article 13(1) a), unless and until it had been submitted as a draft consent order in Hague proceedings.

In all 36 cases were accepted for mediation. In eight of these , mediation was cancelled shortly before it was due to take place. Therefore a total of 28 cases progressed to a concluded mediation and in 21 of these MOU was agreed.

### **England & Wales Court of Appeal Alternative Dispute Resolution Scheme<sup>5</sup>**

The Court of Appeal in England & Wales runs an alternative dispute resolution (ADR) scheme for appeals in family cases. The scheme is not mandatory, and depends upon the reciprocal consent of the parties. Once consent has been given the process is directed by the Court of Appeal. The Court appoints the mediator and settles any disputes as to practicalities. Any agreement is made the subject of an enforcement order. The costs for publicly funded litigants are covered by the Legal Services Commission. In Hague Convention cases the Court of Appeal has referred parties to reunite during the course of its pilot project (see above). If this pilot is extended this resource will continue to be preferred. If not, future referrals will be directed to one of the few mediators with experience in this field. The Court of Appeal only handles about 300 family appeals in a year perhaps 10% of which are Hague Convention appeals. Therefore, to date only about two or three cases a year enter this scheme. According to the Head of International Family Law for England and Wales, the scheme has proved particularly efficacious in international child abduction cases.

### **German Federal Ministry of Justice<sup>6</sup>**

Since the year 2000 specific German family courts have been assigned responsibility for all cases under the Hague Convention. The German Federal Ministry of Justice supports a mediation project in cases brought before these courts. The Federal Ministry of Justice provides training for judges in the use of mediation in bi-national parental disputes. Mediators participating in the scheme should make a commitment that they will make themselves available at two-weeks notice for the holding of mediation in a Convention case. The mediators therefore need to structure the mediation with precision and at short notice. There is discussion about the idea of setting tight schedules along the lines of the reunite project (see above). The aim is that any agreement made in the course of the mediation should be accepted not only by the court hearing the return application but also if possible by the State of habitual residence, and where legally admissible, the agreement should be transformed into a court order.

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<sup>5</sup> Information provided by Lord Justice Mathew Thorpe, Head of International Family Law for England and Wales.

<sup>6</sup> Information provided by the German Federal Ministry of Justice.

### **Franco-German Parliamentary Mediation Commission<sup>7</sup>**

The Ministers of Justice of France and Germany resolved in December 1998 to establish a group of Parliamentary mediators for international child abduction cases. The group was established in October 1999 comprising three French and three German Parliamentarians of whom one French and one German were Members of the European Parliament. The respective Ministries of Justice covered the costs of this scheme. Up until 2002 the group intervened in 50 cases. Two mediators, one German and one French were involved in each case. Most cases, which the group addressed, involved contact disputes. It was often difficult to find solutions and in part this was exacerbated by the amount of time, which elapsed between appeal to the mediation group and the time after clarification of the facts that the mediation was actually held. It was also felt that media pressure in these cases added to the difficulties.

It has been stated that while commencing under political auspices was initially considered helpful, it meant that to an extent private family disputes became politicised and nationalised.<sup>8</sup> Perhaps partly for this reason, the Ministers of Justice agreed in February 2003 that the parliamentary scheme should be abandoned and replaced by a temporary scheme involving professional mediators from the two States. The Task Force for Parent and Child Cases in the German Federal Ministry of Justice dealt with more than 100 German-French cases from 1999 to 2003.

### **Franco-German Project of Bi-national Professional Mediation<sup>9</sup>**

The Franco-German bi-national professional mediation scheme evolved from the Franco-German Parliamentary Mediation Commission (see above). This scheme was established in February 2003 and ran until 1 March 2006 when it was terminated. Mediation under the scheme involved one German and one French mediator, one male and one female, one from a psycho-social profession and one from a legal profession. Once the parents agreed to mediation, the German and French Ministries of Justice jointly produced a bilingual file. On receipt of the file from the Ministries, the mediators contacted the parents. The mediation where possible took place near to the child so that if appropriate the left-behind parent would be able to have some contact with the child, and if appropriate the child could be involved in the mediation. Due to the need for the left-behind parent to travel, the mediation aimed to take the form of "block mediation" *i.e.* over a weekend. If only partial agreement was reached in this time, further mediation took place, if necessary in the left-behind parent's country. In 2005 the professional mediators involved in these cases established an association for bi-national family mediation in Europe - *Médiation familiale binationale en Europe* (MFBE).

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. To a limited extent the professional mediation project was subject to academic study and a major finding of this research was that the overwhelming majority of both parents and mediators assessed the system positively. There was increased willingness of both parents to undertake mediation and the level of

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<sup>7</sup> Information provided by the German Federal Ministry of Justice.

<sup>8</sup> Carl, E., information taken from transcripts of presentations at the Second Malta Judicial Conference on Cross-border Family Law Issues, Malta, March 2006.

<sup>9</sup> Information provided by the German Federal Ministry of Justice. For more information see:  
< <http://pageperso.aol.fr/frdemed/index.html> >

acceptance of the procedure was also higher. It was also considered that there was a greater likelihood that the results obtained with the help of mediators from both cultural and legal systems would be complied with.

### **Proposed US-German Mediation Project<sup>10</sup>**

The German Federal Ministry of Justice and the United States Department of State have initiated a pilot project of bi-national mediation in German-US child abduction cases. At a meeting in May 2005, the US-German Bilateral International Parental Abduction Working Group designated a full day to explore a US-German pilot mediation project. A first experts meeting took place in Berlin on 3-4 February 2006. German and American mediators will now be approached and trained in bi-national mediation.

It is proposed to offer a co-mediation model, which would involve two mediators, one of German origin and one of American origin, one male and one female, one from a psycho-social background and one from a legal background. Efforts are being made to locate mediators of American origin who are residing in Germany and mediators of German origin who are residing in the US. Ideally mediation would take place with both mediators and both parents convening in the country where the child is. If the left-behind parent travels to this country the mediators could assist the parties to organise some form of interim contact between the left-behind parent and the child where appropriate. In reality, the geographical distance means that travel by the left-behind parent might be financially impractical. In these circumstances mediation could proceed through video or teleconference facilities. The National Center for Missing and Exploited Children (NCMEC) is exploring the possibility of tapping into a US nationwide network of video-conferencing facilities, which might be willing to offer its facilities to parents for little or no charge. Use of the Internet is also contemplated.

It is estimated that a successful mediation will take between 12 and 16 hours spread over two to four days. Strict time limits for the completion of mediation will be established to fit with the Hague Convention time frame.

### **The International Social Service (ISS)**

The International Social Service is planning a training programme to help to promote the Hague Child Protection Convention and the Hague Child Abduction Convention including the use of mediation and conciliation. The ISS intends to organise ten regional seminars which would involve professionals from 80 to 100 States. The seminars will focus on raising awareness and the practice of conciliation and mediation as well as a better understanding of the international conventions. The seminars aim to target specifically professionals in the ISS network but will also be open to other professionals such as Central Authorities, NGOs and other competent authorities. The ISS also hopes to be able to publish a regular Newsletter similar to the Newsletter it produces in the context of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*. The Newsletter will be a regular periodical which will ensure a follow up for those professionals who have benefited from the training programmes. The Newsletter would also be sent to all NGOs and authorities that work in the field of international family conflicts.

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<sup>10</sup> Information provided by the German Federal Ministry of Justice and ICMEC / NCMEC.

## **A SELECTION OF RESOLUTIONS AND CONCLUSIONS AND RECOMMENDATIONS FROM SOME REGIONAL AND INTERNATIONAL MEETINGS**

### **Resolution 1291 (2002) of the Parliamentary Assembly of the Council of Europe:**

5. *(iii) promote family mediation as a means of preventing parental child abduction and helping to resolve family conflicts.*

7. *Within the framework of their bilateral relations and also with the non-Council of Europe countries concerned, member states should set up mediation boards or other similar bodies to deal with all pending cases of conflict involving parental child abduction as rapidly as possible and propose solutions in the objective interests of the children concerned.*

8. *Finally, the Assembly urges member States to endeavour to increase the European Union mediator's powers and material possibilities of action and examine the necessity of establishing a Council of Europe mediator to deal with these child custody issues in greater Europe.*

### **Malta Declaration, March 2006:**

3. *Intensified activity in the field of international family mediation and conciliation, including the development of new services, is welcomed.*

*The importance is recognised of having in place procedures enabling parental agreements to be judicially approved and made enforceable in the countries concerned.*

*Legal processes concerning parental disputes over children should be structured so as to encourage parental agreement and to facilitate access to mediation and other means of promoting such agreement. However, this should not delay the legal process and, where efforts to achieve agreement fail, effective access to a court should be available.*

*International family mediation should be carried out in a manner which is sensitive to cultural differences.*

### **Latin American Judges' Seminar, November-December 2005:**

27. *Judges should encourage, promote and facilitate whenever possible the resolution by agreement of contact disputes.*

### **Malta Declaration, March 2004:**

3. *Steps should be taken to facilitate, by means of mediation, conciliation, by the establishment of a commission of good offices, or by similar means, solutions for the protection of the child which are agreed between the parents.*

**Noordwijk Seminar, October 2003:**

2. *Having regard to the benefits to the child of an amicable settlement, the Central Authority and the court should from the outset and throughout the proceedings, working as appropriate with the parties or their legal advisers, give consideration to the possibility of a mediated or other form of voluntary settlement, without prejudice to the overriding obligation to avoid undue delay in the litigation.*

5. *Judges should do what they can to promote voluntary compliance with return orders and thus reduce the need for the application of enforcement measures.*

**Conclusions and Recommendations of the Fourth Special Commission to Review the Practical Operation of the Convention, March 2001:**

*Securing the voluntary return of the child*

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 c) of the 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.*

1.12 *Contracting States should ensure the availability of effective methods to prevent either party from removing the child prior to the decision on return.*

**Common Law Judicial Conference, September 2000:**

8. *It is widely agreed that the problem of enforcing access rights internationally, though intertwined with international child abduction cases, is not adequately addressed by the Hague Child Abduction Convention. Other legal and judicial solutions should be pursued, including prompt consideration of the 1996 Hague Convention on the Protection of Children (which provides, inter alia, a mechanism for handling international access cases), and court-referred mediation in appropriate cases (to help parents make their own arrangements for international access).*